

Göttinger Juristische Schriften

Harry Willekens, Kirsten Scheiwe, Theresa Richarz,
Eva Schumann (eds.)

Motherhood and the Law



Universitätsverlag Göttingen

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erschienen als Band 24 in der Reihe „Göttinger Juristische Schriften“
im Universitätsverlag Göttingen 2019

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Band 24



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2019

Bibliographic information published by the Deutsche Nationalbibliothek

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.dnb.de>.

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Typesetting and layout: Lisa Hollemann

© 2019 Universitätsverlag Göttingen
<https://univerlag.uni-goettingen.de>
ISBN: 978-3-86395-425-3
DOI: <https://doi.org/10.17875/gup2019-1201>
e-ISSN: 2512-6849

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List of Abbreviations

BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (Federal Court of Justice Germany)
BGHZ	Entscheidungssammlung des Bundesgerichtshofs in Zivilsachen
BMJV	Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry of Justice and Consumer Protection, Germany)
C.C.	Civil Code
CRC	(UN) Convention of the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights)
ECtHR	European Court of Human Rights
FamRZ	Zeitschrift für das gesamte Familienrecht
FCC	Federal Constitutional Court (Germany)
FCJ	Federal Court of Justice (Germany)
FLA	Family Law Act (British Columbia, Canada)
IVF	In Vitro Fertilisation
NJW	Neue Juristische Wochenschrift
NRT	New Reproductive Technologies
NVwZ	Neue Zeitschrift für Verwaltungsrecht (Germany)
NZFam	Neue Zeitschrift für Familienrecht (Germany)
SMC(s)	Single Mother(s) by Choice

Motherhood and the Law: Introduction

Harry Willekens and Kirsten Scheiwe

This volume is the product of an international research conference on “Motherhood and the law” held at the University of Hildesheim, Germany, from 13 till 15 September 2018.¹ The aim of the conference was to bring together lawyers with an interdisciplinary approach with scholars from other relevant disciplines so as to engage in an intensive debate on social and philosophical questions regarding the foundations of motherhood as a legal construction, as well as to discuss policy-oriented questions about the regulation of motherhood in a comparative context. We thank all the participants for their inspiring contributions and vivid, enriching and partly controversial discussions. The conference was organised in the context of an overarching socio-legal research project “Macht und Ohnmacht der Mutterschaft” (“Power and powerlessness of motherhood”) (2017-2020). The project is pursued by the universities of Hildesheim and Göttingen² (directed by Ilona Ostner, Kirsten Scheiwe, Eva Schumann, Friederike Wapler and Harry Willekens) and financed by the Gender Research Programme of the Ministry for Science and Culture of the German state of Lower Saxony. This project is interdisciplinary in its approach, but focuses on the law of motherhood, on issues of the legal definition of motherhood, on the way in which legal conceptions affect the discourse on motherhood (and vice versa), and on the influence of legal rules on power relations between mothers, fathers, children and the state.

¹ We wish to thank the Gender Research Programme of the Ministry for Science and Culture of the German state of Lower Saxony for the financial support of this volume, Göttingen University Press for publishing as well as Jonathan Harrow and Lisa Hollemann for the thorough editing.

² See <https://www.uni-hildesheim.de/mom-projekt/> for further information.

In what follows, we will first point out the legal and social developments and the ensuing political and scholarly controversies against the background of which this volume was written (*section 1*). Next, we give a short description of the research project and how the “Macht und Ohnmacht” project and the conference have tried to intervene in these developments and debates (*section 2*). At the end of this introduction the chapters of this book are summarised and positioned within the broader debate (*section 3*).

1 Motherhood in the law and in feminist debate – changes and challenges

Woman’s role as mother and the impact of motherhood upon the opportunities and life chances of women were central subjects of the first women’s movement at the turn towards the twentieth century. Positions towards motherhood and reform claims were contested and controversial. The second women’s movement criticised the ‘myth of motherhood’ and the biologisation and idealisation of stereotyped ‘female’ roles as part of the grand conflict about women’s autonomy (de Beauvoir, 1951; Kortendiek, 2010). Reproductive rights were (and are) a highly contentious issue and a central claim of feminists regarding abortion. Suggestions to free women from the burden of motherhood included the idea that reproductive technologies (in the form of the artificial womb) could be a solution (Firestone, 1971). In the 1970s and 1980s controversies over the question whether motherhood should be a prominent feminist subject continued. Critical feminist contributions aiming to deconstruct motherhood ideologies, motherhood myths and finally legal constructions of motherhood followed (Fineman, 1992 and 1995; Fineman and Karpin, 1995; Hering, 1998; Lucke, 1997; Luker, 1984; Scheiwe, 1999; Schütze, 1991).

Since motherhood for a long time was seen as “natural” and self-evident (“mater semper certa est”), no theoretical debate about the foundations and justifications of the legal assignment of motherhood emerged – as opposed to the extensive debate on fatherhood (see e.g. Collier and Sheldon, 2006 and 2008; Helms, 2011; Murphy, 2005; Röthel and Heiderhoff, 2014; Scheiwe, 2006; Schwab and Vaskovicz, 2014; Willekens, 2006). When motherhood was treated in legal publications, this happened mainly with regard to labour law (the protection of pregnant women and mothers), or in the context of parental responsibility and custody.

Legal rules on motherhood in family law have undergone tremendous change since about 1950. In traditional family law, the husband/father was the head of the family, and mothers’ rights and duties towards their children were therefore subsidiary to fathers’ rights and obligations. In the traditional regime a sharp distinction was maintained between children of a marriage and children born out of wedlock; the latter had fewer rights than the children of a marriage and did not belong to the family proper of their parents, in any case not to their father’s family. In this legal context the unwed mother was a figure somewhere in between a child and an

adult, someone who could not be trusted to exercise parental rights on her own, but who had to be supervised by the public authorities. All of this has changed now: in the face of the law all children are equal, parental rights have become gender-neutral, and the unwed mother has the same rights and obligations as a married mother. What is more, these progressive reforms, which only a few decades ago were the site of vehement ideological struggle, have in the meantime come to be seen as self-evidences: nowadays, no one would dare to propose the reintroduction of the status of bastardy or of the traditional powers of the father.

With the general acceptance of these reforms, controversies about the legal status of motherhood have not, however, disappeared. New issues have arisen.

First, there are developments extending and deepening the logic of equality underlying the reforms of the 1960s-1980s. If gender is irrelevant for the establishment of a person's rights and obligations, why then should there still be a rule of gender dichotomy in parenthood? Such a rule only makes sense if persons of different gender are supposed to fill different social roles, but if the law refuses to differentiate between the social roles of "father" and "mother", what reason then can there still be to have "fathers" and "mothers" rather than "parents"? The introduction of parental gender neutrality opened a breach into which activists for same gender marriage and parenthood could step. In fact, the *principle* that persons of the same gender can share parenthood has now come to be accepted in many legal systems, but this has only raised further questions. Should same gender parenthood be restricted to adoption or can other ways of establishing the parental status be extended to same gender couples? Can the old rule of assigning fatherhood to the mother's husband also be applied to relations between two women (as is already the case – with some variations – in Belgium, the Netherlands or England (see *Smennen* and *Willekens* in this volume))? Can contract (of its conceptual nature gender-neutral) replace biology and marriage as the foundations of parenthood? If a parent's gender is irrelevant to the fulfilment of the parental role, is it then acceptable for parents to change their gender during the course of their parental life? And if gender difference does not matter anyway, why then still maintain the requirement that a child ideally should have *two* parents? This requirement made sense as long as the differences between fathers and mothers were deemed to be necessary for the child's upbringing, but if there is only one set of gender-neutral parental rights and obligations, why then would not *one* person suffice to exercise these rights and comply with the obligations (see *Boyd* in this volume)? Or why not have three parents (who would of course all have the same gender-neutral obligations towards the child) (see *Sanders* in this volume)? Once the premise of gender dichotomy in parenthood has fallen, there is no fixed ground anymore on which any of the aforementioned demands could be rebutted.

Many of the questions raised in the last paragraph have been exacerbated by the simultaneous development of new reproductive technologies which have created the possibility of procreation without sex, and sometimes using the sperm, ova, embryos and even uteruses made available by third parties (see especially *Sanders* in

this volume). These new possibilities have opened a Pandora's box of questions. Must the intentional parents be a heterosexual couple, as was the idea at the time these new technologies first appeared? Why cannot these services be available to same gender couples, to persons who want to parent on their own, to two sisters or good friends, to configurations of more than two intentional parents (see *Svensen* and *Sanders* in this volume)? And should the state or sickness insurance pay for such treatments, and if so, in which cases? These questions could not have arisen as long as the traditional model of gendered parenthood based on male and female parental specialisation was in force, for the technology in itself and its mere availability could not have changed dominant family norms. But once these legal norms were changing and gender-neutral parenthood had come to be accepted, the next step was to wonder in which constellations the new technologies would be allowed to be applied.

There is also another way in which the dynamic of the equality discourse has widened the field of controversy over the regulation of motherhood. Equal rights are one thing, the factual ability to exercise them is another one. Even if mothers have had full parental rights for several decades now, the material conditions under which they exercise these rights have not necessarily improved. As a result of increases in the divorce and separation rates, many mothers have to bear the double burden of caring for the children and earning their own and the children's keep. They are single *by constraint*. Others are single *by choice* (see *Boyd* in this volume). But in both cases mothers struggle with two problems which weigh less on fathers: the problem of financial security; and the issue of the reconciliation of paid and unpaid (care) work. There are private and public solutions for these issues (Scheiwe 2007, Willekens 2014). Financial issues can be addressed by divorce and separation rules which recognise the value of care work and by efficient systems of the collection of fatherly child support – but even the most efficient systems can only collect and redistribute what is there, and they are therefore only suited as social security arrangements for the well-off. Reconciliation issues can be addressed by parental sharing of the care work – but not much can be expected from such a “solution” unless social policy reforms facilitate and incentivise men's participation in care. Satisfactory solutions for mothers' financial and reconciliation problems are hardly conceivable without the provision of accessible public child care, without an organisation of paid work facilitating its combination with care work, and without social policies which collectivise the poverty risks of separation and of single parenthood. None of the contributions to this volume deal directly with such social policy issues; but they should nevertheless be in the back of our minds when reading these contributions on issues such as the foundations of legal motherhood, single motherhood, multiple parenthood, the solutions of conflicts between parents etc. Such questions cannot be answered on the level of philosophical or legal abstractions alone, the answers must always also refer to the material conditions under which parent-child relations are lived.

There is yet another way in which the ideal of gender equality and the realities of life clash. Parents may well have equal and gender-neutral rights and obligations, but who exercises them when the parents do not live together (see *Scheiwe* in this volume)? The issue is simple as long as one parent withdraws from his responsibility (though in that case the problem of mothers' double burden arises), but hard to solve when two (or possibly more) parents are willing to take care of a child although not living together. The child's "best interests" in principle play a decisive role here, but they are very hard to determine in cases where two or more at the face of it suitable carers are competing for decision-taking rights. Power relations then come into play, and struggles for custody and decision-taking rights over children impinge on settlements of economic claims between ex-partners (Elster, 1989). The parent with the stronger interest in the child is in the weaker bargaining position with regard to issues of alimony and the division of property. If free bargaining plays a role in the distribution of rights upon divorce or separation, this parent may end up paying with money for acquiring the privilege of preferential access to the child (with the paradoxical result that in such cases the child's main caretaker ends up with fewer material resources to take care of the child).

Finally, new controversies have arisen as a result of the partial acceptance of the commodification of the parent-child bond in the form of surrogacy contracts, which enable an as yet unconceived child's intentional parents to pay a woman to give birth to a child which will then become *their* child. In as far as such contracts are deemed valid, their novelty does not lie in the contractual nature of the creation of the parent-child tie. Adoption, though subject to strict judicial control of the best interests of the child, as a rule is still based on an *agreement* between the original and the intentional parents. The difference between surrogacy and earlier ways of creating parent-child ties lies herein that, first, the surrogacy contract is entered into before the child is even conceived, and, second, that the birthmother's promise to give up the child is often given for a financial consideration. The first of these novelties puts a dent into the nearly universal principle of the birthmother's priority in acquiring the parental status (see *Willekens* in this volume). In allocating a child to parents it values intent (and the ability to pay) over the experiences of pregnancy and childbirth. The second novelty creates a disturbing similarity between the establishment of parenthood and the sale of goods.

It is these two features of the surrogacy contract which lead to vehement controversies over its legal acceptability – controversies which not only oppose advocates of surrogacy to critics, but also relentless adversaries of surrogacy, who are prepared to deny legal consequences to surrogacy contracts even at the cost of depriving children of any parents at all, to those who, though critical of surrogacy contracts, take a more pragmatic stand and are willing to condone altruistic surrogacy and to accept that in the interest of children even illegal surrogacy agreements may create legally valid parent-child ties (further references in *Willekens* in this volume).

The shift towards gender-neutral norms related to parenthood happened not only in family law, but also in other areas of law. In labour law, social security law and welfare law rights and benefits for parents are widely gender-neutral (with a few exceptions during the period shortly before and after childbirth and with regard to breastfeeding). The century old conflict over special rights and the protection of women during pregnancy, childbirth and breastfeeding that split even the women's movement into different fractions (Wikander, 2010) has come to an end as a result of the introduction of non-discriminatory occupational safety legislation (Nebe, 2006). Special labour law rights for mothers have for the most part been discarded and have developed into gender-neutral parental rights. This tendency towards the 'neutered mother' in law has been criticised by some feminists as encompassing the risk of losing the positive cultural values and social components that are linked to motherhood, getting lost within the "degendered components of the neutered institution of parenthood" (Fineman, 1992, p. 655; Slaughter, 1995). A similar critique has been raised in the feminist social policy debate regarding the tendency towards the generalisation of the individualised male adult worker model as the normative standard in labour law, welfare law as well as in maintenance and child support law (Daly, 2014; Daly and Scheiwe, 2010).

The "care debate" shifts the focus away from the former debates about the pros and cons of gender-specific or gender-neutral norms on 'parenting' towards a gender perspective upon formally equal legal rules that have unequal and gendered impacts, because care-work is devalued and not sufficiently recognized by law (see *Herring* in this volume).

These developments and debates are the background and foundation on which our research is based. Our main focus in this book is however narrower; we are here mainly concerned with the concepts and the regulation of motherhood in the fields of family law, medical law and reproductive rights.

2 The research project "Power and powerlessness of motherhood" and the conference "Motherhood and the law"

It is the aim of the research project "Macht und Ohnmacht der Mutterschaft" to study the questions raised above, but adding a perspective which in our opinion is still under-researched, at least in the field of legal and socio-legal studies. This is the power perspective. Gender-neutral rules affect the distribution of resources and power relations (between adults and children, men and women, mothers and fathers) just as well as (though differently from) the older rules of gender hierarchy. Although gender-neutral, the rules can have differential effects on persons with unequal access to resources and thus exercise an influence on power relations. Identical rules may nevertheless distribute power differently in different social contexts. One has to realise, though, that power can take different forms and that it is rarely one-sided. The imposition of the responsibilities of motherhood on

women functions on the one hand as a disadvantage on the labour market and a hindrance to emancipation, but it may at the same time strengthen women's power with regard to the access to children. It is the aim of this research project to look at the different questions associated with the legal treatment of motherhood (such as the regulation of reproductive technologies or the rules dealing with the exercise of parental rights in case of divorce or separation (see *Scheime* in this volume) from the point of view of mothers' power/powerlessness.

The conference "Motherhood and the Law" was organised within the framework of this research project. A number of the papers presented at the conference have been gathered in this volume and are presented in the next section. Some other conference presentations have not found a written form in this volume. We thank Andrea Büchler ("Uterus transplantation and discourses on motherhood"), Theresa Richarz ("One is not born, but rather becomes a woman? - by giving birth? Queering of gendered kinship law"), Sally Sheldon ("The Abortion Act 1967, a biography") and Claudia Wiesemann ("Conceptions of gender and age in debates about postponed motherhood") for the stimulating talks they gave at the conference.

3 The essays in this volume

The book starts with an introductory historical-sociological essay by *Harry Willekens* ("Motherhood as a Legal Institution: A Historical-Sociological Introduction"). Willekens takes a look at the history of the legal rules on motherhood in order to better understand the debates of the present. He addresses two questions: 1. Who was/is the child's mother, or, to be more precise, what were/are the legal rules assigning motherhood to specific persons? 2. Which parental rights and obligations did/do mothers have, as compared to fathers and to other social actors (kins(wo)men in earlier societies or the state in our society)? As to the first question, a wide-ranging historical comparison shows us that there is one universal rule of the establishment of legal motherhood: the birthmother is the child's legal mother. Wherever there is a concept of legal motherhood (for it was lacking in some societies of the past), motherhood was and is primarily assigned to the birthmother; in many societies, there have been and are other ways to acquire the maternal status (such as adoption or the surrogacy contract), but all of those are predicated on the *primary* ascription of the maternal status to the birthmother. As to the second question, huge intersociety variation in the distribution of rights and obligations vis-à-vis children can be observed. But there is one constant: although mothers had hardly any rights in some societies of the past and had far-reaching decision powers over children in other past societies, the distribution of such rights was until recently always premised on gender difference, i.e. mothers had different rights from fathers. It is only over the past decades that gender-neutral equal rights have been introduced; and in more and more legal systems these rights can now

also be exercised by parents of the same gender. It is noteworthy, though, that this move towards gender neutrality goes hand in hand with developments curtailing parental powers (the new understanding of parental rights as responsibilities, the recognition of children's rights and the extension of state control over parent's and children's behaviour). The author connects these legal breaks with the past to the (very slow) transition from the logic of (gendered) kinship to a society in which most of the former social functions of kinship are fulfilled by the market and the state – both of them institutions which can function without any reference to gender.

In “Maternalism and Making Decisions for Children” *Jonathan Herring* addresses the conflict between welfare and autonomy in situations where decisions regarding children have to be taken (by parents or by judges). The welfare criterion for taking such decisions is usually seen as paternalist (the parent or the judge deciding what is best for the child). It is Herring's purpose in this essay to defuse the contradiction between the welfarist and the autonomy position by recasting paternalism as “maternalism”: “decision-making for others as an archetypal mother might make, rather than as an archetypal father”. The first step in this undertaking is to look at recent English case law in which decisions for children had to be taken. Herring demonstrates that applying the welfare criterion in such cases does not amount to a negation of autonomy, but that the possibility for children to lead an autonomous life in the future is conceived as central to their welfare. He proposes “maternalism” as the method which ought to be followed in taking decisions for children. Maternalism is to be understood as a form of decision making which relies on the values of care and relationality rather than on abstract welfare principles. Children's interests and children's liberty can only be apprehended within the context of the relations in which they live, it makes no sense to construe children (or adults) as autonomous subjects existing in a social vacuum. Maternalist decision taking thus also takes the carers' interests into account, for no child can flourish outside the relationship with its carers. It respects the children's liberty, but their liberty within the context of their existing relations rather than their liberty to do whatever enters their head. It does not proceed by coercion, but rather by nudging the children into the right direction. Its understanding of parenting is neither that of the paternalists, who assume “daddy knows best”, nor that of libertarian autonomists, who think the child's (real or presumed) wishes should always carry priority. It is structured “around the promotion of caring relationships which enable children to flourish”.

In “Choice and Constraint: Exploring ‘Autonomous Motherhood’” *Susan B. Boyd*, in a piece of research combining the analysis of legislation and case law in Canada with in-depth interviews with “single mothers by choice”, explores the legal and social position of women who decide to parent without a partner; both women who had already planned the pregnancy with the intention of becoming single mothers and women who decided to parent alone after becoming pregnant were considered. The essay starts with the observation that the position of single

mothers has been improved by legislative reform (especially by the abolition of illegitimacy) and by women's economic emancipation. There are, however, serious obstacles to single motherhood by choice, foremost among them the strengthening of (unmarried) fathers' rights and the neo-liberal economic context in which children have to be raised. The genetic tie has become much more significant than it used to be in determining parental rights; in combination with the widespread ideology that it is in a child's best interests to have two parents this makes it difficult for single mothers by choice to truly parent autonomously. The economic context in which children grow up is a further impediment to single parenting: since the basic idea is that children have to be provided for by their parents, it is much more difficult to bring up a child on one's own than if one has a partner; and, conversely, the economic dependence on the child's biological father is bound to reduce the space for the mother's autonomous decision-making. Pointing to the special relation between the birthmother and the child, Boyd holds a plea for the acceptance of single mothering by choice and for the development of institutional economic support for mothers.

Frederik Swennen ("Motherhoods and the Law") and *Anne Sanders* ("Multiple Parenthood: Towards a New Concept of Parenthood in German Family Law") address similar questions, but they do so in different ways. Both authors try to make sense of the complex of political-ethical debates, technological developments and legal changes which is putting the traditional assumptions of parent-child law under an irresistible strain. It is especially the fixed notion that children should have two parents, no more but also no less than two, on which they focus. The two authors, however, deal with this issue in different ways. Swennen tries to develop a fundamental critique of the existing *concepts* and a framework for a radically new type of parent-child law. Sanders constructs a typology of the new factual constellations with which the law has to deal and looks for satisfactory pragmatic solutions for new problems, all the time remaining quite close to the existing concepts and rules of the law (in this case German law).

At the basis of *Swennen's* argument lies a critique of the status approach in family law. In this approach, the state ascribes parenthood to individuals on the basis of certain objective facts; the ensuing parental status is not at the parents' disposition, it cannot be changed at will by them. This status approach contrasts with actual practices and experiences, in which motherhood may be split and in which different persons may assume comparable or different motherly roles vis-à-vis the same child. The law in many countries is aware of this contradiction, and legislative strategies are being pursued in order to incorporate plural motherhoods into the law (such as the application of pre-existing statuses to new kinds of family relations or the extension of parental responsibility to individuals without parental status). These reforms are, however, still predicated on seeing parenthood as a *status*. Swennen is a proponent of an alternative model described as "cont(r)actualisation", in which it is recognised that there is no such thing as "motherhood" in the singular, but which starts from the assumption that there are

multiple motherhoods, different dimensions of motherhood/parenthood, all of which should find recognition in the law. Cont(r)actualisation is an approach which does not reduce the law of child-parent relations to a simple matter of contractual agreement, but which opens a space for the bottom-top construction of legal parent-child relations within a framework still guaranteed by the state.

Sanders shows that technological and social developments have produced a situation in which children in many cases are connected to more than two adults in ways which might be legally relevant. She points out that individuals may be connected to a child as genitors (in the ordinary case the providers of the egg and sperm cells), as gestational parent (the woman from whom the child is born), as initiators of the conception and pregnancy (e.g., the individuals who enter into a contract with a surrogate mother), and as “social” parents (i.e., the individuals who factually care for the child); if these different connections do not coincide with each other, up to seven persons can have a “parental” connection to the child. The question then arises to whom parental rights should accrue. *Sanders* pleads for a new parent-child law in which all those connections would find some recognition. The extent and intensity of parental rights should, in her opinion, be dependent on the number of different connections which relate a child to its (many) parents. This differentiated approach would lead to a system in which a child may have “main parents”, but also “deputy parents”, with lesser but still real rights.

In her essay “Parental Conflicts over the Exercise of Joint Parental Responsibility from a Comparative Perspective: From Daily Matters to Relocation” *Kirsten Scheiwe* takes a comparative look at the rules for dealing with conflicts between divorced or separated parents and at their (possibly gender-specific) influence on the parents’ bargaining positions. She starts from the observation that nowadays joint parental responsibility remains in force also after a divorce or separation; but the question then arises who has the decision-making authority when the parents disagree. On the basis of a broad legal comparative overview *Scheiwe* identifies three ideal-typical solutions for such parental conflicts: the autonomy model, which enables either each of the parents or the parent who lives together with the child to take decisions on their own, leaving the other parent only the option to apply for a court order so as to reverse the first parent’s decision; the strong consensus model, under which the parents have to agree on everything but the most trivial issues; and the weak consensus model, in which parental responsibility in principle has to be exercised jointly, but in which a legal presumption that each parent acts with the consent of the other in fact creates a space for autonomous decision-making. These models are not descriptions of reality, they are ideal types. Even the legal systems which most stress autonomy nevertheless do not allow a parent to decide everything without the other parent’s consent, and even the laws which most stress cooperation allow the parent who is together with the child some space for independent decision-taking. So as to deepen our understanding of the intricacies of the real-life rules, *Scheiwe* compares two legal systems which apparently lie at the extremes of the autonomy-consensus spectrum, England and

Germany, in respect of the specific issue of the main carer's change of residence together with the child: to what extent does the main child carer need the other parent's consent to move to a different place together with the child? The differences between English and German judicial decisions prove to be less than might have been expected in view of the major differences between the two legal systems at the level of principles. In this context the author formulates a plea for a relational interpretation of the rules regarding relocation, one in which the child's "best interests" cannot be separated from the child's main carer's (i.e. usually the mother's) interests. In the last part of the essay Scheiwe formulates some provisional hypotheses about the rules' impact on parents' bargaining positions and hence on the power relations between parents – a complex of questions the answers to which can only be developed with the aid of empirical research.

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Motherhood as a Legal Institution: A Historical-Sociological Introduction

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1 The essay's background and basic question

Until recently, the public and scholarly debates on motherhood focused on issues of gender equality and gender justice. The basic question of these debates was whether gender equality should unreservedly apply to the legal and social position of mothers and fathers or whether there were good reasons to ascribe special responsibilities to mothers and hence also to give them special rights. These debates opposed conservatives and some (care-oriented) feminists, either glorifying the myth of natural motherhood or starting from the empirical observation that care work is predominantly feminine, to liberals and liberal-oriented variants of feminism. These confrontations, fierce as they were, did, however, only rarely put the *concept* of motherhood into question. In legal discourse, until recently the questions of what is a mother and of who is a child's mother were never discussed. It was assumed that everyone knew.

This has now changed. Recent social and technological developments have raised questions which remained invisible as long as everyone thought they knew what a mother is. The possibility of bearing a child with another woman's ovum has split biological motherhood into two elements. The spread of surrogacy raises doubts about the naturalness of motherhood, for the motherhood emerging from

legally recognised surrogacy is based on contract and not on any corporeal connection with the child. The recognition of same gender parenthood raises the question whether it still makes sense to speak of mothers and fathers, for these gendered concepts presuppose that a mother has an “other” (a father) who is her complement; but if both parents are “mothers”, what sense then can the concept of a “mother” still have? Questions such as these have thrown the legal discourse on motherhood into turmoil.

It is not the purpose of this essay to address these questions head-on. It is my conviction that much of the contemporary debate, not only on motherhood, but on the legal ordering of the family in general, is suffering from a lack of historical perspective which makes it very difficult to put a finger on what is new and on what is problematical in our present condition. It is not possible to understand a phenomenon without comparing it to a point of reference. But if we blend out or misunderstand the past, we lose the point of reference we would need to illuminate the questions of today. In this contribution I want therefore to take a huge step backwards, to look at the *longue durée* of the rules on motherhood, in order to better understand these rules and the controversies of the present.

The essay focuses on two sets of rules:

1. The rules establishing the criteria for allocating the legal status of motherhood, i.e. the rules determining to which mother a newborn child is normatively attached.
2. The rules establishing which rights and obligations exist between the child, the mother and their kin (rights such as the right to take decisions for the child or the right to material support or to a share in the other’s inheritance).

It would defeat the purpose of my undertaking to restrict the inquiry to societies with highly differentiated legal systems and formally enacted written laws. I am looking for knowledge which can put the contemporary debates on motherhood in a wider and different perspective, and I am not going to find this by focusing exclusively on societies which share the same assumptions (and nowadays also the same doubts) about parenthood. This essay will thus also address the norms on parenthood and motherhood in societies in which law has not yet become differentiated from social norms and group practices.

2 Preliminary points

Two basic points must be kept in mind when looking at the development of the legal rules concerning motherhood:

1. It makes no sense to talk about the rules on motherhood in abstraction from the rules on fatherhood.
2. Nor does it make sense to look at these rules without asking what purpose they are serving. In most, though not all societies the rules governing kinship and parent-child relations serve two purposes which I will show are at odds

with each other: on the one hand, these rules are part of the solution of the universal problem of caring for the young, who could not survive unless being cared for; on the other hand, these rules also are important building blocks of the organisation of cooperation and solidarity between individuals and between groups, and thus essential elements of social cohesion.

2.1 Parenthood as a gendered institution

As the latest family law developments demonstrate, parenthood need not be gendered; in many contemporary legal systems (e.g. in the Nordic countries, Belgium, the Netherlands, Germany, Austria, England (Théry and Leroyer, 2014)) persons of the same gender may share the parental status. But this was unheard of until only a few decades ago. I know of no single example of same gender parenthood on the historical or anthropological record before the 1990s. Until then, the operation of the rules with regard to the establishment of legal parenthood universally presupposed the classification of all potential parents as either male or female. What is more, throughout history the rights and obligations of mothers vis-à-vis their children were different from the corresponding rights and obligations of fathers; it was only with the advent of Communism in Russia that such rights and duties for the first time came to be defined as gender-neutral. In the past and until recently parenthood was thus not only universally gendered, it was also built on a principle of gender *asymmetry* assigning different and complementary roles to men and women.

At this point a naïve observer confusing sex and gender might object and draw the attention to an institution (misleadingly) called “woman marriage”, which used to be widespread in traditional sub-Saharan African communities. This institution allowed a biological woman to marry another woman and become the parent of the children borne by the wife¹. This arrangement can, however, only be understood in the context of the patrilineal kinship systems prevailing in the said communities. According to the rules of patrilineal kinship the rights and duties ensuing from the membership of the kin group exclusively apply to descendants of the same *male* ancestor. Kinship exists only in the male line; a child has a father, but not a mother (since it is not related in the male line to the woman who has borne it). In the absence of a male successor in each generation such kin groups are doomed to become extinct. “Woman marriage” is one of several solutions to this continuous threat: by paying the price for a bride, a biological woman becomes this bride’s husband and the father of her children. By marrying, she turns into a *male* person able to continue the patrilineage. The existence of this institution is a formidable confirmation rather than a refutation of the observation that gender difference until very recently was *always* at the heart of parenthood; for this specific

¹ There is a rich anthropological literature on the subject. Some of the best examples are Amadiume (1987), Evans-Pritchard (1951/2002), Herskovits (1937), and Krige (1974).

example demonstrates that *the principle of gender asymmetry used to apply even to relations between two persons of the same biological sex*.

Even if gender asymmetry as a leading principle of parenthood appears to have been recently abandoned for gender neutrality, we must thus keep in mind that throughout history fatherhood and motherhood were different and complementary things. We must realise that there is nothing self-evident about present day assumptions about gender-neutral parenthood, for these assumptions are historically unique², their existence is therefore in need of a causal explanation, and in the absence of such an explanation it is hard to judge how stable the principle of gender neutrality will prove to be.

2.2 The social functions of the allocation of the parental status

The second point we have to heed when investigating the history of the rules on motherhood is somewhat more complex. Rules are incomprehensible unless one knows what purpose they serve within their social context. This would of course be an insurmountable obstacle to a wide-ranging historical-comparative inquiry if the rules on parenthood would serve a different purpose in each different social context; in that case, no meaningful comparison would be possible. But I submit that the purposes served by these rules are only two, one which is of necessity present in all human societies, and another which can be found in many societies of the past.

The one *universal* function of the rules assigning parents to children is the care for vulnerable children. Children can neither survive nor grow up to become integrated members of society unless they receive a lot of support and care from older members of society; and societies which do not render this support to children will not be able to reproduce for lack of a next generation. From a purely logical point of view, there may exist widely diverging ways of dealing with this problem. It is just conceivable that a society might be able to reproduce without having any rules or any form of social organisation with regard to the responsibility for children, simply by leaving all relevant decisions with respect to the care for children to adults' individual preferences and trusting to living beings' natural predispositions to care for their offspring. It is also conceivable that full responsibility for childcare be borne by the group as a whole, and if so there would be no need for any rules assigning parents to children. But in forty years of extensive reading I have not been able to find a trace of any society in world history which would have consistently and successfully practised either solution to the care problem. In practice, every society uses a different mix of individual and collective arrangements to care for children (Hrdy, 2011); but however strong the collective contribution to this care may be (as it is in present-day Western European societies, with their obligatory schooling and large availability of public and commercial child care), every socie-

² This uniqueness is analysed in much more depth in Willekens (2003).

ty has rules assigning the primary powers over and the primary responsibilities towards children to specific individuals: parents³. These rules obviously do not constitute the sole solution to the issue of child care, for it is rarely the case that parents can accomplish their care job without community support, but they appear to be *always* a part of the solution.

In most societies, rules on parenthood, however, do not only serve the purpose of caring for the children, but they allocate rights over children *as resources*, usually in connection to the children's position within a kin group (Willekens, 2006). In many societies of the past, in which there was neither a functioning state nor an overarching device of economic coordination such as the market mechanism, all kinds of social functions which we nowadays associate with the state or the market economy were fulfilled by the solidarity within kin groups and by the ties and networks of cooperation between these groups. Kinship is an institution which creates rights and obligations between individuals on the basis of their common descent from a real or mythical ancestor⁴. Where there is no state or only a weak and inefficient one, people need some other arrangement to (somewhat) guarantee their physical security; an individual who is a member of a larger group of which it is known that it is its duty to protect and revenge him/her, is in a much safer position than an individual on his/her own. Under the same conditions, material support, often necessary for survival, was only to be had from the kin group. Before the advent of developed markets in labour and land the only fairly secure access to the means of existence in sedentary societies consisted in the inheritance of a piece of land or at least of the right to cultivate a piece of land; one inherited of one's kin, and whoever was not a member of a kin group (such as the illegitimate child) was lost in such a system.

Kin groups were thus necessary for the protection of the physical and social security of their members. But a system of closed kin groups standing aside each other would not have been viable. Kin groups were tied to each other by marriages; from marriages emerged complex networks of alliances, which served the triple social function of reducing the threat of physical insecurity, strengthening the basis of economic security and building power bases enabling some alliances to dominate others.

Given the pivotal societal position of kinship during most of history, it is easy to understand how children used to function as resources in this context; and it is

³ This thesis might be contested by pointing to the (few) historical instances of small communities in which the responsibility for children is claimed to have been fully collectivised, such as the Israeli *kibbutzim* or some nineteenth century utopian socialist communities like Oneida (Foster, 1991). I cannot go into the validity of these claims here, but even if we would –just for the sake of argument– accept them as true, it ought to be pointed out that we are dealing here with small experimental islands within much larger complex societies, and that generalization from that basis is highly problematical.

⁴ The whole argument here is based on a literature so abundant that it would be impossible to cite even a tenth of it. The publications I have found most helpful to understand kinship are: Fox (1967); Godelier (2004); Goody (1990); Needham (1971).

also easy to see why having rights vis-à-vis a child was not so much a burden as a benefit to the parents.

First, children were necessary to *continue* the kin group. In pre-state horticultural and pastoralist societies, this question was complicated by the fact that kinship was usually matri- or patrilineal⁵. In a society in which so much depends on kin relations, such unilineal systems are necessary to delineate the frontiers of solidarity, to draw a precise borderline between those to whom an individual is obliged and all others –something the so-called cognatic kinship system practised in our society cannot accomplish. But unilineal kinship is at the same time extremely vulnerable, for the unilineal kin group does not just need *a* child for its reproduction, it needs children of the right gender and of the right age at the time of the parent's demise. A patrilineage can only be continued by a son, a matrilineage by a daughter; a child of the wrong gender is useless for the continuation of the group.

Secondly, children were necessary building blocks in the formation of alliances between kin groups. In non-state societies such alliances are essential for survival and physical security. But even in societies with a state and an already developed market economy alliances of the sort are used to build a political power base, to increase social security or to bring together lands or capital so as to facilitate larger-scale economic undertakings. Enduring alliances are often built on marriage or at least reinforced by marriages. Kin groups (and also smaller families) must be able to push children into the appropriate marriages and therefore also to keep them from marriages which produce no benefits for the group. In this context, the right to direct children to enter into certain marriages and to refrain from entering into others is a highly valuable resource.⁶

Third, children of course are resources to their parents and further kin in ways which do not directly contribute to the reproduction of kin groups, but which are nevertheless highly beneficial to the parents or kin group. They care for parents and kin when these become too old to care for themselves. They work in the family firm or on the family farm. They are especially valuable in horticultural contexts where the ratio of labour power to land is low and where every child adds to the family's production rather than being a burden on the family (as was the case until recently in sub-Saharan Africa (Goody, 1976), but not anymore in Western Europe since about 1500 (Hajnal, 1965)). They were equally valuable in pre- or protoindustrial production for the market, for this production was often organised on a household basis (Medick, 1976). Where the protection of the law is weak, they take

⁵ The best general introductions to the logic of different types of kinship systems are still Radcliffe-Brown (1950) and especially Fox (1967).

⁶ Whole libraries have been written on this subject. Some of the finest contributions on which I base the argument: Bourdieu (1972), Burguière and Lebrun (1986), Seccombe (1995). And see also Willekens (2001).

up positions in family enterprises which, because of trust problems, it would be risky to leave to outsiders⁷.

Most of these functions of children for their parents and kin belong to the past. They certainly did not disappear immediately with the advent of capitalism and the strengthening of the state. Even if the need for children to work in the productive family unit withered away with the development of labour markets, kin solidarity remained of major importance as capitalism and the state developed. First, capitalism requires capital, and at a time when bank credit and company law were still underdeveloped family alliances were crucial in gathering the capital needed to establish or expand enterprises; and the continuity of enterprises is dependent on manning crucial positions within the enterprise with trustworthy individuals –and kinship and trust used to be (and still are) strongly correlated (Chandler, 1990; Goody, 1996). Secondly, it is only with the advent of the welfare state that family social security was partly replaced by collectively organised social security. Although kinship is nowadays certainly not *necessary* anymore for the functioning of capital markets or big enterprises nor for guaranteeing individuals the material means of their survival, inheritance and kin-based networks of personal relations still play a crucial role in the social distribution of wealth and economic opportunities (Piketty, 2013; Vontobel, 1999).

To summarise: the rules on parenthood in most societies serve two purposes, one of them being the survival and socialisation of children, the other the allocation of rights to control children's labour power and behaviour in the interest of the children's parents and their kin. In order to understand the history of these rules it is vital to see that these two purposes stand in patent *contradiction* to each other. From the point of view of caring for children, the one and only purpose of the rules is to assign the children parents who are willing and able to do what is necessary for keeping the children alive and for preparing them for life in society. Nothing else counts, not the parents' gender, nor the parents' institutional relation, nor their genealogical relation to the child. From this perspective concepts like "bastardy" or "illegitimacy", which until the early twentieth century were nearly universal throughout history⁸, make no sense, for they *exclude* children from the rights they need for their survival and adaptation to the society in which they live and hence do the opposite of what the rules are supposed to accomplish. If such concepts have nevertheless been so pervasive throughout history, there must be another explanation –and that is to be found in the second function of the

⁷ See, e.g., Ferguson (1999; 2000) on the fundamental role of family alliances and solidarity in the rise of the Rothschild financial empire.

⁸ See Davis (1939-1940) and Willekens (2003, pp. 86-91). No written law is to be found on the record which did *not* differentiate between legitimate and illegitimate children until a Norwegian reform of 1915 proclaimed the equality of all children (but still excluded children born out of wedlock from inheriting landed property in the countryside). As to societies without written laws: on the anthropological record there are just a few hunter-gatherer societies with economies based on communal sharing, such as the Mbuti of the Ituri rainforest, in which the distinction between legitimate and illegitimate children does not appear to have operated.

parenthood rules. Wherever kinship is decisive for access to the means of production, and wherever it constitutes the foundation of economic solidarity and/or of a common defense against enemies or natural threats, kinship rules operate according to an inclusion/exclusion mechanism. The solidarity of the kin group can only function if it has boundaries and is able to distinguish between those who are in and those who are out. To become a member of a kin group a person must enter it according to the rules of the prevailing kinship system, which in most cases means that one must be born within a marriage contracted under the control of the kin group. Such rules of exclusion obviously run counter to the first and most basic purpose of the parenthood rules, but they are unavoidable if the kin group is to fulfil its many functions.

The whole history of the rules on parenthood as well as the recent, fairly radical transformations of these rules are bound to remain incomprehensible unless analysed within the framework of the central contradiction between the rules' two main historical purposes. This contradiction (and the ensuing priority of kin group interests over child welfare for most of history) will accompany us for the rest of this essay.

3 The history of the motherhood rules: some observations

It would be more than rash to endeavour to write a world history of the motherhood rules. This of course is impossible. In writing this essay, my only ambition has been to sort through the available literature, with the goal of looking for, on the one hand, general tendencies, and, on the other hand, peculiar and unexpected facts which might broaden our perspective and stimulate reflection.

But here we immediately bump into a stumbling block. The institutional history of fatherhood has for a long time been a recognised subject of research for historians, anthropologists and legal scholars (Scheiwe, 2006; Tissot, 1921; Willekens, 2006); but the institutional history of motherhood has, with rare exceptions (Iacub, 2004; Lucke, 1997), remained a blank page. It is true that with the rise of women's history and with the spectacular expansion of studies in "social history" motherhood has become a subject of historical scholarship (for overviews see: Hufton, 1995; Knibiehler, 2000). But this literature focuses on maternal experience, on the embeddedness of mothering practices within communities, or on the moral discourse about mothers and the behaviour that is expected from them; it tells us very little about the criteria for the legal ascription of motherhood to certain persons or about the rights and obligations associated with the maternal status. It is thus unencumbered by too much pre-existing scholarship that I can look into the questions which follow.

3.1 The basic rule of motherhood ascription

The lack of scholarly discussion on the criteria for deciding who is a child's mother comes as less of a surprise when one takes a more detailed look at the historical and anthropological record, for a first reading of the evidence conveys the distinct (but, as we will see, superficial) impression that the rules determining the maternal status *do not have a history*. Disregarding some special cases and exceptions, it would appear that the basic rule for assigning the legal status of motherhood has always and everywhere been the same: *mater semper certa est*, the mother is the woman who has given birth to the child. In most legal orders, this rule was not even explicitly formulated, it was just assumed (and this is still the case, e.g., in Japan (Gruenbaum, 2012)). Until a few decades ago, most European legal systems did not have a written rule on the matter; the issue was supposed to be so clear-cut as not to be in need of being put down in writing. It is only recently that it has come to be deemed necessary to write down the rule, either in the context of a big reform of parent-child law in the course of which diverse rules came to be specified in greater detail (as in Belgium in 1987 (Heyvaert, 2002, p. 170 and pp. 200-212)) or as a reaction to new technological developments (as in Germany in 1998 (Coester, 2004, pp. 1246-1247)). In the latter case, the new possibility of giving birth to a child bearing the genetic material of a woman other than the birthmother was seen as a reason to explicitly confirm the *mater semper certa* rule.

Throughout most of history the law has thus remained silent (and yet crystal clear) as to the basis on which the maternal status is assigned, so silent that one might be tempted to conclude that we are not at all dealing with a social norm here, but with a pre-legal, natural "given" not subject to differentiated human decision-making. Upon closer observation, however, some exceptions to *mater semper certa* can be found which make it clear that the natural law thesis must be wrong.

I will now first deal with three (mostly apparent) exceptions which have a long history, and then address some (also mostly apparent) exceptions which have arisen as a result of social and technological developments of the last decades.

First, lots of societies are to be found on the anthropological and historical record in which children *do not have legal mothers at all*. In the context of the discussion of African "woman marriage" here above I have already drawn attention to the existence of purely patrilineal kinship systems, in which children exclusively have rights and obligations in relation to their father and his kin. Such kinship systems were not only widespread in sub-Saharan Africa, they were to be found throughout the world in societies without a state or with a weak one (Murdock, 1949; Radcliffe-Brown, 1950). They also existed in the remote European past. The kinship regime of archaic Rome, for instance, was patrilineal, no legal ties existed between the birthmother and the child she had born, and even after some such legal ties eventually had come to be recognised Roman law for centuries remained strongly albeit not exclusively patrilineal (Corbier, 1991). It was not completely unknown in such systems for rights and obligations to exist between woman and

child (it was for instance taken for granted that the birthmother had to breastfeed the child and take personal care of it), but such rights and obligations were not inferred from any legal relation between the two, but found their basis *in the marriage* between the birthmother and the child's father (see, e.g., Evans-Pritchard (1951) on the Nuer). These patrilineal regimes of course constitute a true exception to *mater semper certa*, but it has to be pointed out that this is a very peculiar exception, for the rule allocating the maternal status to the birthmother is *not replaced here by an alternative rule*, the maternal status itself is just being dispensed with.

Second, there exist legal orders in which *mater semper certa* is the basic rule for the allocation of the maternal status, but *in which this rule is not applicable to children born out of wedlock*. In English law, until well into the twentieth century a child born out of wedlock was considered to be a *filius nullius*, nobody's child: the child did not have parents at all (Ellger, 1994, pp. 387-389). Under the so-called "Poor Laws" a parish, between 1576 and 1834, had a right of recourse against the presumed genitor of a child supported by the parish; and from 1844 the birthmother herself had a claim to child maintenance against the genitor (Henriques, 1967). But neither of these rights was a right of the child nor were these rights supposed to be derived from a family relationship between the child and its biological parents; they were just expedients for redistributing the expenses of maintaining the child, without any further consequences in, e.g., succession law or the law of parental authority. In the Code Napoléon (1804) –which was applicable in France and Belgium– and in the Italian law inspired by it no automatic legal tie between mother and child arose with the child's birth: such a tie was only established if the mother recognised the child (art. 331 and 334 of the French and Belgian *Code Civil*); and even if recognised the child's rights in the succession were less than if it had been born within a marriage (art. 756-761 French and Belgian *Code Civil*). In Italian law this exception (though not the discrimination in succession law) has survived until today (art. 250 *Codice Civile*). These legal rules, to be found both in the common law and in Romanic legal systems, must be discounted as true exceptions from *mater semper certa*, for they can just as well be construed as a confirmation of this basic rule. The automatic imposition of the maternal status upon parturition in these legal regimes was refused only to births *deviating from the norm*, i.e. to children who were going to be excluded from the normal rights associated with kinship anyway. In the French legal and political debate, two reasons were given for this exclusion of unwed mothers from the main rule: first, a birth out of wedlock was a scandal which could ruin a woman's whole life, and the law in its "clemency" ought to give women in such a situation the opportunity to sever themselves from the child and go on with their life; and, secondly, it was feared that women, unless the law granted them an exit option, would resort to abortion or infanticide to avoid the scandal (Lefaucheur, 2013, pp. 90-91; Sagnac, 1898, pp. 359-362). The rules on motherhood out of wedlock in France, Belgium, Italy and England thus functioned as a safety valve to enable a system of rigid distinction between legitimate and illegitimate children to function without too much friction. The main rule in this system

was that children in a kinship sense only counted if born within marriage, and within marriage *mater semper certa* reigned supreme, without any exception⁹.

Third, there is adoption. Adoption creates a legal tie between a parent and a child not directly biologically related to this parent, and thus constitutes an apparent exception to the rule ascribing maternal status to the birthmother. Adoption has been around for millennia and was for example widely practised in Roman law (Corbier, 1991); in Europe, the institution was for a long time banned under the influence of the Catholic Church (Goody, 1983), but it was widespread in Asian societies (Goody, 1969; Goody, 1990). Until less than a century ago, adoption was nearly exclusively used as a device for filling lacunae in kin groups: if a child of the right gender and age was lacking within the kin group or family, and if this lack was endangering the continuity or the power basis of the group, a person –usually a young adult– was adopted to fill the gap (see e.g. Corbier (1991) for Ancient Rome or Beillevaire (1986) for Japan until well into the twentieth century). It is only in the course of the twentieth century that adoption developed into an institution for giving a family to orphans or abandoned or neglected children. Both the older and the newer forms of adoption are methods of correcting unwelcome results of the primary rule of maternal status allocation (in the first case the absence of the right kin at the right time, in the second case the lack of care for the child). As such, they are predicated on this primary rule: it is only when this rule fails to deliver that adoption becomes an option. In contemporary law, adoption always presupposes either the birthmother’s consent or a judicial decision establishing that the birthmother is unavailable or unable or unwilling to take care of the child.

Historically, we can thus observe three apparent exceptions to the basic motherhood rule: patrilineality; the exclusion of children born out of wedlock from the application of the ordinary rules of kin genealogy; and adoption. Adoption presupposes the basic motherhood rule and therefore does not contradict it. The non-application of the basic rule to illegitimate children is one of several possible methods for doing what the concept of illegitimacy is supposed to do, i.e. for excluding children conceived outside the control of the kin group from the benefits of kinship, and it is therefore less of an exception to the basic rule than a confirmation of its centrality for the functioning of kinship. Under patrilineality, the basic rule does not operate, yet this is not because another rule would have priority over *mater*

⁹ In a fascinating piece of historical research Iacub (2004) shows how it used to be possible for French married couples to “smuggle” the child of an unmarried servant into the family. If the child at birth was registered as a child of the couple and if the parental relation between the child and its non-birthmother was then publicly lived for some time, the legal tie between the child and the non-birthmother became uncontested because of the concept of *possession d’etat*: proof against a registered civil status confirmed by the public behaviour of the status holders was forbidden. This, however, does not constitute an exception to *mater semper certa*: the described practice, though unassailable, was illegal, and the “lacuna” in the law which made the practice viable at all was the unintended result of legal mechanisms devised to protect lawfully wedded spouses and legitimate children from discussions about their status.

semper certa, but because in the patrilineal kinship regime there is *no need for any such rule*.

Recent developments have thrown the whole field of parent-child law into turmoil. They are also raising doubts about *mater semper certa*. But to what extent have they led (or could they conceivably lead) to new rules supplementing or replacing the old, nearly universal motherhood rule?

In answering this question, it is necessary first to distinguish between the legal relevance of new technologies and that of new social practices. Much is being made in legal debate of new procreative technologies such as ovum or embryo donations, donations of mitochondrial DNA and even uterus transplants (Büchler and Schlumpf, 2017), innovations which are supposed to be “splitting” up motherhood. All of these new techniques enable women to bear children with which they could otherwise not have become pregnant; some of the techniques dissociate gestational from genetic motherhood, because they allow women to bear children conceived with another women’s DNA. But it cannot be stressed enough that the relevance of all these novel developments for the establishment of legal motherhood is *nil*. There is no legal system in the world which allocates maternal rights and obligations to the donors of ova, embryos, uteruses or mitochondrial DNA, nor to the medical staff involved in applying the new technologies; and neither are there any serious proposals on the table to change the law in this direction.

This point being out of the way, there are four types of (relatively) new and partly legally recognised social practices which are relevant to the birthmother’s pivotal position in parent-child law.

First, and foremost, there is surrogacy. The surrogacy contract enables a woman to become a child’s legal mother without having borne the child. A considerable number of legal systems (e.g., many states of the USA, Russia, Ukraine, Greece) recognise the validity of such contracts; others (e.g., France, Italy or Germany) consider such contracts to be contrary to public order; and still others, such as the English law, take an intermediate position and, though holding surrogacy contracts to be unbinding, accept the judicial transfer of parental status to the new parents if the birthmother (and an eventual other parent) agree to this transfer after the child’s birth (s. 54 Human Fertilisation and Embryology Act 2008) (Gruenbaum, 2012; Trimmings and Beaumont, 2013). But even national laws which do not accept surrogacy contracts have to find solutions for the status of children which surrogate parents bring back with them from countries where the contracts are valid; to deny any legal force to the surrogacy contract at that point amounts to turning the children into orphans, and the judicial and administrative authorities of countries where surrogacy is not recognised often try to find ways to avoid such a result (Dethloff, 2014, pp. 925-30; Witzleb, 2014). Where surrogacy contracts are given effect, they constitute an exception from *mater semper certa*, for with the entry into force of the contract the birthmother loses her parental rights and has to give way to the contract partner. But it has to be pointed out that the structure of the surrogacy contract presupposes the birthmother’s priority. The surrogate parents

only acquire parental rights because the birthmother agrees to waive *her* original rights; if she does not agree to do so, she will be the child's legal mother, regardless of the child's genetic origins and regardless of the material support she may have received during pregnancy.

Second, there is a construction which in its form is quite close to the surrogacy contract: three (or more) people agree to share the parental rights and responsibilities vis-à-vis a child, typically already before its conception. This kind of contract is mentioned now and again in recent literature (Brake, 2010), but positive law examples of it are rare. One could mention s. 30 of the British Columbia Law Act 2011, which makes it possible for a birthmother to share the parental status with one or two other persons on a contractual basis and which also allows the birthmother and her spouse to contractually share the parental status with a donor. It has to be pointed out, however, that s. 30 is only applicable in cases of assisted reproduction and that the contracts envisaged by it never deprive the birthmother of the maternal status. In fact, it is hard to conceive how contracts of this kind could ever function without the prior recognition of the birthmother's original parental rights: with whom *but* with the birthmother could one contract in order to acquire parental rights with respect to a specific child?

Third, some legal systems (e.g., Belgium, the Netherlands and England¹⁰) have extended traditional rules with regard to the establishment of paternity to relations between two women. In these countries, the woman who stands in an institutional relation (marriage or, in the Netherlands, also registered partnership) to the birthmother or who, by recognition (in Belgium) or by a common declaration together with the birthmother (in England), declares her intention to take on motherhood, becomes the child's second parent, its "co-mother". In this way, the maternal status is assigned to a woman without the need for her to bear the child herself. Rules of this kind, however, do not replace the birthmother by another woman, they just add a second parent to the birthmother. The novelty consists in this second parent being a woman. But apart from that, the structure of the legal assignation of parenthood remains the same as it was before and as it was in most societies of the past: the starting point is the birthmother, and another person is added to her, preferably on the basis of an institutional relation with her. The question arises whether it still makes sense, in this context, to speak of "motherhood" as distinguishable from "fatherhood", for the "co-mother's" "motherhood" is nothing but a copy of what used to be called "fatherhood".

Last, there is an international tendency towards the extension of the rights and obligations of stepparents (several contributions to Eekelaar and Sarcevic, 1993; Willekens, 2000). It is impossible here to go into the manifold forms this development is taking, but to the extent that stepparents may now acquire parental responsibility and that stepchildren may claim financial maintenance from them and from

¹⁰ Belgium: art. 325/2 and 325/4 civil code. The Netherlands: art. 1-198 civil code. England: s. 42 and 44 Human Fertilisation and Embryology Act 2008.

their successions (all of which is now possible in, e.g., English law¹¹) the divide between the legal status of parents and the (formerly non-)status of stepparents tends to become less and less clear. But even if some stepmothers in some legal systems now (slightly) approach the status of motherhood, they do not replace birthmothers; that is only possible by an adoption, and therefore only if either the birthmother consents to the transfer of rights or if she is found to be unwilling or unable to care for the child.

All these new rules (or attempts to introduce new rules) tend to allocate parental rights and obligations to persons who, until recently, could not have been vested with these rights and duties. In that sense, they create new “motherhoods” – though since they are all gender-neutral it might be preferable to speak of “parenthoods”. But they are still all predicated on the primacy of the birthmother’s claims, and, with the exception of surrogacy, they just add new parents to the birthmother, they do not replace her by someone else. The surrogacy contract, if deemed valid, of course deprives the birthmother of all rights; but it always presupposes her consent and thus confirms her priority.

Having looked at a number of (mostly apparent) exceptions to *mater semper certa* we must conclude this chapter with the observation that the birthmother’s primacy is a *universal social rule* in the sense that it applies in all societies which have *any* rules for the assignation of the legal status of “mother” (but not all societies, as we have seen, have such rules). All the “exceptions” to this principle either already presuppose the birthmother’s primacy (as with surrogacy) or function as solutions for cases in which the primary rule cannot fulfil its basic social function (as in the modern case of the adoption of a neglected child or in the traditional case of the non-application of kinship rules to children born out of wedlock).

3.2 Mothers’ rights and obligations

If the answer to the question “who is the child’s mother?” slightly simplifying might be said to have been the same throughout history, the question of mothers’ rights and obligations as related to the rights and duties of fathers and of other actors (kinsmen in earlier societies, the state in ours) at first sight leads us into a labyrinth of complications. Parental and kin-related rights and obligations are not the same in all societies; and even where they are similar, their distribution between

¹¹ S. 4 Children Act 1989 makes it possible for a stepparent to acquire full parental responsibility for a child either by agreement with the child’s original parents or by a court order. S. 23 and 24 of the Matrimonial Causes Act –in combination with its s. 52- allow the court to make financial provision in matrimonial proceedings (usually in divorce proceedings) for “children of the family” (i.e. children who have in fact been treated as part of the nuclear family though they are not related to the persons against whom the order for financial provision applies). S. 3 of the Inheritance (Provision for Family and Dependents) Act 1975 enables a child of the family to sue for financial provision from the inheritance of a person who had treated it as part of the family and who had assumed responsibility for the child’s maintenance; in specific cases financial orders on the basis of this law can result in a step-child’s receiving a larger share of the inheritance than the deceased’s own children.

fathers, mothers and others in myriad ways varies from one society to another. Yet I think it is possible –now grossly simplifying- to distinguish five historical types of dealing with mothers’ rights. There are: (i) societies in which mothers do not have any rights; (ii) societies in which legal mother-child ties, with ensuing rights and obligations, are recognised, but in which mothers are excluded from any significant decision-taking with regard to their children; (iii) societies in which mothers have extensive decision-taking powers, but these powers are different from those of fathers; (iv) societies in which mothers, as compared to fathers, have considerable –but still gender specific- decision-taking powers, but in which a good deal of the important decisions with regard to children are taken by the group or the state; (v) societies in which parental rights are gender-neutral.

First, in the aforescribed societies with a strictly patrilineal kinship regime the question of mothers’ rights is moot. There are no mothers and hence *no mothers’ rights*.

Second, in what I suspect is the great majority of societies on the historical record, legal ties between mothers and children exist, and from these claims to maintenance and the status of heirship are inferred. The practical import of such rights should not be overestimated, though, in societies in which the means of existence are predominantly under the control of men. The most important function of the status relation between mother and child in such societies is that the child, in virtue of its relation to the mother, enters into a legal relation with the mother’s husband and with the mother’s and/or father’s kin, and as a result of this becomes a dependent and an heir of father and wider kin as well as subject to the father’s decision-taking. Typically, in societies of this type mothers have little or no authority over their children. The authority is exercised by the father, and if the father is deceased it is usually not the mother to whom decision-taking rights are transferred, but rather a *kinsman* of the father (or, in matrilineal kinship regimes, of the mother). The forerunners of our present Western family laws, until well into the twentieth century, indubitably belonged to this second type. Mothers and children could inherit from each other, and children had a duty of support vis-à-vis their mother. The mother’s duty of support vis-à-vis the child was, in the normatively prescribed case of married parenthood, subsidiary to the father’s duty of support. Taking decisions for the child was the father’s prerogative. Married mothers partook of parental authority only in rare cases. Even if a mother was the sole surviving parent or, in the case of unwed mothers, the only parent the child would ever have, she could nevertheless not occupy the legal position of the absent father, but was only allowed to exercise some of the parental rights under the supervision of a guardian (Scheiwe, 2006).¹²

Somewhat surprisingly, even many societies with matrilineal kinship regimes have to be counted as belonging to this second type. Under matrilineal kinship

¹² For good overviews of the legal position of mothers in the nineteenth and early twentieth century West, see e.g. Heyvaert (2002, pp. 163-189) or Sagnac (1898, pp. 355-380).

rights can only be transmitted to the next generation by the mother. Men have rights within their matrilineal kin group, but they cannot transmit them to their children. Contrary to what one might expect, however, the authority over children in most societies with matrilineal kinship is *not* exercised by the mother, but by a *male* relative, typically a brother or a maternal uncle (but *not* by her husband or her mother's husband, who as a consequence of the prohibition of incest both by definition do not belong to the mother's or child's kin group and therefore cannot hold any rights within it). It is only in the fairly rare cases in which marriage is matrilocal (i.e. in which it is the rule that men, upon entering into marriage, leave their own kin and go to live with their wife and her kin) that women's/mothers' decision-taking rights are somewhat more extensive. In such cases the mother's brothers and maternal uncles, having moved house as a result of their own marriage, unavoidably live at a distance from their sisters and the sisters' children and are therefore hampered in the exercise of their decision-taking powers; and the mothers' husbands are in a very weak position to fill this power vacuum, first, because the matrilineal kinship regime does not give them any formal rights regarding their wife's offspring, and, secondly, because they live in a location where most of the other inhabitants are their wife's kin^{13,14}

Third, a small number of societies of the past have been documented in which gender difference was a fundamental trait of social structure, but in which women, as women and as mothers, untypically held extensive rights of economic decision-taking and of decision-taking with regard to children. Some of these were societies in which men specialised in war (the Nayar of Kerala until at least 1940¹⁵) or in a combination of war with long-distance trade (the Vikings¹⁶, the Iroquois before their integration in the white colonial economy¹⁷) and were therefore far away for most of the time, or were (as in the case of Ancient Sparta, documented below) strictly segregated from the rest of society. Even though old men were not involved in the long-distance movements and were present to take decisions for the group as a whole when required, this kind of social structure nevertheless implied that husbands and fathers (or, in matrilineal kinship, maternal uncles) were not around, sometimes for several years in a row, to exercise authority over children nor to manage the farm (for all these societies had economies based on a combination of horticulture, trade and plunder). The decision-taking gap was filled by women/mothers (which leads us to the remarkable observation that women's autonomy and power in the past was greatest in warrior societies with strongly martial dominant ideologies). There are a few other, non-war mongering societies in which women/mothers exercise far-reaching decision powers, the most remarka-

¹³ For an illustration of how this works, see Geffray (1990) on the Makhuwa of Mozambique.

¹⁴ This paragraph is, among many other sources, based on the pioneering work of Malinowski (2001/1927) and on the encyclopedic study of matrilineal kinship by Schneider and Gough (1961).

¹⁵ Gough (1961).

¹⁶ Hjaltalin (1872).

¹⁷ Brown (1970), Noon (1949).

ble of them that of the Na of Yunnan and Sichuan (Hua, 2000) (in western sources sometimes called “Mo-so” (Bacot, 1913)), who until recently did not know either marriage or paternity and who used to frown on all long-term romantic ties; they were even able to maintain the organisation of daily life and of a horticultural economy on the strict basis of the internal cooperation of the matrilineal group against the forces of Chinese modernisation until the near end of the twentieth century. In Na kin groups, authority is exercised in cooperation between a leading female and a leading male (obviously not the husband, but a male member of the matriliney).

It should be pointed out that, even in these (relatively few) societies of the past in which women held extensive decision-taking powers with regard to children and with regard to the organisation of the production unit, such powers were structured around an “inside/outside” logic: if women/mothers could take binding decisions with regard to relations *within* the kin group, the production unit or the small community, decision-taking powers usually shifted to men when questions regarding the relations with other kin groups, production units or communities had to be settled (Dux, 1997, and see, e.g., Hua (2000) for the Na or Geffray (1990) for the Makhuwa of Mozambique). Thus, if for instance children’s marriages with important implications for the building of alliances with other groups had to be negotiated, men would be involved.

Fourth, in some societies, still strictly structured along gender lines, the differentiation between mothers’ and fathers’ rights is of subordinate significance because authority over children, such as it is, is exercised predominantly by the state or the group. There are two cases I am aware of: Pygmy hunter-gatherer societies; and ancient Sparta.

In hunter-gatherer societies with few or no property rights in the means of production, such as the Mbuti, Aka and Efe Pygmies of the African equatorial rainforest, parents have some important obligations vis-à-vis their children (such as breastfeeding them or carrying them on the long walks nomads have to take), but food in these groups is gathered and distributed collectively, and after children have reached the age at which they can do long walks on their own and start to be integrated in the collective organisation of labour they need little private care or education anymore; the care and socialisation which still occur are the result of the concurring efforts of many individuals within the group, every adult being deemed to have a certain responsibility for all the children of the group (Ivey, 2000; Tro-nick, Morelli and Winn, 1987). Nor is there much to be decided for their future. Although parents try to influence their children’s partner choice, there does not exist any necessity to arrange marriages in the interest of the kin group, for there are no kin groups –no extended kinship is needed, for the functions of physical and social security which are the usual job of kin groups are fulfilled by the group as a whole here. Generally speaking, very little authority –by anyone- is exercised over children in these groups (Diamond, 2012, pp. 172-209); and at the same time, broad comparative studies show that the distribution of time spent in daily child

care and play with children is much less unequal between Pygmy fathers and mothers than in other societies (Hewlett, 1988 and 1993)¹⁸.

The second example of this fourth type of the distribution of authority between mothers, fathers and the group, that of ancient Sparta, is, from a social-structural point of view, entirely different from the Pygmy case. Sparta between the 8th and 4th centuries BC was about the most militaristic society there has ever been. Boys were taken from their mothers at the age of seven, to undergo lengthy military training resulting in military service from the age of 20 until retirement at 60. Productive work was performed by the helots, a kind of serfs who, though working on private lands of Spartan citizens, were the property of the state; one of the reasons for the militarisation of the whole male population was the huge discrepancy between the small number of Spartan citizens and the large number of helots who had to be coerced to work for the Spartans. Since the men spent most of their life in the barracks or on campaign, men and women, even if married to each other, led separate lives. Although the men (or, rather, an elite among them) held the power to take political and military decisions, economic decision-taking was women's privileged domain; untypically for Ancient Greece, women had the same rights to own, inherit and administer property in Sparta as men. And since the boys until seven and the girls until marriage in their early twenties lived with their mother, most decisions regarding the children were taken by the mother. In fact, there was very little fathers could decide with regard to their children. The same, however, held for mothers, for a Spartan's life was preordained, education was to a good deal public –military for boys, and centred on elementary reading and writing, sports and music for girls- and wherever decisions had to be taken, it was the state which had the last word, starting with the decision whether a newborn infant was to live or not. We have a case here where mothers certainly did not have fewer rights than fathers, but they held them within a context in which decision-taking with regard to children had been socialised much further than in any twentieth century communist regime.¹⁹

As far as the division of decision-taking powers between men and women and as far as women's autonomy in relation to men go, ancient Sparta and the said hunter-gatherer societies could just as well have been classified as examples of the third type of social arrangement. The difference is that the *range* of private decision-taking with regard to children in both the Spartan and the hunter-gatherer cases is much narrower than in most other societies in history, for two reasons: because there is not that much to be decided in social contexts in which the children's future social roles are so clear-cut; and because the group or the state takes on most of the decisions.

¹⁸ Aside from the works already cited on specific issues, this paragraph is based on Turnbull (1965).

¹⁹ This paragraph is based on Cartledge (2001, pp. 106-126), Cartledge (2013), Pomeroy (2002), and Schmitz (2002).

If mothers in societies of the third and fourth type had far-ranging decision-taking powers, this was *always* within the context of a fairly rigid gendered division of labour. Among Pygmy hunter-gatherers only two criteria of social differentiation, age and gender, exist, and although men and women do lots of things together, only women gather and only men hunt for big game. In warrior societies the separation of male and female spheres was extreme, since, contrary to what was the case in most pre-capitalist sedentary societies, male and female tasks were not only conceptually but also spatially separated, with the result that transgressions of role expectations were less much easily accomplished. Whether the mothers of the past had wide-ranging decision-taking powers or none at all, these powers (or the absence thereof) were thus embedded *in a regime of gender difference*. It is only in the course of the twentieth century that the idea of parental gender neutrality, of equal (in the sense of *the same*) rights for fathers and mothers has taken hold.

This brings us to the fifth and last type of the distribution of parental rights, the contemporary one in which the rights of mothers and fathers tend to be rigorously the same and in which the parents' gender itself tends to become irrelevant. This new regime constitutes a radical break with everything which came before, it is historically unique. The first break with the past occurred in the wake of the Russian Revolution: a decree of 18 December 1917 swept away the entire old Russian family law and introduced full equality of men and women in family relations, thus also in the relations between parents (Antokolskaia, 2003, p. 61) –though it must be noted that the new principles remained abstract and the decree did not contain detailed rules for conflict resolution. Although in the meantime small advances in extending parental rights to mothers were occurring in capitalist countries, it would take until well after the Second World War, in some cases until the 1980s before full parental equality was introduced in these countries (Boulanger, 2008). Once parental rights had become gender-neutral, a further step then became logically compelling: if fathers' and mothers' rights and duties are the same, the rationale for the dyadic system of parenthood (based on the assumption of male and female complementarity, i.e. on the idea of a fundamental difference between fathers and mothers) dissolves into thin air. What reason can there still be for differentiating between fathers and mothers, if you can exchange a father for a mother without changing anything in the child's legal status (i.e. in the set of rights and obligations vis-à-vis its father(s)/mother(s))? And indeed, since the 1990s laws introducing same gender parenthood have come to be introduced. In the meantime, many jurisdictions (e.g., all the Nordic countries, the Netherlands, Belgium, Spain, England, Germany, and a large number of US states) allow same gender couples to adopt under the same conditions as apply to couples of different genders (Théry and Leroyer, 2014). And as we have seen *supra* under 3.1, some jurisdictions now also have rules assigning parenthood to a second woman without the necessity for going through complex adoption proceedings.

It has to be noted, though, that this process of the equalisation of mothers' and fathers' rights does not consist in bringing mothers into the same legal posi-

tion as used to be held by fathers. Two processes of change coincide: the one introducing equal rights for women and men as parents; the other transforming the nature of parental rights from a power to a responsibility. Paternal authority as of old was the power to take decisions for or about the child. This power was not absolute (a nineteenth century father was not allowed to kill, maim or sell his child), but it was far-reaching. It was first limited by the introduction of compulsory schooling (which takes the child for part of the week out of the parental decision-taking sphere) and of restrictions on child labour. In the course of the twentieth century, paternal authority was further eroded by the introduction of educational standards by the state as well as by the extension of children's and mothers' rights. The introduction of children's rights since the 1970s, culminating in the UN Children's Rights Convention of 1989, obviously puts a limit to parents' discretionary decision-taking powers. The state for his part has on the one hand introduced more and more specific rules of child protection and has on the other hand developed systems of administrative "support" for parents and of judicial intervention in the exercise of parental rights which, taken together, draw the borderlines of what still counts as socially acceptable parenting. Parental authority has come to be seen as parental "responsibility", as a functional right to be exercised in the best interests of the child. The possibility to take decisions about the children in the father's personal interest or in the family's interests, which used to be an attribute of paternal authority, has dwindled to practically nothing; what was *paternal power* has now become a *parental* duty to *care*. Thus, women's acquisition of equal parental rights does put an end, yes, to their legal subordination as mothers, but the new rights they have acquired over the past half century are not the parental rights of old, these new rights are first and foremost responsibilities. One could say that these rights have been "mothered".²⁰

4 Back to the present: the background to recent changes and the scope for further change

To return to the present and future: what is new in present day law and legal discourse, what has remained constant? Why have some things changed dramatically and others hardly at all? What can we learn from the comparison between the present state of the law and the historical-anthropological data? If we understand why things have changed, does this then enable us to see what the scope and limits of further change might be? And how may this knowledge help us to give a more solid structure to the contemporary debates on motherhood and the law?

What is new, what is not? As we have seen, the short answer to that question is that the basic rule of the assignation of the legal status of "mother" in contempo-

²⁰ For detailed descriptions of the general developmental tendencies in parent-child law summarised in this paragraph, see: Boulanger (2008); Dingwall, Eekelaar and Murray (1984); Dopffel (1994); Therborn (1993).

rary Western legal orders is still the same as it was in the (near and distant) past and in the most remote cultures, whereas the substance of maternal rights and their relation to paternal rights have undergone tremendous change, to the point that we live in the only society in history in which parental rights and obligations are conceived as rigidly gender-neutral. This short answer has to be slightly qualified, in the case of the basic motherhood rule, by the observation that it has become easier to discard the original allocation of the maternal status due to the facilitation of adoption and to the partial recognition of surrogacy agreements. As regards the distribution of rights between the parents a further qualification is necessary, for gender equality has come to be realised at a time when parental authority was being transformed into parental responsibility under the watchful eye of the state –and so the rights in respect of which mothers and fathers are equal nowadays are not the same rights in respect of which they used to be unequal in the past.

How are the remarkable constancy of the basic motherhood rule, the (very modest) weakening of it, and the revolutionary jump towards gender neutrality to be explained?

The invariance of the motherhood rule appears nigh unavoidable, both from the point of view of child care and from the point of view of the functioning of kin groups.

Since children are not able to survive without being intensively cared for by adults for a good number of years, a responsible adult must be allocated to them from the time of birth. As a game, one could think up all kinds of rules allocating such a person to the newborn (e.g., by lottery²¹), but any society which wants its children (and itself) to survive would prefer the rule to designate the person most likely to be willing to take care of the child and to forego benefits to themselves in the interest of this care. The only person of whom this can reasonably be presumed is the birthmother. She has shared her body with the child for nine months, and until recently it was unavoidable for her to breastfeed the child²². These experiences forge a bond primary to and different from any other bonds which might develop between the child and other persons. They uniquely predispose the birthmother to care for the child and to act altruistically in relation to it²³. Or to state the same idea differently: at the time of birth the birthmother has already and unavoidably made a serious investment in the child, and it may be expected that she will tend to protect that investment²⁴ –and she is the only one to be in this posi-

²¹ A proposal discussed in Gheaus (2012).

²² The historically documented social arrangements which made it possible to delegate breastfeeding to other children's birthmothers (Gestrich, Krause and Mitterauer, 2003, pp. 571-575) were of their nature only available to elite women.

²³ For an overview of the rich biological and anthropological evidence supporting this thesis, see: Eibl-Eibesfeldt (1984); Hrdy (1999) (who is the opposite of a biological determinist). For an attempt to draw rule-oriented consequences from such evidence: Gheaus (2016).

²⁴ At this point, every neo-classical economist will object that „sunk costs do not count“ (since they belong to the past and nothing we do now will alter them) and that investment decisions should be taken without regard to the past; but though the logic of this is impeccable, there is massive empirical

tion. I cannot think of any alternative basic rule of assigning a primary parent to the child which would give the child a comparable chance of survival (and it has to be remembered that until less than a century ago infant and child mortality was high even under the best of conditions, even for children living with well-off parents, and that it was dramatically high for children entrusted to orphanages or “hospitals”).

Two objections might be made to this analysis. The first objection would be that not all birthmothers are willing and able to care for the children they have borne, but this does not really matter for the validity of my argument. The argument is probabilistic: for my argument to stand it is sufficient to assume that birthmothers are more likely to be willing and able to care for their children than would parents under any other rule. The second objection might be that children are best off with parents who have expressed their intention to take care of the children. But the allocation of newborn children on these grounds could never have worked as a primary rule, first because it does not allocate a parent to *all* children, and, secondly, because it has no solution for cases in which several adults or groups raise competing claims to the parenthood of one and the same child.

To avoid misunderstandings: I am not arguing here that “nature is destiny” and that birthmothers *ought* therefore to care for their children. My argument is strictly empirical. I am arguing that from the double point of view of children’s and group survival it is much more *efficient* to allocate child care responsibility to the person most likely to take care of the child spontaneously than to anyone else, and that this surplus in efficiency has pushed all societies until now to impose the primary responsibility for child care on birthmothers (whether, as individuals, they wanted this or not).

As we have seen, though, the rules assigning parents to children in most historical societies serve two functions, one of assuring child care, the other that of enabling kinship to do its work. From this second point of view a special position for the birthmother looks even less avoidable than from the child care perspective. Kin groups regularly need new members. These new members do not fall from heaven. To claim newborn children to be members of a specific kin group, there has to be a primary point of attachment to this group. For most of history –until reliable DNA-testing came around- the *only* available point of attachment was a child’s birth from a specific woman, *either* a woman herself a kin group member and bearer of the right to transmit group membership to her children, *or* a woman who herself belongs to a different kin group but who in virtue of the marriage bond brings the child she has borne into her husband’s kin group. From the point of view of kin logic, then, a rule assigning the *maternal status* to the birthmother is *not strictly necessary*; it is sufficient to have a rule which ties specific birthmothers’ children to the kin group. But in view of birthmothers’ position as both primary

evidence that people in fact tend to take past investments into account when deciding upon the continuation of activities (for both the basic theory and the empirical evidence to the contrary, see Frank, 1986).

child caregivers and primary points of attachment to kin groups, it would make no sense to deny the maternal status to the birthmother and grant it to someone else (who?) –except in the patrilineal cases in which there is *no* maternal status.

In the case of the basic rule *mater semper certa*, thus, both the main functions of the law of parentage point in the same direction. We have, however, seen in chapter 2 that assuring child care and enabling kinship to work are two social functions which structurally conflict with each other; and we have also seen that the role of kinship in society has been shrinking considerably under the influence of the market and the state. Those two observations will enable us to understand the changes which have occurred in the law on motherhood.

First, then, how to explain the recent social acceptance of (minor) exceptions to *mater semper certa*, such as the surrogacy contract? These exceptions have to be seen within the wider context of the appearance of new practices and rules (the inclusion of children born out of wedlock into the family, the tendency towards the primacy of the genetic bond in parentage law, the addition of a second female parent to the mother) which are reshaping the law of parentage. All of these innovations would have been unthinkable as long as kinship was a central mechanism of physical and social security, because they make it impossible to control the borders of the kin group. If genetics or private agreements between individuals determine who is a member of the family and who is not, there is no way for kin groups to bar some from entering the group nor to keep others from leaving it; group membership is then reigned by the accident of which individual has sex with (or contracts with) which other individual –and this renders all family strategies moot. Under the reign of kinship, it is the kin group which controls women’s reproductive potential, and the legal enforcement of individual decisions enabling women to contract away this potential is the antithesis of kin logic. Thus, the introduction over the last half century of a whole set of new rules of parentage law –of which the new rules on motherhood form a part- was only possible because the social functions of kinship had already been withering away.

Second, how to explain the change from a regime of gender asymmetry, in which fathers in general had much further reaching rights but also responsibilities than mothers, and in which decision-taking powers over children included dispositive rights over the children’s labour power and over their reproductive and marital behaviour, to a regime in which mothers and fathers are legal equals, but in which parental rights are perceived as responsibilities towards the child (and towards society) rather than as discretionary powers to be exercised in the interest of the broader family?

An explanation fitting the facts can, in my opinion, only be developed if we first understand that children are both costs and resources for their parents, for their kin and for the larger society into which they are born²⁵. Both the nature of

²⁵ This argument is developed more in depth in Willekens (2006, pp. 29-33). For theoretical foundations of this way of looking at parent-child relations, see e.g. Folbre (1994) or Rusterholz (2015).

these costs and resources and their distribution over different social actors are, however, different in different social contexts, and many of the differences in children's and parents' legal status can only be understood in light of the variance in these costs and resources.

It need hardly be argued here that raising children is costly. As a result of the slow biological maturation of human children the costs extend over a very long time. They do not consist only in the input of material resources, but also in the opportunity costs of the individuals performing the daily care work and thus depriving themselves of the possibility to deploy alternative activities. Nobody would want to incur these costs unless there were considerable benefits to compensate for them.

There is *one universal benefit* of having children: they are the reproduction of oneself (or, if one prefers, of one's genes). Most parents experience their life with children as emotionally enriching, and that is a benefit too. But beyond that children have, for most of history, been beneficial to their parents and kin *in an instrumental way*. As was seen in chapter 2, they were necessary for the functioning of kin groups, both in order to fill the right group positions at the right times and as pawns in strategies of allying families through marriage. In all horticultural societies where land was plenty and labour scarce (as in sub-Saharan Africa until recently, see *supra*), they were in high demand as providers of labour power for their family. They cared for the old.

Children were thus vital resources for their parents and kin, but they were resources only to the extent to which their behaviour was under the control of those parents and kin. Most of the time a direct exercise of such control was superfluous, for children were dependent on their kin for their own physical and social security and hence had incentives of their own to do "the right thing" without having to be coerced. Ultimately, however, an authority was necessary to keep children from putting their own interests above those of the group, e.g. by entering into the "wrong" marriage (i.e., a marriage without use to their own kin group). Such an authority had to be able to speak *with one voice* – a requirement which precludes equality between fathers and mothers (though it logically allows for a rule giving precedence to mothers or for a clear-cut division of labour allocating some decisions to mothers and others to fathers).

The decisive point we need to understand to be able to explain the transformation of the law of parent-child relations is that most of these benefits of having children *have vanished* with the replacement of kin solidarity by the state and the market. Children do still constitute resources, for without children there would be no social reproduction, no work, no payments into pension funds, no care for the elderly or needy, and in the final analysis no state and no market. But the benefits of raising children to a major extent accrue to the community, not to the individual parents. For them, the benefits of having children have shrunk, whereas the costs have tended to rise as a consequence of the lengthening of the time during which children are economically dependent on their parents. Since children cannot be

used as parental resources anymore, the traditional parental (or rather paternal) *authority* which enabled parents/fathers to use children as pawns in the pursuit of their own or of family interests does not make sense anymore. Since the deep-rooted causes for parental authority and for unilateral decision-taking have withered away, these legal institutions have been replaced by parental responsibility (an institution corresponding to the sole surviving function of parenthood, i.e. to parenthood as a mechanism of child care) and by bilateral decision-making (a rule corresponding to the new ideal of gender neutrality).

It would, however, be simplistic to think that institutions change *just* because their functions change. The only thing I have shown until now is that the *need* for (unilateral, paternal) parental authority has become less and less pressing over the last centuries. The change in the rules towards bilateral parental responsibility does not yet *automatically* follow from this social-functional change²⁶; rules only change if some social actors have an interest in such change sufficient to induce them to mobilise resources and to exercise power in order to change the rules. In this case, however, a configuration of interests conducive to legal change was obviously at hand. Traditional paternal authority implied the oppression of women and children. Maintaining such oppression requires resources too, the more of them the more the oppression is resisted –and there is ample historical evidence that it was resisted even before kinship started to lose its central position in society (Levi and Schmitt, 1997). Over the last century both the interest fathers had in the maintenance of parental authority *and* the resources available to fathers for coercing women and children to comply with paternal decisions have been dwindling as a result of the increased importance of the market and the state. This increased importance both created exit options for women and children from the reign of kinship *and* made it less interesting for fathers to maintain their legal authority over women and children (since resources and power were acquired on the market now, not any longer as a result of kinship strategies). On top of this, under conditions in which children were developing into resources for society as a whole rather than for their parents it was in the state's interest to turn parental authority into state-monitored parental responsibility. A new situation had developed in which men had less and less of a material incentive to defend traditional paternal powers and women, older children and the state had a stake in changing the traditional rules; no wonder then that structural-functional change was followed by corresponding changes in the law.

This leaves us with a last question: does all the foregoing tell us anything about the future directions the legal regulation of motherhood could take? Again, there are *two* questions here. First, is a substitution of *mater semper certa* by an alternative rule conceivable? Secondly, is the regime of gender-neutral parental responsibility under which we now live a kind of an “end of history”, or can this regime be expected to develop further or to become subject to fundamental change?

²⁶ As I have shown for the history of inheritance law in Willekens (2001).

As to the *first question*, it is hard to see how *any* rule could replace the ascription of parenthood to the child's birthmother as a *basic principle*. Conceivable alternatives suffer the glaring disadvantage of not being universally applicable from the time of birth onwards. The only other in theory universally applicable criterion for the assignation of parenthood is genetic descent, but this is a very unpractical criterion, for it is much more difficult to establish the fact of genetic descent than the very visible fact of a child's being born from a certain woman, and a person merely tied to a child by genetics is much less likely to be willing to care for the child than is the child's birthmother; and besides, this criterion would nearly always coincide with the birthmother criterion. It is only if the long-discussed prospect of growing children in artificial uteruses (Huxley, 1932; Firestone, 1979/1970; Schultz, 2010) would become reality *and* if this way of having children would come to be the standard way of having children that *mater semper certa* could lose the central position it now has in the law on parenthood.

As to the *second question*: I have diagnosed the development towards gender-neutral parental responsibility as a result of the substitution of the market and the state for the kin group in promoting social goods such as social and physical security for the individuals. If this analysis is correct, the way back to the father's privileges of old looks extremely unlikely. This way back would presuppose a devastating and final crisis of the capitalist market economy and its substitution not by state planning, but by the chaotic breakdown of institutions -which would then open the space for a reanimation of the old logic of kinship. It appears exceedingly more likely that the logic of the process which has brought us gender-neutral parental responsibility will be allowed to develop to its full extent. As the law stands, parental rights are gender-neutral, but *access* to parental rights is still, in many legal systems, conditioned by the principle of gender complementarity, i.e. it is much easier for different gender couples to become shared parents than for same gender couples. As the law stands, parents are still called "mothers" and "fathers", even if their rights and duties are exactly the same. As the law stands, parenthood in most legal systems is still based on the ideal model of a child having no less nor no more than two parents -and this is even the case in legal systems which accept same gender parenthood and which have thus rejected the premise of gender complementarity. But in as far as kinship is losing its significance and in as far as the only remaining social function of parent-child law is the organisation of care and responsibility for children, there are no compelling reasons anymore to restrict parenthood to two parents of different gender nor to call "parents" "father and mother" rather than just "parents". If the main social purpose of parenthood is to have persons who will care for and be responsible for children, then neither the number nor the gender of such persons can be a decisive criterion for the assignation of parenthood. I therefore consider it extremely likely that presently still existing rules on the number and gender of parents will be swept away by the new care logic of parent-child law.

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Maternalism and Making Decisions for Children

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1 Introduction

Paternalism is a major theme in family law, particularly concerning decision-making over children. When courts resolve a parental dispute over children they commonly rely on the concept of the welfare or the best interests of the child. This is sometimes described as a paternalistic approach. Sometimes parental rights are thought to include the right for parents to make decisions over children and again this is presented as being paternalistic. Similarly, in debates over children's rights there is often a debate between those who wish to protect children's rights to make decisions for themselves and those who emphasise the importance of rights of protection for children. The latter are sometimes labelled "paternalists".

Paternalism has a somewhat bad name. It is often used as a pejorative term to indicate that the person making the argument thinks they know best and is failing to respect the interests of others. It can rely on an image of a disciplinarian father deciding what is best for a child and expecting his decision to be followed, simply because "I say so". Such a father might imagine that he is best placed to decide what should happen for his child and indeed that he is entitled to have his decision respected, regardless of its merits. Many contemporary family lawyers reject paternalism and prefer an "autonomy respecting" approach where the child should be permitted to make decisions for themselves, or where that is not possible we make the decision we believe the child would have made, had they been able to make the decision (Eekelaar 1994).

In this chapter I want to offer a rethinking of paternalism, by re-casting it as maternalism. Decision-making for others, as an archetypal mother might make, rather than as an archetypal father. This will promote an approach somewhere in between paternalism and autonomy respecting approaches.

I am not using maternalism in the sense one strand of feminist literature has used it, as a particular weighting to role and insights of mothers per se (Stephens 2011). Nor am I using it, as it is sometimes used, as a social policy tool, designed to target interventions on mothers (Stephens 2011). Rather, I am using it as some feminist philosophers have used it as a new way of thinking of decision-making for others which breaks out of the paternalism versus autonomy (or welfare versus rights) debates that tend to dominate family law. That said, it would be wrong to suggest maternalism in this philosophical sense is entirely divorced from the other senses of maternalism because it seeks to draw on values of care, nurturing and inter-dependency which are often associated with maternal care.

This chapter will start by a discussion of paternalism: what it means and its role in family law. I will suggest that its role is not as prominent and straightforward as commonly supposed. I will then seek to reimagine this style of thinking through an alternative lens, maternalism. I will argue this is a better understanding of proxy decision making for children and is better in line with the current law, in England at least. I will then summarise how this kind of maternalism differs from paternalism or autonomy respecting approaches.

2 Paternalism

Paternalism is making a decision on behalf of another for the purposes of promoting the good of that person. Gerald Dworkin (2017, p.1) claims “Paternalism is the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm”. There is, as might be expected, disagreement over some of the details of the exact definition, but I (building on Dworkin 1972) suggest its key features are as follows:

- D (the decision maker) is making a decision over what should happen to P (another).
- D is making that decision based on the assessment of what are P’s best interests.
- D will only be influenced by P’s wishes, morality or the public good in so far as they may be relevant to what D thinks is good for P.

We might, therefore, distinguish paternalism from other forms of proxy decision making (Groll 2014). It is unlike legal moralism where a decision is made simply on the basis of morality, with no claim that the decision will be in P’s welfare. (It may, of course, be argued that what is morally good for P will promote P’s welfare (Foster and Herring 2016), but that seems a minority view). Similarly, where D

makes the decision which they believe best for themselves, this is not properly paternalistic. Nor is it paternalism where “substituted decision-making” is used and D seeks to make the decision that P would have made had P been able to make the decision. Nor is it “supported decision-making” where D seeks to involve and enable P to make the decision together. Paternalism involves D making the decision over P, with an acknowledgement that D has particular expertise or status making them the most suitable person to determine what in their view is best for P.

Some definitions of paternalism, including the one cited above from Dworkin suggest that a decision is only paternalistic if P disagrees with the decision D has made (Merry 2012). That would mean a decision made over a child or person lacking capacity, who was not disagreeing with the decision, would not be regarded as paternalistic. However, others argue, and I would agree, that paternalism is a description of a method of decision making, rather than relating to the response to the decision. So, paternalism is used where D reaches the decision based on D’s assessment of P’s welfare, regardless of whether D needs to interfere with P’s liberty to effect the decision (although whether force is needed may be relevant to its justification) (Groll 2014). This is the approach David Archard (2004, p. 52) takes, a leading philosopher of childhood, explaining that “Paternalism is making choices for other people. It is justified when people cannot make the choices they would make if they were rational and autonomous [...]”

3 Paternalism in family law

Paternalism is generally seen as playing a major role in family law in relation to decision-making about children. Rachel Langdale QC and James Robottom (2012, p. 1) claim that “English law has conventionally adopted a paternalistic approach towards children.” I will highlight three areas in which it is sometimes said that paternalistic reasoning is being used. I will focus on English law, although I expect similar points could be made about many western legal systems.

3.1 Court decision making over children

Section one of the Children Act 1989 states:

When a court determines any question with respect to —

- (a) the upbringing of a child; or
 - (b) the administration of a child’s property or the application of any income arising from it,
- the child’s welfare shall be the court’s paramount consideration.

The judge in applying section one appears to be making a straightforwardly paternalistic assessment of what is best for the child as the judge rules that to be. The “ascertainable wishes and feelings of the child concerned” are mentioned in sec-

tion 1(3) but simply as a circumstance, among many others, that a judge should consider in determining what is best for the child. It is abundantly clear that if a court must choose between a decision which will follow the wishes of the child and a decision which will best promote the child's welfare, the latter should be followed. In the *Matter of Alife Evans* (no 2) (Supreme Court, 20 April 2018), Baroness Hale (at para 4) stated that she believed the best interests test to be the "gold standard" in protection of children. Any other form of reasoning, which, for example, gave particular weight to the interests of parents or the views of children, could lead to a result which was suboptimal for children.

3.2 Parental rights and responsibility

In the absence of a court decision parents are legally authorised to make decisions on behalf of their children. For example, parents can give consent to medical treatment or make decisions about schooling. These decisions are standardly presented as paternalistic. The parents should exercise their parental responsibility in the way which best promotes the welfare of the child. Lord Scarman (in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, p. 184) has explained that "Parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child". This makes it clear that the parents should not be taking into account their own interests or standards of morality, but rather decide based on what is best for the child. David Archard (2004, p. 78) argues this is required because:

"On the standard liberal analysis, children are in a state where adults may paternalistically choose for them. Children are thought to merit paternalism both because they have not yet developed the cognitive capacity to make intelligent decisions in the light of relevant information about themselves and the world, and because they are prone to emotional intensity such that their decisions are likely to be wild and variable".

Parents are best placed to make that assessment.

3.3 Children's rights

In the academic literature on children there is a long-standing debate between those who support "children's rights" (particularly the right to autonomy) and those who support protection of children from harm (the welfare of the child). The latter are seen as paternalist. Indeed, most opponents of paternalism (or a welfare-based approach) use arguments from a rights perspective. Hence Nigel Cantwell (2011, p. 37) suggests that children's rights are "grounded in self-determinism and anti-paternalism". Michael Freeman (2011, p. 35) sees children's

rights as confining paternalism which he sees as “the philosophy at the root of protection”. Paternalism, then, is seen as a rejection of children’s autonomy rights and a promotion of their welfare or protection.

4 Questioning paternalism in family law

4.1 Court decision making over children

As explained earlier the standard paternalistic approach requires the decision maker to focus on the question of what will promote the well-being of the person they are deciding for. It is not, however, clear this is what the courts or parents are using as the basis of their decision. Particularly in the past few years it has become clear that the welfare test is not simply a matter of the judge determining what is best for the child. In *Re G* [2012] EWCA 1233, para 80, Mummy P writes:

“our objective must be to bring the child to adulthood in such a way that the child is best equipped both to decide what kind of life they want to lead – what kind of person they want to be – and to give effect so far as practicable to their aspirations. Put shortly, our objective must be to maximise the child’s opportunities in every sphere of life as they enter adulthood. And the corollary of this, where the decision has been devolved to a ‘judicial parent’, is that the judge must be cautious about approving a regime which may have the effect of foreclosing or unduly limiting the child’s ability to make such decisions in future.”

This approach seems broadly in line with that promoted by, for example, John Eekelaar and Michael Freeman, who emphasise the importance of making decisions which provide the child maximum autonomy in adulthood. Michael Freeman (1983, p. 57) expands on this theoretical perspective in this way:

“The question we should ask ourselves is this: what sorts of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings? We would choose principles that would enable children to mature to independent adulthood. Our definition of irrationality would be such as to preclude action and conduct which would frustrate such a goal; within the constraints of such a definition we would defend a version of paternalism. It is not paternalism in its classical sense. Furthermore, it is a two-edged

sword in that since the goal is rational independence those who exercise constraints must do so in such a way as to enable children to develop their capacities.”

Such an approach could be seen in terms of a paternalistic test but only if the promotion of autonomy is presented as tied to the core of a child’s welfare. It is not in line with traditional paternalism where the decision-maker determines what is best for the child. Under the Freeman/Eekelaar approach the decision-maker is constrained in their best interests’ assessment by the requirement to maximise the child’s autonomy later in life.

In some recent decisions the courts have sought further to clarify the nature of the welfare test. Rather than the judge using their own values and assessment of what is in the best interests of the child, paternalism *strictu sensu*, the judge is to use the values of the reasonable person. Lord Upjohn explained in *J v C* [1970] AC 668, p. 722, welfare is to be judged by reference to "the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children". This was recently quoted with approval by Munby LJ in the Court of Appeal *Re M* [2017] EWCA Civ 2164, para 44, who went on to explain:

“What this means is that a child’s welfare is to be judged today by the standards of reasonable men and women in 2017, not by the standards of their parents, grandparents or great-grand parents in 1989, 1971, 1925 or 1902. And fundamental to this is the need to have regard to the ever changing nature of our world: changes in our understanding of the natural world, technological changes, changes in social standards and, crucially for present purposes, changes in social attitudes.”

He develops his argument further at para 45:

“The function of the judge in a case like this is to act as the “judicial reasonable parent” judging the child’s welfare by the standards of reasonable men and women today, 2017, having regard to the ever-changing nature of our world including, crucially for present purposes, changes in social attitudes, and always remembering that the reasonable man or woman is receptive to change, broadminded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society. We live in a democratic society subject to the rule of law. We live in a society whose law requires people to be treated equally and where their human rights are respected. We live in a plural society, in which the family takes many forms, some of which

would have been thought inconceivable well within living memory.”

Under this approach the judge is seeking to determine what is in the welfare of the child, but the values to determine that assessment come not from the judge themselves, but as assessment of what values the reasonable person would adopt. As Munby LJ explained in *Re G* (para 34):

“If the reasonable man or woman is receptive to change he or she is also broadminded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society increasingly alive to the need to guard against the tyranny which majority opinion may impose on those who, for whatever reason, comprise a small, weak, unpopular or voiceless minority. Equality under the law, human rights and the protection of minorities, particularly small minorities, have to be more than what Brennan J in the High Court of Australia once memorably described as ‘the incantations of legal rhetoric’.”

At one level this may be seen as watering down the paternalistic nature of the welfare assessment, in that the judge (the decision maker) is not being given complete authority to determine what is best for the child. They cannot follow their own views on welfare, if those were to contradict those of the reasonable parent. However, at another level this can be seen to enhance the significance the welfare assessment should carry: this is not just what one judge is saying is best for the child, but what society as a whole or at least all reasonable people in society say is best for the child.

Recent cases have also witnessed a degree of blurring between paternalism and legal moralism. In *Re G* (para 29) Munby P indicated that the cultivation of virtue could be included within welfare, stating:

“Very recently, Herring and Foster have argued persuasively (‘Welfare means rationality, virtue and altruism’, (2012) 32 *Legal Studies* 480), that behind a judicial determination of welfare there lies an essentially Aristotelian notion of the ‘good life’. What then constitutes a ‘good life’? There is no need to pursue here that age-old question. I merely emphasise that happiness, in the sense in which I have used the word, is not pure hedonism. It can include such things as the cultivation of virtues and the achievement of worthwhile goals, and all the other aims which parents routinely seek to inculcate in their children.”

While the passage retains a paternalist focus (what is best for the child?) by including an assessment of what is morally good as an aspect of welfare it certainly blurs the boundaries between moralism and welfare.

So, to describe the welfare principle in section one of the Children Act 1989 as paternalistic is too simplistic. While the basic idea of the decision making determining what will be best for the child is there, elements of virtue, community standards and autonomy are shaping the concept of welfare and in a sense restrict the judge in exercising a welfare assessment. The judge is not, therefore, given *carte blanche* to make a paternalistic decision over a child.

4.2 Parental rights and responsibility

In English law most parents are given parental responsibility, but as the famous quote from Lord Scarman, above, indicated, they are expected to exercise this for the benefit of their children. That appears to support the notion that family law expects, even requires, parents to act paternalistically. However, the position is more complicated than that. First, the restrictions on parental decision-making only apply when they are exercising parental responsibility. This means that decisions such as whether someone wants to divorce or marry are not decisions in relation to a child and so can be made by the parent on any basis they wish. Second, the courts have acknowledged a broad range of cases where parents are left with a discretion as to how to raise the child. For example, in *Re W (Residence Order)* [1999] 1 FLR 869 whether the mother wished to live a nudist life style with the children was found to be something on which reasonable people could disagree and so the parent could decide this for herself. Religious upbringing would similarly fall into this category. In such a case it seems the parent is entitled to take into account their own preferences in deciding how to raise the child and it is parental discretion, rather than paternalism, which seems the order of the day. Third, in cases where there are two or more children who will be impacted by the decision a parent may consider the interests of all children (*Re T & E (Conflicting Interests)* [1995] 1 FLR 581). Here we have some acknowledgement that the welfare principle can require a balancing of the interest of family members.

4.3 Children's Rights

The distinction between rights (autonomy) and welfare (paternalism) is misleading. Jane Fortin (2004, p. 259) has written: "the claim that a rights-based approach must necessarily be devoid of any element of any paternalism or "welfare" misconstrues the concept of rights". You would have to have a very strange understanding of what is good for a child to place no weight on the wishes of the child. Similarly, you would need to have a very strange understanding of children's rights to have no concept of a right to protection from abuse. For example, Article 3 of the United Nations Convention of the Rights of the Child (CRC) states that: "In all

actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

David Archard (2004) describes this as a paternalist approach. He is correct in that description, but note it is present as a key right of the UN Convention on the Rights of the child.

Leading exponents of taking children’s rights seriously John Eekelaar (1994), Michael Freeman (1983) and Jane Fortin (2004) have all explained that children’s rights should not be used in a way that seriously harms children. This is because harm to a child will impact on autonomy. This means that in many cases a welfare and a rights perspective will produce the same result. For example, in deciding on issues surrounding child protection, whether the question is seen as one involving children’s rights or welfare the same outcome is likely to be reached. The kinds of cases which seem to divide those taking a rights or a welfare approach are those involving autonomy: the extent to which the law should respect the decision of a competent child to do something that slightly harms them. John Eekelaar has developed a highly influential approach to children’s rights based on dynamic self-determinism. This approach is designed “to bring a child to the threshold of adulthood with the maximum opportunities to form and pursue lifegoals which reflect as closely as possible an autonomous choice” (Eekelaar 1994, p. 53). It is an approach which involves allowing children to make an increasing number of decisions as they grow up, but not allowing them to make a decision which would unduly restrict their life choices when reaching adulthood. What is notable about this powerful description of children’s rights is that, as Eekelaar emphasises, it is not anti-child welfare: quite the opposite. It has as its goal a particular model of what is in the best interests of children. This model is that, come adulthood, they should be in the best position to make decisions as to how to live their lives. A children’s rights proponent can, therefore, readily accept that children’s choices should be restricted in order to promote their welfare. Indeed, it would be quite possible for a children’s rights advocate to be less willing than a child welfarist to allow children to make decisions for themselves. This would be so where a children’s rights advocate emphasised children’s rights to protection from harm, the right to a safe environment or the right to discipline and/or where a child welfarist placed much weight on the benefit to children of developing their own personalities through making decisions for themselves and learning from their mistakes.

Certainly, in English Law it is rare for the courts to specifically promote children’s rights of autonomy and examples of cases where they might be thought to do so are commonly presented as being about a means of promoting children’s welfare. Even the well-known decision of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, in which the House of Lords acknowledged the right of competent children to consent to receiving contraceptive advice and treatment, was premised on the finding that it would be in their best interests to receive the advice and treatment.

In this section, we have seen that despite first impressions, the idea that paternalism permeates family law is not straightforward. There is plenty of scope within the apparently paternalistic language of children's welfare and parental rights to pay attention to children's rights. Similarly, within the language of children's rights there is scope to pay attention to protection of children's welfare.

5 Maternalism

As mentioned in the introduction, there is some confusion over the meaning of the term maternalism. There is a strong line of feminist literature using the term maternalism to suggest that there is a particular knowledge and understanding that mothers have and that should be respected. Rachel Kutz-Flamenbaum (2010, p. 1) has used it in this sense and has defined maternalism as:

“an ideology and philosophy. It asserts that “mother knows best” and that women, as a group, maintain a set of ideas, beliefs, or experiences that reflect their motherly knowledge and motherly strengths. Maternalism suggests that women are (and should be) the moral conscience of humanity and asserts women's legitimate investment in political affairs through this emphasis.”

More recently Julie Stephens (2016, p. 506) sees it as having a wider significance and involving three key elements:

“recognition of the public importance of mothering and the care of children; extending the social and political value given to the ideals and ethics associated with maternal care, and a politics that, at its best, challenges the boundaries between public and private, men and women, state and civil society.”

I am using maternalism in a slightly narrower sense than either of those writers and specifically as a philosophical principle in contrast to paternalism. It does draw on some of concepts developed in the feminist maternalist literature. In particular, it argues we should view substitute decision making as reflecting the values of care, relationality and interdependence (van der Klein 2012; Mezey and Pillard 2012). However, it does not rely on a claim that these are values uniquely or particularly found amongst mothers (Ruddick, 1989, 1998).

Maternalism in the sense I am using it is, therefore, a form of proxy decision making which seeks to rely on the values of care, co-operation, mutuality, relationality rather than on abstracted principles of welfare. Maternalism in this sense is working together with a child within a relational context to reach a solution. It is not a blind acceptance that a judge or parent has the authority to make the decision “for themselves”. It is a rejection of what Father says is right because “I say so”.

Barbara Peterson (2012, p. 1) explains that in the case of paternalism the decision-maker takes charge and is confident that their decision is better than the decision the other will make because the decision-maker is more intelligent or capable to make the decision. She argues that maternalism is a “more nurturing approach to addressing a concern of problem”. Paternalism is authoritative, while maternalism is supportive. The paternalistic parent says to the child: “I know what is in your best interests better than do you, and therefore you should let me decide what is best.” By contrast the maternalist parent says: “If we work at this together, we can come up with a solution that meets all of our needs.”

Maternalism involves listening to the needs, feelings and experiences of the child. It is about giving advice, information and support. A child who is obese as a result of their diet is not simply told, or forced, to eat more healthily. There is a discussion and dialogue about a whole range of questions: what foods the child likes; why the child is eating the way they are; what kind of healthy eating plan would the child find acceptable; what help and support would they need? (Peterson 2012).

The literature on this kind of maternalism is limited and this chapter is an attempt to develop it further and clarify its claims. I will now bring out what I regard as some of the key aspects of a maternalist approach.

5.1 The Relational Context

Maternalism sees the relational context of the decision as of critical importance. When a decision has to be made about a child (or indeed anyone) it is not simply a matter of deciding what is best for that child in the abstract, because the child cannot be considered separately from those they are in close relationship with. I have described this interpretation as relationship-based welfare (Herring 1999). The identity and well-being of a child (and an adult) are tied up with their relationships. If a parent is harmed, that is harm to a child too. So when deciding what is best for a child this has to be considered within the context of the family relationships.

Maternalism will not always require that children’s interests on a particular question are prioritised. Instead, it will accept that there will be occasions on which children will be required to make sacrifices as part of a beneficial ongoing relationship (Herring 2005). Indeed, if a child was brought up in a way which meant that every decision concerning them was made entirely on the basis of their interests, that would not maximise the child’s welfare. Nor would it be in the child’s interests to be raised in a relationship which improperly infringed a parent’s rights. Indeed, it is impossible to construct an approach to looking at a child’s welfare which ignores the web of relationships within which the child is brought up. Supporting the child means supporting the care-giver and supporting the care-giver means supporting the child. As Barbara Bennett Woodhouse (1993, p. 1825) has explained:

“A truly child-centred perspective would also expose the fallacy that children can thrive while their care-givers struggle, or that the care-giver’s needs can be severed from the child’s, which has led to the attitude that violence, hostility, and neglect toward the care-giver are somehow irrelevant in the best interest calculus.”

This approach requires the courts to consider a particular decision within the context of the family relationships. The questions to ask would include: What have been the “gives and takes” in the past and what are likely to be the “gives and takes” in the future? Given the emotional issues and personalities of the individuals what solution will best promote a good caring relationship between the parties? What responsibilities emerge from the relationship? (Herring 2005) Asking these questions may mean it is best for a relationship between a child and particular adult to come to an end, if it is antithetical to the network of caring relationships the child is living in. It may also mean that the decision which is made may, in a narrow immediate sense, not be the one which promotes the child’s welfare, but is most conducive to the promotion of caring relationships over time.

A further aspect of this analysis is that it acknowledges children as actors with responsibilities and relational values of their own. This helps us move beyond a simple focus on dependency and autonomy. As Laura Rosenbury (2015, p. 20) puts it:

“By focusing on children’s dependency and developmental needs to the exclusion of other aspects of their lives, law perpetuates a particular vision or construction of childhood, one in which children are always dependent on adults, able to escape that dependency only by developing into adults.”

The passages in *Re G*, cited above, indicate the courts are becoming more open to the importance of relationships in considering welfare.

5.2 Virtue and Welfare

A maternal approach would seek to understand child welfare not simply as a matter of a child having their needs met but also as a matter of the child recognising the value of caring and meeting their relational obligations. As Charles Foster and I (2016, p. 38) have put it, discussing our model of best interests:

“the model we advocate, both for children and adults, is not one that seeks simply to produce merely autonomous individuals. Instead our goal must be to promote the thriving of individuals in a network of caring relationships which works for the good of all. This recognises that, alone, we cannot be what

we want to be. We become more ourselves [...] by embedding our lives in the lives of others [...] We want children who value their relationships, recognise their dependence on others, and rejoice in their obligation[s]”

We go on to explain how having a life which displays a reasonable degree of altruism and virtue is a good life. It is what we seek for ourselves and so is what we should seek for our children. Again we can see in *Re G* this understanding of altruism being part of welfare receiving judicial acceptance.

5.3 Making decisions together

A maternalist approach recognises that a proxy decision maker must have a relationship with the person they are making decisions with. It does not promote a distant authoritarian decision-maker, but one who works alongside and with the child. Karen Wright (2015), describing an approach to eating disorder services, suggests:

“The maternalistic approach seen here as personal and individual is used to describe a worker who cares about the person as well as for them. Maternalism also better reflects the protective, feeding and nurturing role that is adopted by the care workers.”

Elizabeth Horn (2018, p. 1) argues:

“Maternalistic physicians are not dictating to our patients what to do, but rather guiding them gently to what we think is best. We give our patients autonomy but never make them feel alone or unsupported in their care. We reassure them that no matter what they decide, we will be there for them. We care for the patient as a whole, not just an illness, but as a person with faults, weaknesses, with individual interests and goals, with human hopes and fears. We acknowledge our patients as the unique persons they are, and we love them all the same.”

This captures the idea that maternalism is not about making a decision and simply walking away. Nor is it about giving the individual the information they need and leaving them to make the decision for themselves isolated in their autonomy.

Maternalism requires the decision-maker to know, or to get to know, the person about whom they are making the decision. Laura Specker Sullivan (2016, p. 439) suggests that maternalism is “predicated on the existence of relationships in which one party can discern the will of another without explicit communication.” That requires trust and interpersonal understanding (Specker Sullivan and Niker 2017). This would make it difficult for a judge, for example, to make a maternal-

istic judgment without taking significant steps to get to know the person involved (Niker and Specker Sullivan 2018). This is not impossible and some of the best judgements of judges in the Court of Protection, for example, see a genuine attempt by judges to see all the friends and family of the individual lacking capacity to get to know their values, interests and personalities (e.g. *Wye Valley NHS Trust v B* [2015] EWCOP 60). The same should be undertaken when the court is making decisions about children.

5.4 Liberty

Peterson (2012) makes the important point that maternalism rejects the model of liberty that critics of paternalism espouse. She argues (at p. 3):

“The children’s liberties are not threatened because from a feminist, caring framework, liberty is not defined as complete separation and independence from the parent. Children’s liberties are enhanced and nurtured when they are loved, cared for, listened to, and understood, and they respond to the care not only by participating in the decisions about what is best for them but also by caring for themselves [...].”

The argument here is that leaving a person to make a choice on their own and straightforwardly respecting that choice is not necessarily enhancing their autonomy. That is for two reasons. The first is that few people in fact make decisions on their own. They make decisions with other people. In relation to important decisions most of us will seek out the advice of experts and trusted friends. This is, indeed, recognised in the law by specific requirements for legal advice before certain important decisions are made. Leaving a child alone to make a decision will not promote liberty, but often inhibit the child’s decision-making. Second, family life decisions require co-operation for them to work. A child is very likely to need the support of caring relationships to enact and implement the decision which is made. Thus making and implementing decisions, particularly for a child, will require support and assistance. A straightforward autonomy model ignores this.

5.5 Nudging and maternalism

It is in the nature of maternalism that it will be reluctant to use force to implement a decision. Heta Häyry (1991)’s understanding of maternalism is that it controls by inducing a guilty conscience. Looking at the issue of obesity Søren Holm (2007) suggests that hard paternalism may involve forcing people to engage in healthy eating or preventing eating food, and soft paternalism may involve giving clear

messages about what they should do and making it harder or more expensive to eat unhealthily. Maternalism, he argues, focuses on the latter.

I suggest the concept of nudging may be more helpful than conscience in this context. Nudging is built on the observation that people find it hard to act on their good intentions and that interventions are justified to make it easier for people to follow their goals. A common example is placing healthy eating options within easy reach in a buffet. Clearly this is not denying the option for those who wish to choose the unhealthy option, but it is encouraging people to eat healthily. Nudgers commonly deny their interfering with autonomy as people can still make whatever choice they like, but they are making certain choices easier. Indeed, using the buffet example, however the buffet is set up there are going to be certain dishes which are easier to reach and so we cannot avoid “nudging”, the only question is what choices we should be nudging people towards (Thaler and Sunstein 2003).

The benefit of working with a child to reach the right decision through nudging is that it produces some of the virtues generated earlier. The child is nudged into making a self-sacrifice and learns of the good of that. The child sees the importance of maintaining caring relationships. The child can build up a sense of agency. Most importantly they are not taught that forcing people to act in a particular way by violence or oppression is a good way to treat others. I am not saying that a maternalist would never use force to implement a decision reached about a child, but it would be a last resort.

5.6 The nature of parenting

The paternalistic and autonomy-based models propose an undesirable mode of parenting. The autonomy model suggests the parents' role is simply to ascertain and then effect the child's will. The paternalistic approach sees the parent as determining what is best for the child. Under either model parenthood is something that parents do to children and is designed with the aim of producing good well-rounded children. For paternalists it is the job of parents to mould their children to be good citizens, and to be responsible if they do not perform this task well. For autonomy supporters it is to allow children to be the person the child wants to be.

What both of these models overlooks are the ways that children ‘parent’ the adults in their life. Children care, mould, control, discipline, cajole their parents, just as parents do the same for children. The wrong of a parent seeking to genetically engineer or hyper-parent their child is not just that the parent is seeking to impose a particular view of what is a good life on their child, although that is wrong too. It is the wrong of failing to be open to change as an adult; failing to learn from children, failing to see that the things you thought were important are, in fact, not. It is failing to find the wonder, fear, loneliness, anxiety, spontaneity and joy of children and to refind them for oneself (Herring 2018).

Parenthood is a specific relationship with a particular child. It involves working out with them what will make a successful relationship (Smedts 2008). Sandel

(2004, p. 55) says that ‘parental love is not contingent on talents and attributes a child happens to have’. And that is what is wrong with paternalism. The child is not a project for parents to design and control. Rather than being parents as managers of a child, they should see themselves as trustees of, of stewards of, the child’s decision-making powers, until the child is old enough to make decisions for themselves.

The nature of paternalism falls away once a parent relinquishes claims to control. This is particularly apparent for those of us whose children do not fall into the conventional sense of ‘normal’. The notion of parental control and responsibility for what a child is seems absurd in this context. The rule books are long since discarded and it is a matter of finding day-by-day what works or, more often, what does not work. Parents of disabled children come to know that the greatest success for the child will be a failure by the objective standards of any Government league table or examination board. But such social standards fail to capture a key aspect of parenting – children can cause parents to be open to something more wonderful, particularly when they are more markedly different from a supposed social norm.

The notion of paternalism can involve an unjustified claim to expertise. Writing on genetic enhancement of children, Frances Kamm (2005, p. 14) writes:

“A deeper issue, I think, is our lack of imagination as designers. That is, most people’s conception of the varieties of goods is very limited, and if they designed people their improvements would likely conform to limited, predictable types. But we should know that we are constantly surprised at the great range of good traits in people, and even more the incredible range of combinations of traits that turn out to produce ‘flavors’ in people that are, to our surprise, good.”

And this is the major problem for paternalism. Our vision of what is best for our children is too depressingly restrained: a good job, a happy relationship, pleasant health and to be free from disease. Yet the best of lives is not necessarily marked by these things. More significantly paternalism can involve failing to learn from or to co-operate with children in finding new ways of being, doing and seeing. A maternalist perspective does not privilege the adult or the child as the decision maker, but sees co-operative mutual decision-making where both may change, be renewed or have their eyes opened.

6 Conclusion

In this chapter I have sought to explore the concept of maternalism as a form of decision-making, particularly as applied to children. Maternalism seeks to promote a middle path between paternalism and autonomy-based approaches. It seeks to

rely on the values of caring, mutuality and relationality, which encourages parents, courts or others making decisions about children, to make decisions with children. It encourages decisions to be made within a relational context and recognises the importance of cultivating a suitable degree of altruism and virtue. It is centred around the promotion of caring relationships which enable children, and indeed everyone, to flourish.

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Choice and Constraint: Exploring ‘Autonomous Motherhood’

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1 Introduction

Single motherhood remains a contested phenomenon in the 21st century and women who choose to bear and/or raise children on their own still confront problematic normative frameworks that surround the definitions of gender and family. Single mothers are nowadays much more visible in popular culture and in society (Juffer, 2006; *Baby Mama*, 2008; *The Back-Up Plan*, 2010; *The Switch*, 2010; *Miss Conception*, 2008), and social and legal changes have facilitated women in making the choice to parent without an intimate partner. Yet this chapter suggests that single motherhood is not yet ‘the new normal’ and that women’s choices about motherhood remain significantly constrained by social and legal norms, as well as privatized systems of economic responsibility. Single motherhood is not yet simply one of several lifestyle options from which women can select and be supported by law and society.

This chapter focuses on women who make a decision to parent without a partner, sometimes without the bio-genetic father knowing about or being involved with the child. Of particular interest are mothers who choose to keep a baby after becoming pregnant in circumstances where they anticipate parenting on their own, or who choose to conceive or adopt and raise a child on their own. The research is based on studies reported more fulsomely in *Autonomous Motherhood? A*

Socio-Legal Study of Choice and Constraint (Boyd et al., 2015). A feminist socio-legal lens is used, which recognizes that women's agency is 'always exercised within constraints, that inequality is an ever-present component, and that the constraints relate to social, not just personal, power relations' (Madhok, Phillips and Wilson, 2013, p. 7). Specifically, the concept of 'choice' must be problematized in a society that has not yet fostered women's equality in relation to reproduction nor acknowledged that children can fare equally well within family forms that depart from the nuclear model. The case of autonomous motherhood renders starkly visible the ways in which more robust systems of public responsibility for reproductive labour are needed before women can make empowered choices about the family form within which to raise children. As it stands now, the heavy reliance of state and society on women's 'free' reproductive labour, which is rendered more acute under neo-liberal policies that privatize the costs of care and download them onto families, creates an unequal ground upon which women exercise choice. This chapter argues that, while not all women will want to parent 'autonomously', the playing field should be leveled so that women can make less constrained choices about motherhood. Although the study is grounded in Canadian law and society, the trends and patterns are relevant to other countries that are similarly influenced by factors such as neo-liberal economic frameworks and an increased valorization of genetic paternity.

2 The Possibilities and Perils of Single Motherhood

In liberal democratic states such as Canada, unwed motherhood has recurrently generated intense public debate, accompanied by overtones of moral censure. Until fairly recently, and sometimes still, the children of unmarried parents were legally defined as 'illegitimate' and unmarried mothers were treated as social pariahs. Much of the scholarship on unwed motherhood has centred on women who did not want to become single mothers, or were not in a position to do so, and on the options they pursued to avoid lone motherhood (Backhouse, 1984; Brodie, Gavigan and Jenson, 1992; Cunliffe, 2011; McLaren and McLaren, 1997; Solinger, 2005; Rattigan, 2012; Strong-Boag, 2006). Considerable socio-legal research has also been done on women who became lone mothers through separation, divorce, desertion, or the death of an intimate partner (Gordon, 1994; Chambers, 2007; Gavigan and Chunn, 2010; Bradbury, 2011).

Since the late 1970s, the legal significance of illegitimacy has been abolished or significantly diminished and reproductive technologies have proliferated. More women have given birth to or adopted and reared children outside of marriage or cohabitation, with increasing numbers of both lesbian and heterosexual women undertaking to become single mothers (Hertz, 2006; Kelly, 2012, p. 257). Some women chose lone motherhood even prior to these late 20th century developments (Chambers, 2007; Strong-Boag, 2006), but since the 1970s the decision to

become a single mother has been surrounded by less stigma and fewer impediments (Wieggers and Chunn, 2015). The gay and lesbian movement also enlarged the socio-legal imagination about family forms that create alternatives to the married, heterosexual, nuclear family (Kelly, 2011). Canadian law does not restrict use of anonymously donated sperm or eggs, most of which are imported from sperm banks in the United States.

The embrace of neo-liberalism in countries such as Canada and its reliance on a formalistic definition of equality has both enabled and limited more expansive choices for women. Formal equality is a component of traditional liberalism and assumes that individuals are on a level playing field and should be treated in the same way, regardless of factors such as sexuality or gender. These ideas have challenged the traditional nuclear family based on heterosexual marriage and gendered roles, and enhanced the notion that people should be able to choose to live in a range of family forms. For neo-liberals, it is up to individuals to make 'good' choices and take advantage of opportunities, not the state's responsibility to tell them what to do. These ideas are now mainstream.

Feminists have presented more fulsome ideas about equality, but neo-liberal ideas are now the dominant influence on family law and policy, alongside some ongoing neo-conservative proponents of the traditional nuclear family as *the* normative family (Cossman, 2002). Because neo-liberalism prioritizes privatization, or the shifting of the costs of social reproduction to the private sphere of the family, a preference for the two-parent family unit remains. Simply put, the perception is that two parents can better bear the costs of raising children than can one. As a result, single mothers face the prospect of offering what is perceived to be a lesser family form. Neo-conservatism and neo-liberalism meet on familiar terrain in this regard.

From a feminist perspective, formal equality (of women and men, of same-sex and opposite-sex couples) is a necessary but not a sufficient approach to conceptualizing equality. Feminists generally insist that states need to play a role in contributing to equal outcomes for everyone. Otherwise, identical treatment of people who are differently situated simply exacerbates existing inequalities, as Anatole France (1917, p. 75) famously pointed out ('the majestic equality of the laws ... forbids the rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.'). Some feminists have pointed out that the apparent diversity of family forms that is recognized in contemporary family law obscures the reality that the nuclear dyad remains the foundation of virtually all 'new' forms of family that are legally recognized (Silva and Smart, 1999; Collier and Sheldon, 2008; Fineman, 1995). Likewise, the neo-liberal *assertion* that mothers and fathers are equally situated and, therefore, equally able to parent well ignores the reality that the *application* of gender-neutral family law is still heavily influenced by 'old' ideas about family and parental roles (Boyd, 2003; Cossman, 2002; Daniels, 1998; Juffer, 2006). For example, beliefs that children need two, preferably opposite-sex, par-

ents and that children, especially boys, need a resident father remain prevalent. Many judicial decisions embody such views.

The trend towards gender-neutral family law plays out in contradictory ways in relation to single mothers. Gender-neutral family laws suggest that women and men are equally able to parent, which also should imply that parenting well is possible regardless of sexual orientation and with or without a live-in partner. Yet this belief in parenting parity also informs the argument of fathers' rights advocates that when parents do not have a live-in relationship or when a relationship breaks down, it is in the 'best interests' of the children involved that each (biological) parent should have 'equal shares' with respect to the legal and physical custody of them (Smart, 2004). While most feminists and most women support the notion that men have the same *capacity* to parent as women, the question of imposed equality in this field is more problematic, especially in the form of joint custody after parents separate. The reality that women typically have greater responsibility for child care during intact relationships cedes to the powerful idea that women and men are equally able to parent.

The seemingly progressive enhancement of fathers' rights and the modern version of the best interests of the child principle (Boyd, 2003) limit a woman's ability to choose autonomous motherhood. Emphasizing contact between children and 'both' parents generates the impression that the proper legal family is constituted by the biological parents plus child, meaning that a single parent family remains 'othered'. As well, the privatizing effects of neo-liberalism impose greater financial responsibility for children on men who can be defined as legal fathers. This development can produce positive effects for some women, but also diminish social supports for many mothers (Cossman, 2002). A single mother is now expected to be self-sufficient or to rely on private sources of funding such as child support, which in turn ties her to a genetic father from whom she may wish to distance herself, due to abuse or other factors. The possibility of single motherhood can be compromised by the expectation that single mothers should take personal responsibility for themselves and their children and conform to neo-liberal ideals of self-sufficiency and freedom from dependency on the state (Gavigan and Chunn, 2007; Juffer, 2006). Yet, the liberal individualist vision of autonomy is difficult to attain when one is encumbered by the responsibilities of care for a child and these difficulties are exacerbated by factors such as poverty.

A key constraint on women's choices in relation to autonomous motherhood, often framed within the discourse of children's rights, is the 'almost unassailable presumption' that children have a right to know their genetic origins in an age of widely available DNA genetic testing (Smart, 2010). The importance of genetic parenthood, especially fatherhood, is increasingly highlighted, and reflects technological developments that permit easier identification of genetic heritage (Mykitiuk, 2001; Smart, 2010). Some argue that it is ethically unacceptable for laws and social policies to promote the raising of children who are 'genetic orphans' (Somerville, 2007). Vanessa May (2011, p. 140) suggests that '[t]his is perhaps the new form of

stigma that contemporary lone mothers face – as women whose children pay the price for their mother's right to assert their autonomy'. Mothers are made to feel responsible for their children's knowledge of their paternal origins, or even for ensuring that their children have a relationship with their genetic fathers (Wallbank, 2009). Failure to do so may generate a new form of illegitimacy that suggests that fatherless children suffer from some sort of deficiency. The ideological focus on the significance of fathers to children's wellbeing has been internalized by many single mothers. As we shall see, many mothers that we interviewed made their children aware of the identity of their genetic fathers and/or encouraged contact.

Claims by bio-genetic fathers to formal rights in relation to children have obtained considerable purchase (Collier and Sheldon, 2006). This is partly as a result of Article 7.1 of the United Nations *Convention on the Rights of the Child* (1989) [CRC], which affirms, *inter alia*, 'as far as possible, the right [of the child] to know ... his or her parents.' The meaning of 'parent' is quite expansive and includes donors of genetic material, the child's 'birth parents', and the child's social parents, according to the *Implementation Handbook for the Convention on the Rights of the Child* (Hodgkin and Newell, 2002, pp. 105-106). In addition, Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) [ECHR] may protect the right of a genetic father to know his child where the relationship between father and child or father and the child's mother give rise to 'family ties' (Council of Europe, 2018, pp. 46-47). This protection for family life may also 'extend to the *potential* relationship which may develop between a natural father and a child born out of wedlock' (*Nylund v Finland*, 1999, p. 14; Council of Europe, 2018, p. 51). The protection for 'private life' under Article 8 includes the right of a child to gain access to information regarding his or her personal identity, including the identity of his or her parents; this right is, however, to be balanced against the interests of third parties, such as the child's parent(s).

Some determinations of legal parentage, or the best interests of a child, seem to ignore important facts, such as whether a man has had an enduring relationship with the child's mother or has played a role in caregiving. For example, under Article 8 of the ECHR, when determining whether 'family life' exists between a genetic father and a child born outside of marriage, the Court considers not only the nature of the relationship between the mother and father but also any 'demonstrable interest in and commitment by the natural father to the child both before and after the birth' (*Nylund v Finland*, 1999, p. 14; Council of Europe, 2018, p. 51). In Carol Smart's (1991, p. 489) terms, fathers can be rewarded for 'caring about', or expressing love for, a child even as the labour of 'caring for' a child, more commonly provided by mothers, is undervalued. In Canada, the few statutory provisions that retain some protections for birth mothers who do not wish to disclose the identity of biological fathers are increasingly challenged. In *Trociuk v British Columbia (Attorney General)*, 2003, the Supreme Court of Canada established that the disparate and arbitrary treatment of the interests of genetic fathers in the birth registration and naming of children constituted sex discrimination (Lessard, 2004). In *Pratten v Brit-*

ish Columbia (Attorney General), 2012, a donor conceived adult initiated an initially successful constitutional challenge to donor anonymity. This decision was ultimately overturned on appeal but led to considerable public debate (Kelly 2017). A growing number of jurisdictions other than Canada have abolished donor anonymity. For example, in Australia, sperm donors increasingly search for their genetic children under permissive legislation in the state of Victoria (Kelly et al., 2019). New challenges to autonomous motherhood have thus arisen, even as the stigma surrounding single motherhood has diminished.

Finally, economics inevitably influence women's choices concerning motherhood. Single mothers living in poverty are more often the subject of vilification than those who are more privileged economically (Crawford, 1997; Wieggers and Chunn, 2015) and single mothers generally are constructed as a 'risk class,' 'who can legitimately be intruded upon, scrutinized indefinitely and held to account for their daily activities' (Swift, 2010, p. 143). The extent to which some single mothers manage to escape these intrusions, keep their children, and forge a relatively autonomous space for their self-defined families is our focus, including the extent to which material conditions influence these possibilities. As we shall see, the ability of single mothers to act autonomously may rest in large part on their relatively privileged demographic situation, especially in relation to economic, racial, and educational status (Hertz, 2006; Jadva et al., 2009).

3 What does Autonomy mean for 'Autonomous Mothers'?

'Autonomous motherhood' can arise in different ways and 'autonomy', like 'choice', is a fraught concept. A modern 'single mother by choice' usually chooses to conceive (most often using an anonymous sperm donor) or to adopt a child, knowing she will be her child's sole parent, at least at the outset. Considerable planning generally occurs prior to conception. The 'single mother by choice' may well be part of a social network of such mothers who connect via face-to-face support groups or through an array of online networks (Single Mothers by Choice Inc., 2019). Other women, however, who may be termed 'single mothers by chance,' may find themselves pregnant after a brief sexual relationship or through an intimate relationship that was, mistakenly, expected to lead to marriage or cohabitation. They may then decide to raise the child without the participation of the biological father or a partner. A single mother by chance may well have hoped to become a mother previously, but likely did not plan to become pregnant in precisely these circumstances. An element of choice is present, but typically there is less forward planning than where a single woman adopted or used a sperm donor to conceive. Further complicating the categories, some women who use assisted reproduction and thus engage in forward planning, are not part of the social or online networks offered to single mothers by choice. Moreover, some women without access to sperm banks or reproductive technologies elect to conceive via

intercourse, but with no intention of involving the genetic father in their families. The fact that lack of access may determine whether assisted reproduction is used or not suggests that bright legal lines should not be drawn between children born 'naturally' and those born using technology.

Parenting alone is clearly a challenging prospect and this chapter does not seek to glamorize it. Instead, it draws on feminist relational theory, which challenges liberal individualism through its emphasis that 'autonomy requires constructive relationship throughout a person's life' (Nedelsky, 2011, p. 39; Downie and Llewellyn, 2012; Mackenzie and Stoljar, 2000). Autonomy is 'nourished in relationships with others' rather than being 'solipsistic assertions against intrusion' (Madhok, Phillips and Wilson, 2013, p. 7). My approach to autonomous motherhood challenges liberal individualist definitions of the self and of choice, even as it explores the possibility for mothers to achieve a relative degree of autonomy over their lives and decisions. Single mothers by choice typically rely on support networks of various forms, refuting any notion that their motherhood is or should be conducted in splendid isolation. Relationships are key to the ability of most single mothers to raise a child, but these relationships not necessarily the couple-based relationships upon which family law is premised.

As many feminists have shown, the 'ideal legal subject upheld in liberal theory is a rational, choosing person, capable of decision, an autonomous individual' (O'Donovan, 1997, p. 47). This idealized legal subject is, however, premised on conditions of privilege that are linked to gender, class, race, and ability, among other relations of power. For most women, perhaps particularly mothers, purely autonomous choice in the liberal individualist sense is a virtually mythical notion (Boyd, 2010). Although the difficulties that mothers confront in the 21st century certainly differ from those faced in the 19th or 20th centuries, the challenges facing mothers today are not negligible. These challenges reflect some of the major debates of our time regarding preferred family forms and the conditions necessary to guarantee equality.

The relationship between women as mother-caregivers and children illustrates the important connection between relationships and autonomy and the ways in which relationships can simultaneously facilitate and constrain autonomy. Specifically, the caregiving that mothers provide enables children to become autonomous persons; yet this same caregiving relationship constrains maternal autonomy, perhaps inevitably. Given the still powerful societal expectations that mothers will provide primary care for children, and the strong sense of responsibility that most mothers feel towards the well-being of their children, parenting imposes considerable pressures on female autonomy. The ideology of motherhood too 'has an effect on women's autonomy, so that we are often not viewed as persons in our own right, with choices to make about ways of being and living' (O'Donovan and Marshall, 2006, p. 103). Even when a woman parents with a male partner, women's 'pregnant embodiment' (Collier and Sheldon, 2008, p. 60) – their more continuous physical experience in relation to children as a result of pregnancy, breastfeeding,

and even caregiving responsibility – prevents them from being able to opt in and out of involvement with children in the way that men still can, if they so choose. For a woman parenting alone, these responsibilities rest on her shoulders, but social and economic structures can make these responsibilities less exclusive and onerous.

Motherhood must be seen as a relationship within larger social and economic structures that can either enable or constrain autonomy. Without generous social or familial structures supporting mothering (for example, allowing mothers time without the children to pursue their own interests), mothers' ability to make choices for themselves is inevitably constrained, particularly for single mothers. Yet, due to the ongoing ideological assumption that the costs of reproduction and care labour will be borne by the privatized family, and by women within that family, few material supports for different, perhaps more collective, models of care exist. Although the employment rate of women with children has increased over the past three decades, women with children are still less likely to be employed than women without children (Statistics Canada, 2017, p. 11). One key reason is that quality daycare is difficult to find and often prohibitively expensive. Moreover, women are still paid less than men on average and remain concentrated in traditional, female-dominated fields of employment. Women work part-time more than men, not infrequently in order to have more time to cover parental responsibilities. (Single mothers may, of course, not have this luxury, given they are the sole breadwinners for their families.) Workplace structures often fit poorly with parenting responsibilities, and work/life balance remains a myth for most mothers, as does economic self-sufficiency for many.

Although feminists have long highlighted the relational nexus between motherhood, socio-economic structures, and personal choice, in most western societies the family is still constructed as autonomous and as part of the non-public sphere (Barrett and McIntosh, 1991; Boyd, 1997; Fineman, 2004). Parenting is often accomplished in isolation from extended families, and without adequate childcare and other social supports, so that maternal autonomy is correspondingly limited. Both the 'patriarchal' (separate spheres for men and women) and 'individual responsibility' models of family implicitly or explicitly conceptualize the family as a nuclear unit; both view social reproduction as the primary responsibility of this privatized unit rather than shared with the larger community or the state (Eichler, 1997). This arrangement is not friendly to single mothers because it typically means that a female caregiver holds primary responsibility for both reproduction and social reproduction, including financial aspects. The patriarchal model helps to construct a lone mother and her child(ren) as a pathological family form while the individual responsibility model absolves the state of anything more than temporary responsibility for maintaining them. The experience of autonomous mothers reveals the impoverishment of both such models in an ostensibly modern world of 'choice'.

4 The Canadian Study

The study upon which this chapter is based was one of the first to explore the social-legal aspects of ‘autonomous motherhood’ – or unpartnered women who decide to raise a child on their own – as opposed to single motherhood more generally. Our research (Boyd et al., 2015; Kelly 2012; Wieggers and Chunn, 2015, 2017) reveals clear evidence of the exercise of autonomy by mothers, but also constraints on this possibility arising from emerging fathers’ rights, the technological ability to identify the paternal genetic tie, and the impact of the tenets of neo-liberalism. The research methodology we used included legal, historical, and sociological techniques. Our legal methods included legislative histories that tracked changes to the laws on illegitimacy and case law studies of custody and access involving unwed mothers and single mothers. We also conducted qualitative interviews with women who chose to raise children alone from the post-Second World War period until 2010, including those who self-identified as ‘single mothers by choice’.

4.1 The Legal Studies

Our case law studies and our legislative history of illegitimacy show that, overall, claims by bio-genetic fathers to formal legal rights in relation to children have obtained considerable purchase. After World War Two, the number of successful court claims to access, joint custody, and sole custody by fathers increased. Fathers who had cohabited with unmarried mothers first gained rights, arguably reflecting some relational connection with both mother and child. These successful claims were, however, followed by fathers who were neither married to, nor had cohabited with, the mothers prior to making a claim. The case outcomes attest to a shift away from the relative invisibility of unmarried fathers up to the 1950s (except possibly for the purposes of child support) towards almost a presumption of equal parental authority during the 1990s and since that time.

The legislative history of illegitimacy and its abolition in Canada shows that, despite the primary focus on children’s equality rights in the law reform debates, a secondary focus on the rights of ‘natural’ fathers also emerged. This focus on paternal rights limits the ability of single mothers to define their own family structure without interference. The abolition of the status of illegitimacy for children was usually accomplished by legislation stating that a person is legally ‘the child of his [sic] natural parents.’ This reform was premised on children’s rights, for example the right to child support, which should exist regardless of whether their parents are married or not. It reflected a concern for privatizing, or relieving the state of responsibility for the financial costs related to children born out of wedlock. However, the wording simultaneously gave biological fathers stand-alone rights based on the ‘natural’ ties of bio-genetics. Overall, the socio-legal policy shifted from an emphasis on the responsibilities of fathers towards an affirmation of their rights,

with mixed results for women who sought to create a family form independent of biological fathers. The abolition of illegitimacy enabled biological fathers to claim custody or access even as the stigma around having a baby out of wedlock was diminished and as some mothers were newly enabled to claim child support.

Our review of 154 Canadian judicial decisions on custody and access disputes between 1945 and 2009 concerning biological parents who had neither married nor cohabited highlights the legal experience of mothers who tried to parent autonomously of fathers and the greater extent to which bio-genetic fatherhood was perceived to be important to children's welfare (Boyd, et al., 2015, pp. 95-136). Claims made by biological fathers were increasingly affirmed by courts, whereas maternal claims based on gestation and care of a child were eroded. Although mothers obtained sole custody more often than fathers, consistent with statistical trends for married parents, the number of successful claims by unmarried fathers to sole or joint legal and physical custody and to access increased over time, accelerating most dramatically in the 1990s and 2000s. In some cases, the fathers had developed relationships with the children or had *de facto* care of them; sometimes mothers lost custody due to findings that the children were at serious risk in their care. But this was not always the case. Awards of legal custody to fathers exceeded the number of physical custody awards, but the rate of successful paternal claims to physical custody (either sole custody or joint custody with primary residence or shared parenting) averaged 40% across the four provinces we studied: British Columbia, Saskatchewan, Ontario, and Nova Scotia.

This shift in custody and access awards occurred as the 'best interests of the child' became the paramount or exclusive consideration in custody and access outcomes nationally and internationally. However, the best interests of the child principle is not neutral, but rather is indeterminate and therefore interpreted through the values and biases of decision-makers (Kline, 1993; Mnookin, 1975). Our case law study revealed that certain factors were particularly relevant to judicial assessments and marked an advance in the rights of fathers and diminished autonomy for unmarried mothers who resisted paternal claims.

First, even if there had been little to no contact between fathers and their children prior to a court application, judges increasingly viewed the best interests of the child as including the positive right of the child to know his or her father. The relevance of this right to know to a child's best interests was often simply assumed rather than being explicitly justified or assessed in the context of the facts (such as abusive behaviour by the father towards the mother) or the child's wishes. Moreover, although proponents of a child's right to know one's progenitor, as recognized in Article 8 of the *CRC*, generally acknowledge that this right does not necessitate a social relationship between the child and the progenitor (Giroux and de Lorenzi, 2011, p. 63), Canadian judges have broadly interpreted the child's interest in fatherhood to include a right to *develop* a relationship with the father and the child's paternal relatives. Indeed, evidence that a mother had shown a lack of commit-

ment to providing her child with an opportunity to know the father could contribute to her loss of custody.

Second, the lack of a pre-existing family unit (cohabitation) or a meaningful relationship between the parents prior to the birth became less important over time. Any need by a biological father to adduce evidence of prior care of, or commitment to, the child was eliminated. In turn, the mother generally had to bear the burden of proving that the father was seriously problematic in some way in order to rebut any presumption of joint legal parental authority. For example, in *Schick v Woodrow* (2012) [Schick SKCA], the trial judge had faulted the father for not maintaining a relationship with the mother or providing her with emotional or significant financial support both during and after the pregnancy. While the mother, in his view, had also behaved in an immature way in thwarting the father's access in response to his disinterest in her, she had since the birth improved her ability to both provide for, and make appropriate decisions for, the child by enrolling in an early childhood development course. The father, meanwhile, had continued to live with, and rely heavily on, the support of his parents in the care of the child. He had also failed to improve his level of education or training to be better able to provide a home and the necessities of life for the child. The Court of Appeal affirmed the trial order for primary residence in favour of the mother, but in effect replaced what had been construed as a presumption of legal custody in favour of the resident parent with a presumption of joint legal custody whenever the biological father desires an active role. This outcome was justified on the ground that maximizing contact with a father is presumptively in the best interests of a child, subject to findings of abuse or insurmountable conflict. (Section 6(5) of the Children's Law Act, 1997 contains a maximum contact provision.) While the Court of Appeal rejected the significance of the lack of a pre-existing two parent family, at least on the issue of legal custody, it simultaneously constructed a two-parent post-birth family for the child by investing the biological father's future involvement with critical importance for the child's well-being. Relational factors, such as the father's lack of emotional or financial support for the mother herself during or after pregnancy, appeared irrelevant. The judgment also reduced the relevance and import of the mother's actual caregiving to an assessment of the capacity to act as a legal custodian in the child's best interests.

Third, and relatedly, the importance of a child's attachment to a primary caregiver, which more often favours mothers who typically have care of their children after birth, became somewhat less decisive, given the ever-increasing judicial emphasis on paternal contact with children. Although a father's lack of interest in or contact with a child was often a negative factor in his claim for custody or access, judges often gave him a further opportunity to show commitment by gradually increasing his access over time. That said, other lapses, such as a father's failure to support the mother during or after pregnancy or a failure to pay child support, could sometimes negatively affect their claims.

Fourth, and finally, especially from the mid 1980s on, mothers who asserted an interest in parenting independently of the fathers' involvement or support were increasingly constrained by access orders, joint legal or physical custody orders, and the denial of their requests to travel with the child or to relocate geographically. Moreover, mothers who were viewed as failing to support the father's role in the child's life could lose custody or be otherwise disciplined by a judge. In one case, the mother had a brief love affair with the father (with whom she never cohabited) and became pregnant. She decided to parent alone without the father's involvement. The judge awarded joint custody stating that 'I do not believe that the mother should profit from her conduct which, as stated, was intentionally engineered to attempt to become a 'single parent'. This would not be in the child's best interests' (*Hildinger v. Carroll*, 1998, p. 767).

Thus, by the beginning of the 21st century in Canada, unmarried mothers had lost the right to exclusive decision-making and physical care of their children, which had previously been subject to proof of her unfitness, abandonment, or a serious concern for the children's welfare. In a radical departure, fatherhood was no longer constructed at law as an incident of conjugal status or as a commitment mediated primarily through a relationship with the child's mother. While affirming the ability of men to become equals as parents, this development has been applied in a manner that overlooks important and gendered contextual factors such as the mother's relationship with the child or the quality of the father's relationship with either mother or child. The cost for unmarried, non-cohabiting mothers is that they still bear significant biological and social burdens related to the care of children, yet have far less ability to dictate the shape of their lives. They are expected to actively facilitate the ongoing involvement of fathers in their children's lives and, sometimes, to negotiate high levels of conflict or abuse. Short of serious violence or insurmountable conflict being proven, which is not always easy to do, in most jurisdictions, biological fathers will have a *de facto* presumptive claim to joint legal custody, and access rights that are usually expected to increase over time.

4.2 The Interviews

Our interviews with women who chose 'autonomous motherhood' give more contextual information about this phenomenon than the case law can provide (Boyd, et al., 2015, pp. 137-211; Wiegers and Chunn, 2015, 2017). The first set of interviews were with 29 (adult) women who became sole mothers between 1965 and 2010, a period that was marked by huge upheaval and change, including increasingly accurate paternity testing and the repeal of illegitimacy legislation. The women were interviewed about several aspects of their experience, including: the circumstances underlying their decision to adopt or become pregnant and, if the pregnancy was unplanned, why they decided to go through with it; their pre-natal, birthing, and post-natal experiences as single mothers; and the legal, economic, and social consequences of their original decision to raise a child alone. 'Autonomous moth-

ers' from the 1960s to the 1980s were compared to their counterparts in the following two decades when the proliferation of new reproductive technologies (NRTs) occurred, with the goal of illuminating similarities and differences between and among women who decided to raise a child alone across time.

Two thirds of the 29 women had experienced unplanned pregnancies, mostly in the context of casual, often on-again off-again, relationships that ranged from a few months to six years. Once pregnant, these women chose not to abort or to place the child for adoption. The remaining one third planned their pregnancies; three of them conceived with a donor via sexual intercourse, while six chose anonymous donor insemination. The majority of the mothers were Caucasian and heterosexual. Over time, the age at which they conceived or adopted increased so that from the late 1980s onward, more were over 30 years of age. Most had a higher than average level of education. Some had good jobs but others found it difficult to find work in their field, as do many single mothers. For many women, their choice to parent alone required considerable self-denial and altruism, but virtually all said that they would make the choice again.

The participants' responses challenge three areas where neo-liberalism tells us that equal opportunity has been achieved. First, while over time, women had considerably more choice in relation to conceiving and birthing a child, women's control over reproduction nevertheless remains constrained. For those who conceived 'naturally', difficulties with birth control (notably 'failed' contraception) sometimes made it difficult for a woman to choose the timing of a pregnancy. Most women who planned their pregnancies preferred to use donor insemination rather than to adopt. But gaining access to assisted reproduction can be difficult due to cost and availability, and a woman's ability to use a known donor can be restricted due to potential donors being reluctant or wanting more involvement in the child's life than she is comfortable with. Using assisted reproduction also tends to subject women to the will of an agency and a medicalizing mindset. Erratic regulation of fertility clinics, many of which are private, exists across Canada and the clinics tend to work with a particular sperm bank (usually American) that they recommend to their patients.

Second, women often struggled to cover the costs of social reproduction and often had to turn to family, friends, and/or colleagues for financial and other support. Many did not have jobs that came with maternity leave and benefits, or these benefits did not cover all costs. Although they were very determined not to be viewed as a drain on scarce public resources or reliant on other people because of their decision to parent alone, 48% of the women resorted to state income assistance at least once while their children were young, even as they resisted doing so and found the experience 'humiliating' or 'demeaning'. Few felt that the state should share social responsibility for child-rearing.

Third, the increasing trend to define equality as formal equality between men and women as potential parents posed some challenges. Most mothers did not name biological fathers (on the birth registration), or they used anonymous donors.

In some cases, the relationship with the father had been very casual and they did not want to risk a custody or access claim. In other cases, mothers were warned that naming a father could compromise their claims for social assistance. Despite not naming the fathers, many women spent considerable time and effort to accommodate them in developing some relationship to the child. In some cases, fathers became very litigious, resulting in all-consuming, emotionally draining, and expensive legal struggles. Many of the women ensured that their sons had a male role model, but not necessarily the biological father.

A second smaller interview study was conducted of ten self-identified 'single mothers by choice' (SMCs) who planned from the start to parent without a partner and were affiliated with SMC support groups. The purpose was to explore the modern phenomenon of 'choice motherhood' and to locate it within the larger conversation about autonomous motherhood in the post-Second World War period. Women were asked about their paths to motherhood, any legal or social barriers they experienced, their opinions of the current legal framework, and their experiences of parenting. This study showed the continuing significance of biological connection; the degree to which parentage laws shape pre-conception decision-making and continue to hinder autonomy post-birth; the role of the emerging SMC community; and the ways in which SMCs, because of their commitment to independence and autonomy, can themselves become proponents of neo-liberalism in ways that may generate stigma for other single mothers.

Consistent with other studies, the 'single mothers by choice' we interviewed tended to be a fairly privileged group: in their late 30s or early 40s, well educated, financially independent, and Caucasian. They typically planned carefully for motherhood and saved money, notably to fund fertility treatments, which can be extremely expensive, and cover the cost of taking maternity leave and child care. They internalized the notion that it was their individual responsibility to be financially responsible, especially because they were 'choosing' single motherhood. All were birth mothers who had conceived via donor insemination or IVF. Two women used known donors, while the rest used anonymous donor sperm purchased from a sperm bank. Six of the eight anonymous donors were designated 'identity release', which means that the child can gain access to the donor's identifying information at the age of eighteen.

Having a child on their own was 'Plan B' for more of the women in this study than in the first study, even those who had considered becoming an SMC at quite a young age. That is, they would have preferred to find a partner with whom they could share the experience and many mourned the loss of a more traditional family. Yet some women were clear that they were not willing to compromise their own, or their child's, well-being in order to achieve a 'traditional' family. Specifically, unless the relationship was strong, a traditional family structure was not in and of itself 'better'. The women had a sincere belief in their right to choose to parent alone, speaking to the significant social and economic autonomy that many had. Most assumed they should bear the burden privately of their choice to parent alone

and many distanced themselves from the negative images of single mothers who are not financially secure. Nevertheless, some of the women emphasized the relational networks that they relied on and some actively created relationships of support.

Many of the women had concerns about their reproductive autonomy as they engaged with the fertility industry, encountering high costs, a limited choice of donors, the lack of regulation in the industry that did not always act in their interests or those of their children, and the expectation among fertility doctors that the women would, once within the clinic environment, largely surrender their decision-making capacity and bodies to the doctors.

None of the single mothers by choice limited the notion of 'family' to biological family and none considered the donor to be a parent. Only one considered her child's donor to be part of the family. Bio-genetic connection was not sufficient in their minds to create a familial or parental relationship, especially in the absence of any engagement in the labour of parenting. Nevertheless, the mothers did not dismiss the potential of fathers, or male role models, to enhance a child's well-being. In preferring open-identity donors, they cited the virtue of giving their children a choice to know their donor. In addition, many took steps to link their children with 'donor siblings' and other donor relatives, reflecting some preoccupation with genetically based definitions of family connection (see also Kelly and Dempsey, 2016).

Finally, law emerged as a significant barrier to the autonomy of SMCs, with most women feeling the impact of a legal system that normatively assumes two-parent, biological families. The lack of legal recognition of single mothers by choice impinged on their free movement across international borders, it prevented them from legally establishing their sole parentage, and limited their ability to select the type of donor that they felt best met their prospective child's needs. Eight of the ten women chose anonymous donors even though most would have preferred a known donor, because they feared the risk of legal challenges by the donor to their sole parenthood, even if pre-conception agreements were made. Canadian courts have generally refused to consider known donors to be anything but legal fathers and routinely award them access (Kelly, 2012). Some women also felt that the absence of legal regulation of the fertility industry constrained their ability to act in the best interests of their prospective children.

Overall, for some women in both studies, the experience of autonomous motherhood is more acceptable and easier now than it was in the late 1960s. Historical differences should not, however, be conflated with either progress or regression. Women who choose autonomous motherhood today may confront fewer overt obstacles and discrimination than their predecessors. Yet, in some ways they face both old and new roadblocks to making this choice. Law reform has had contradictory consequences for them. The women interviewed who had planned their pregnancies and identified as SMCs, appear to be more homogeneous, financially secure, and less socially isolated overall. They also seem to be less transgressive of

existing norms than the mothers in the first interview study, probably in part because existing norms in the 1960s to 1980s generated more stigma or were more resistant to single motherhood.

Other commonalities between the two cohorts of mothers interviewed, such as relative financial privilege and higher than average level of education, show that change has not been as radical as might be expected. Many women in both cohorts internalized the values of neo-liberalism, being determined to avoid being viewed as either a drain on scarce public resources or reliant on other people. They demonstrated a strong sense of privatized personal responsibility, both for earning money and for carrying out the work of social reproduction – a double load that is still a challenge. The commonalities between the two interview cohorts may be greater than the differences.

5 Law Reform: Convergence or Divergence?

Law is a significant factor shaping the decision of women who seek to parent autonomously, albeit by no means the only influence. As we have seen, most women in our interview cohorts did not name the genetic father on their child's birth registration even if they knew him, for fear of legal claims or losing social assistance. Difficult questions for law reform are raised when contrasting the experience of mothers wishing to parent autonomously against the dominant legal trend to affirm biological fathers.

Many would argue that the move towards convergence of biological fathers and mothers is both justified and inevitable. Formal convergence may, however, overlook significant differences between women and men in parenthood and parenting, and compromise the legitimate autonomy interests of mothers. Mary L. Shanley (1999, p. 52) highlights the asymmetry of both the biological and the social relationships that birth mothers and fathers have with their children: the birth mother performs the gestational function which, in turn affects 'her own physiological experience and the ways in which others view and interact with her'. This biological and social asymmetry arguably dictates an approach that treats the rights of birth mothers and fathers differently, for example in relation to consent for adoption. Shanley's (1999, p. 56) approach is partly premised on the notion that any parental right should be conceptualized in a relational sense, that is, as 'an individual-in-relationship with a dependent child,' not simply a biological right (see also Boyd, 2010; Rhoades, 2010; Herring, 2013; Wiegers, 2012).

In the Canadian context, Lori Chambers (2010, p. 391) argues that 'In recognition of the nine months of pregnancy, and of the mother's settled intention to parent,' gestational mothers, even those married to the father, 'should have sole control over the fate of the newborn child.' Her justifications include an affirmation of women's dignity and equality rights and the fact that even married fathers can be 'manipulative, violent, or simply unsupportive' (Chambers, 2010, p. 392).

Like most feminists, Chambers does not dispute the capacity of fathers to nurture and care for children. However, she argues that 'this capacity should be exercised, at the time of birth, through the choice of the mother, as a result of cooperation and of supportive behavior on the part of the father' (Chambers, 2010, p. 291). This stance echoes that of Martha Fineman (1995), who emphasizes the role of contract as a mechanism through which a birth mother might engage the father or another person as a co-parent.

Carol Smart (2010, p. 398) has cautioned that the trend to 'see the revelation of genetic truths as benefiting the welfare of the child', including on the part of judges, is overly simplistic. The efforts by some mothers not to reveal this genetic truth to their children might well, she says, be in their children's best interests, or at least done in an effort to care for and protect their children (Smart, 2010, p. 411). As well, like many of the mothers we interviewed, Smart (2010, p. 405) distinguishes between a child *knowing* about her genetic origins and having to have a relationship with a genetic parent. Yet, as our case law analysis reveals, many judges overlook this distinction and are too quick to provide genetic fathers parental rights.

In relation to the legal status of genetic fathers, I am sympathetic to those who emphasize the importance of relational ties and to the fact that, through the process of gestation, a birth mother engages in a form of 'care' prior to the child's birth that no other adult can achieve. This relational tie deserves emphasis in law. If, however, relational ties are to be taken seriously, the relational ties between genetic fathers and children must also be considered. I am not inclined to weigh the genetic tie alone very heavily, following Smart. But where a genetic father, or other partner, has developed a social relationship with a child, through cohabitation or otherwise, it is harder to deny him legal status. Nevertheless, the *quality* of the relational tie with both the child and the mother is key. Not all relational ties are constructive and some can be negative or destructive.

If a genetic father has in fact developed a quality relational tie to the child, this relationship should, in some circumstances, give rise to a legal relationship. This decision should depend on the degree to which a relationship is intended or has in fact developed. In the absence of a clear pre-conception intention (Kelly, 2009; Millbank, 2008; Boyd, 2007; Storrow, 2002; Zanghellini, 2010), entitlement to a parental relationship should require more than occasional care or mere presence. Applying this same reasoning, a social father (or mother, in the case of a lesbian relationship) who shares no genetic tie could also be granted legal rights and responsibilities based on pre-conception intention or on the strong relational ties he (or she) has developed. (This sort of situation could arise where the adults involved cohabited prior to the birth, but the relationship failed prior to birth or soon thereafter.) The most difficult situations arise where one party's intention changes or where a genetic father may want to develop a relational tie, but has not had the opportunity to do so, as when a birth mother has not informed him of a child's birth. Here, differences in factual circumstances can be very relevant. For instance, in cases of assisted conception, it will be easier for the legal system to sever the ties

of an anonymous sperm donor with a child, in part because the assumption is that normally sperm donation is undertaken without attendant legal rights and responsibilities.

The status of a known sperm donor is less clear. Where a known donor has indicated that he will neither make legal claims nor act as a 'parent' in a child's life, and the mother has relied on this undertaking, he should arguably not be able to renege. The importance of familial stability and the avoidance of conflict in the child's life as well as that of the caregiver are key to a child's best interests (Wieggers, 2012). The difficulty is that contractual undertakings are rarely binding when a court is asked to consider a child's best interests and some decision-makers may be persuaded that a known donor should have, or be entitled to pursue, parental rights. They may be influenced by powerful familial and heteronormative ideologies that tend toward affirmation of the legal status of genetic fathers even in the context of assisted conception.

These familial and heteronormative ideologies may play an even larger role where conception occurs via casual sex or a short-term romantic relationship and there has been no discussion as to the possible consequences, let alone a contractual renunciation of legal parenthood. In such cases, the determination of whether a child's genetic father should be a legal father tends to be even more controversial. Some would argue that child support obligations might favour rendering him a legal father: 'Holding men responsible in instances of casual sex may, at least in theory, promote an equal sense of responsibility for the potential consequences of sexual intercourse' (Wieggers, 2012, pp. 189-190). In the adoption context, too, many argue that biological fathers should be required to consent to relinquishment of their child and have the opportunity to raise the child.

I would argue for a robust public system of social supports rather than over-reliance on private methods of child support, especially given concerns about the reproductive autonomy of birth mothers. I am also concerned that, in the current socio-legal context, claims by 'natural' fathers are given greater weight than is necessarily warranted. I would accordingly suggest that there should be strong presumption in favour of the mother's position in relation to decision-making and care for a child. The 'natural' father should not be privileged in a legal regime based only on his bio-genetic tie. He could, however, make a claim to contact with a child subject to countervailing concerns relevant to the child's best interests, such as conflict between the adults, violence, or failure to respect the concerns of the mother-caregiver.

Some modern law reforms have drawn a distinction between 'natural' and 'assisted' conception, with paternal bio-genetic ties being more privileged in the 'natural' than in the 'assisted' context. As a result, the possibility of forming non-normative families, including single parent families and multiple parent families, is greater where assisted conception is used. This distinction affirms the 'naturalness' of dyadic heterosexual parenthood and arguably diminishes women's ability to choose autonomous motherhood. It arises in British Columbia's *Family Law Act*

(2011) [FLA], which defines parentage for that province's purposes. This statute has been lauded as one of the most modern and progressive laws on parentage, given it allows for multiple parents in some circumstances, notably when assisted reproduction is used.

Section 23 of the *FLA* (2011) implies that parentage is a legally determined concept and that the 'naturalness' of biological definitions of parenthood are disrupted. It states that 'a person is the child of his or her parents' and 'a child's parent is the person determined under this Part to be the child's parent'. At first glance, this law offers some potential for birth mothers who wish to determine the shape of their single parent families without undue emphasis on bio-genetic ties. For women who conceive via intercourse, however, the law has not changed very much. These women may disproportionately be poor or lacking equitable access to reproductive technologies, yet their ability to parent autonomously is more vulnerable to challenge.

Like much parentage legislation, the *FLA* takes the birth mother as a starting point in its definitions of parentage. Regardless of whether conception arises through assisted reproduction or sexual intercourse, the birth mother is defined as a legal parent upon a child's birth (*FLA*, 2011, ss 26(1), 27(2)). When children are born via assisted reproduction (defined as 'a method of conceiving other than by sexual intercourse' (*FLA*, 2011, s 20(1))), a donor is not, by reason only of that donation, the child's parent (*FLA*, 2011, s 24). Some more active step is needed, for example, a contractual arrangement or a court order. To this extent, the *FLA* recognizes the potential of single mother families and the still highly gendered facts of reproduction, gestation, and birth. This approach somewhat echoes Fineman's (1995) proposal that the adult dyad be decentred in law in favour of the caretaker-dependant dyad, with other adults being able to opt into parenthood with her consent. The *FLA* thus rejects a strict formal equality approach based on bio-genetic ties in cases involving assisted reproduction. (A donor can, however, still apply under (*FLA*, 2011, ss 31) for an order declaring whether a person is a child's parent or not, should there be a dispute or any uncertainty. Thus, it remains unclear what reasons other than donation alone might generate legal parenthood for a donor.)

In the case of a conception via sexual intercourse, the *FLA* affirms bio-genetic paternity much more clearly. At birth, 'the child's parents are the birth mother and the child's biological father' (*FLA*, 2011, s 26(1)). The dyadic (hetero)sexual family is reinforced in this parentage rule for children born via 'natural' conception. A male person is presumed to be a child's biological father in several circumstances, including acknowledgement by him and the birth mother that he is the child's father. Thus, an autonomous mother who acknowledges a known donor with whom she has had intercourse in order to conceive will, under this law, face the prospect of him being presumed to be a legal parent. Parentage tests can be ordered if parenthood is contested and inferences drawn if a person refuses to comply (*FLA*, 2011, s 33).

British Columbia's law means that a single mother has more potential for autonomy if she conceives via assisted reproduction than if she conceives via sexual intercourse. In the latter case, the biological father may be deemed a legal parent. Single women who conceive via assisted reproduction are, accordingly, better protected under the new law than other mothers who try to parent without the bio-genetic father. As such, single mothers who wish to legally protect their chosen family form should use assisted reproduction with an anonymous donor. Otherwise, they risk a judge exercising discretion to declare that a known donor is sufficiently involved in a child's life to be declared a legal parent. In a climate that still over-emphasizes the need of children for fathers, that risk is real. Ironically, this system may discourage women from honouring a child's right to know who their parent is under the *CRC*.

6 Conclusion

The ability of women to exercise a greater degree of choice in relation to motherhood has been significantly enhanced over recent decades due to the widespread abolition of illegitimacy, increased labour force opportunities for women, the social and legal acceptance of alternative family forms, the availability of reproductive technologies, and the emergence of social networks for single mothers by choice. The Canadian SMCs who we interviewed especially demonstrated a confidence in their choice and the quality of their parenting that many mothers who parented alone in other times might not have shared. The choice to be an autonomous mother is, however, deeply relational and is structured and constrained in many ways, including by law. The enhanced status of bio-genetic fathers in the legal system and the continued normative preference for an opposite-sex, two-parent model place considerable pressure on women who attempt to choose single motherhood. For women to undertake single parenthood in the light of still powerful negative discourses takes courage.

Many factors that influence single mothers have proven stubbornly resistant to change and have played a role in constraining women's choices. The impact of familial ideology was particularly notable in judicial decision-making, but in many respects, the single mothers we interviewed were also influenced by familial ideology and the 'biological imperative'. The notion that children may be damaged if raised exclusively by a single mother continues to hold significant cultural power and is something that clearly influenced many women. Most felt some responsibility to ensure that their children were aware of the identity of their genetic fathers, even if they did not intend that the genetic father play a parental or familial role. Although they often used anonymous donors, due to concerns about their vulnerability to a legal system that might impose a legal father, many opted for open identity donors. Others would have preferred a known donor, but for their legal fears, so that their children could have the choice of knowing the donor.

While to some extent, a woman's decision to parent 'autonomously' certainly goes against the normative grain, her ability to make this choice may not be transgressive, but rather be quite contingent on her ability to conform to the expectations of neo-liberalism, for example, in establishing economic self-sufficiency. Such conformity in turn reproduces hierarchies among women along lines such as class and race. Specifically, it remains far easier for an economically secure, able-bodied woman to choose autonomous motherhood. Overall, until the conditions are in place whereby all women can choose to parent alone or with a partner or within an extended family, as she best sees fit, autonomous motherhood is not *per se* a transformative phenomenon.

Specifically, we need a legal system, and economic and public policies, that materially support the option of single motherhood, rather than marginalizing it or making it acceptable and possible only for those women who have the financial means to make it work on their own (Juffer, 2006). Moreover, while a relationship with a genetic father may be helpful financially and in terms of sharing care responsibility, law and society have been too quick to assume that these relationships are necessarily positive for both mother and child. Any requirement of contact between children and genetic fathers, based only on the genetic tie, can constitute an unwarranted intrusion on the ability of a woman to define the family within which she will raise a child. The best interests of children must be served, but these interests can be supported within a broader range of family forms than is often contemplated and neither a genetic father nor a father-figure are necessary for a child to thrive. Children are also entitled to family stability and the disruption of a child's existing attachment relationships in order to introduce a 'father' may be contrary to the child's best interests. As a feminist, I am committed to the notion that single motherhood should be legally and socially supported and that, overall, such supports will ultimately serve children's interests as well as enhance women's autonomy. In other words, women should be able to make the choice to parent alone without penalty and without concerns for their children in terms of essential supports, such as financial supports. This does not imply that women *should* make the choice to parent autonomously, or that men are not important to children's upbringing and welfare, but rather that the choice to be a single mother should be more available in relation to social and economic structures than it currently is.

7 Acknowledgements

This chapter is based on the arguments and findings made in a book by Susan B. Boyd, Dorothy E. Chunn, Fiona Kelly, and Wanda Wieggers (2015) *Autonomous Motherhood? A Socio-Legal Study of Choice and Constraint* (Toronto: University of Toronto Press), © University of Toronto Press 2015. The University of Toronto Press granted permission for use of the materials in the book. The author thanks her three co-authors of the book for their contributions and collaboration. Doro-

thy, Fiona, and Wanda conducted the interviews reported in the book and Wanda undertook the case law studies. The author is also grateful to Hannah Rawling for research assistance and to Fiona Kelly, Kirsten Scheiwe, Wanda Wiegers, and Claire Young for commenting on drafts. Readers may purchase the book from the UTP website: <https://utorontopress.com/ca/autonomous-motherhood-4>.

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Motherhoods and the Law

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1 Introduction

This paper proposes a family law in which *motherhoods*, as fluid kinship nodes, would replace the current single-static-status approach towards *motherhood*. Its contention is that the substitution of ‘mono-maternalism’ with ‘poly-maternalism’ (Park, 2013) would do more justice to the increasing fluidity of motherhoods in practice (also see Munt, 2013; Urry, 2000).

The concept of motherhoods is just one of the possible applications of a new recognition model for family formations that Croce and I are developing on the basis of assemblage theory and that we have dubbed ‘cont(r)actualisation’. Its theoretical foundations are illustrated in Swennen and Croce (2015) and Swennen and Croce (2017). ‘Cont(r)actualisation’, we claim, is a vehicle for people’s own transformative potential as law-users. Our ongoing project encompasses theoretically informed and empirically grounded research on multiple parenthood and on adult unions outside conjugal coupledom. This paper is limited to theoretical research on motherhoods. It will consist of four sections. First, the current static-status approach towards motherhood in continental family law systems will be elucidated. Echoing Collier and Sheldon (2008), I will then examine and provide insight into the ‘fragmentation of motherhood’. It will become clear that there currently exists a conceptual lag (Shearing and Wood, 2003) between the understanding of motherhood embraced by family law systems on the one hand and the multiple ways in which motherhoods are actually practised on the other. The current strategies used

by legislatures to grasp non-traditional motherhoods will be briefly presented in a third section. The shortcomings of those strategies can be avoided by using our model of ‘cont(r)actualisation’, which will be presented and applied to motherhoods in the final section.

2 Status approach

Family laws in continental law jurisdictions are organised along structural-institutional lines with three layers (Swennen and Croce, 2017). The first and foundational layer of this system is the status approach in family law (Halley, 2011; Müller-Freienfels, 2003; Willekens, 2003). Family law is designed around top-down, pre-defined legal classes and categories of family relationships whose formation, content and dissolution are governed by legal conditions that belong to public policy. As a consequence, they are impermeable to contractual freedom. This approach confers a civil status upon those who are allowed access to the status category, subjecting them to an indivisible and uniform bundle of rights and obligations. Such status has fixed and constant boundaries with regard to membership and content (Morgan, 2011).

The second layer is *civil registration*. Only public authorities – or other authorities recognised as such by public authorities – can confer civil status upon formal registration in a civil registry (on the origins of this system: Noiriél, 1993). Through registration, the civil status of a family relationship becomes legally effective both between parties and *erga omnes*. In addition to its legal effect, registration is also significant from a symbolic perspective because of the meaning of recognition that the persons concerned, as well as society at large, attach to the registration of a particular civil status (Lind and Hewitt, 2009).

The third layer is the *labelling* activity that connects family relationships and legal kinship nomenclature. Legal labels reflect how kinship relationships are (re)presented in state law and state policies. The labels indistinctively apply to any actual kinship formation that is categorised under the label (Morrison, 1989). The legal terminology conveys a socially negotiated meaning on who belongs to whom as well as on the content of their kinship relation (Gibbons, 1999). This allows individuals to position themselves within the kinship structure and reflects how people structure, practice and experience the kinship relations in which they are involved (Ould and Whitlow, 2011).

The conferral of status, registration and labelling have ‘performative effects’ as well as effects of ‘subjectivation’ (Fineman, 1995; Groupe de travail Filiation, origines, parentalité, 2014; Park, 2013). Family law produces, reproduces and structures individual and collective identities on the basis of their belonging to a model that ought to be upheld (Marella, 2011; Park, 2013). Registering a kinship formation under a particular label brings this formation into existence performatively by means of the exclusive bundle of rights and obligations that the law attaches to

it. Only in this way does a kinship formation become legally ‘real’ in both its senses (Oxford English Dictionary) – factual (Lat.: *realis*, from *res*) and royal (Lat.: *regalis*, from *rex*)—that is, in the realm of the King, or the one in power (Frye, 1983; Park, 2013). Dependent as it is on official endorsement, investment with a status serves as a connecting factor for broader access to, and greater visibility in, legal and policy frameworks (Moran, 2005; Williams, 2004). These effects are also at work at the margins of family law, on formations that ‘did not make it into the legal family’ (Halley, 2011, p. 90) and therefore remain invisible as entities in law and policy (Eichner, 2015) and, as a consequence according to the Law Commission of Canada (2001), in the public sphere in general.

As a family law category, motherhood is organised along those three lines of investment with a civil status, registration and labelling.

Leaving aside exceptional regulations on anonymous or discrete birth, the legal mother of a child in most continental law jurisdictions is the person who gave birth to the child after being pregnant. This standard almost reflects an “obsession” (Iacub 2004, p. 216) in these jurisdictions with parturition as the non-negotiable criterion for motherhood. Motherhood is understood as an indivisible bundle of parentage, parenthood and parenting rights and obligations and is conferred solely upon the one person who has given birth (see, for an example of an alternative, Bainham, 1999).

Motherhood is inescapably registered and labelled as such. The suffix *-hood* in motherhood refers to a quality, dignity, condition or rank that is achieved (Oxford English Dictionary) – or not. It provides political and social legitimation to the person who is labelled as the mother and conversely excludes any other party from the same or a comparable status (Swennen and Croce, 2015).

Particularly, with regard to the acts (or omission) of registration and labelling, continental legal systems have been able to make sense of additional persons’ aspirations to be recognised as *the* or *a* mother; this has resulted in the recognition, as co-resp. duo-mothers, of second female parents in the Netherlands and Belgium and in the proposal to introduce *Mit-Mutterschaft* in Germany (Arbeitskreis Abstammungsrecht, 2017).

3 Fragmenting motherhood

In contrast with family law’s simplistic definition of motherhood, motherhoods are actually practised and experienced in a multiplicity of modes. Different persons may actually assume comparable or different roles as mothers vis-à-vis the same child. This gives rise to the fragmentation of motherhood (*gespaltene Mutterschaft* or ‘split motherhood’). Four recent developments are worth mentioning (Swennen and Croce, 2017).

The first concerns the bifurcation of *biological* and *genetic* motherhoods (Groupe de travail Filiation, origines, parentalités, 2015).

On the one hand, legislation has confirmed that in case of medically assisted procreation, the *recipient* of ova (or any embryos created from them) is the mother of the child on the basis of parturition. The genetic link between the egg *donor* and the child remains without legal effect, other than the provision of information on the donor's identity in some jurisdictions. The priority of the birthmother over the genetic mother is in line with both their intentions.

On the other hand, however, the birthmother is the legal mother too in cases of gestational surrogacy on the basis of ova of the intentional/genetic mother. Only the gestational mother is regarded as the legal mother on the basis of parturition. The intention of the genetic mother is disregarded here. Her weak position seems in contrast with the ECtHR's case law on the legal significance of the genetic bond between the begetter and the child (2010, *Anayo v Germany*, § 56-62; 2011, *Schneider v Germany*, § 80-90) – albeit outside the context of medically assisted procreation. The Court has not yet had the opportunity to assess the position of the intentional/genetic mother (comp. ECtHR 2004, *Odièvre v France*, Iacub, 2004). Both European Courts however are reluctant to legally recognise the consequences of surrogacy (under the right to respect for family life), at least from the perspective of the intentional mother (CJEU, case C-167/12 *C.D.*, § 40, and case C-363/12 *Z.*; ECtHR 2014, *Menneson v France*, 2014 *Labassée v France*, 2016, *Foulon and Bouvet v France* and 2017, *Laborie v France*. More far-reaching: ECtHR 2017, *Paradiso and Campanelli v Italy*).

The second recent development is the further bifurcation of *genetic* (and *epigenetic*) motherhood (see already Velte, 1999). Massive attention hailed the 2015 adoption in the UK of Regulations enabling mitochondrial donation with a view to creating so-called three-parent babies. Interestingly, the donor of mitochondrial DNA is treated differently in these regulations than the egg cell donor. The child and the mitochondrial donor have access to each other's non-identifiable information in the relevant registers, but not to further identifying information that would be accessible were they considered genetically related persons. In continental law jurisdictions, legislatures have not yet dealt with this issue. It also remains to be seen whether creating embryos with DNA of more than two resp. three persons will be permitted in the future – the latter currently remains forbidden in the UK.

A third development is the increasing importance of *intention* in determining legal motherhood (Iacub, 2004) in the context of intended two-mother families. Legal parenthood of two women initially found admittance into legal systems through adoption law in many countries. In the early years of this legal practice, however, the person who gave birth remained on a pedestal in these systems and enjoyed an advantageous position compared with the adopter (Swennen and Croce, 2015). In subsequent years, various legislatures have introduced second female parenthood equivalent to the status of a father, thus maintaining the dyadic system and sacrificing the potential father's position (Antokolskaia et al, 2014; Coupet, 2010).

A fourth development is the accommodation of social motherhood, which can be defined as special ties that exist or are likely to exist between a child and a person who is or has been actually involved in parenting without having parental status (Swennen, 2019). As early as 1998, the Dutch legislature introduced full parental responsibility for one third party other than the two parents who was involved in parenting (art. 1:253sa and 1:253t NBW). In 2011, the German legislature opted for limited parental responsibility with the *kleine Sorgerecht* (§ 1687b BGB). It is remarkable that, even in these newly recognised legal relationships, the traditional family model remains in force: these additional-parent third party roles are limited to (former) partners of the two parents.

In summary, many types of links to a child may qualify a person as that child's mother in contemporary social practice, including biological, genetic, intentional and social links (comp. Arbeitskreis Abstammungsrecht, 2017). There is no longer a single negotiated social meaning of the label 'mother' (comp. Lind and Hewitt, 2009: not of father either). The legal label under which only one of these relationships is recognised as motherhood therefore does not reflect the social significance of motherhood. The recognition of only one mother for each child also prevents or erases the legal recognition of all other mothers, even if they also play a significant role in the child's life (Groupe de travail Filiation, origines, parentalité, 2014). Hence there is a conceptual lag between the 'law's families' recognised in black-letter family law and the actual families in which children are being raised (Diduck, 2008).

4 Current strategies

Different legislatures have applied different strategies to incorporate plural motherhoods. Those strategies, however, are far from transformative and disappointingly remain within the register of the sexual family (Fineman, 1995). As a consequence, the paradigm of sexual reproduction, though it is in some cases merely presumed or even fictional, limits parenthood to two persons that have (had) a sexual relationship and that (have) form(ed) a household—parenthood is hence dyadic, sexual and domestic. An enlightening application of that paradigm can be found in the blunt extension of the presumption of paternity to the mother's female spouse in the Netherlands and Belgium, as proposed for Germany too (Arbeitskreis Abstammung, 2017, pp. 70-71).

A first strategy employed by legislatures has been to extend the scope of existing civil statuses so as to include new motherhoods (for the UK: Smith, 2013). The Dutch Government, for example, expanded the legal definition of mother from 'the person who has given birth' to also include 'the woman who is married to or involved in a registered partnership with the birth mother and has consented to medically assisted reproduction using the semen of a donor with no parental aspirations' (art. 1:198(1)(a) and (b) Dutch Civil Code, my translation). The label moth-

er hence can refer to two persons. The Belgian legislature did not expand the definition of mother but created a new civil status of “co-mother” (art. 325/1 *et seq* BW). It copied and pasted the provisions of fatherhood (on the basis of marriage, acknowledgment or judicial determination) into new provisions on co-motherhood. The genetic basis for fatherhood is replaced with an intentional basis for co-motherhood. A child has either one mother and one father, or one mother and one co-mother. From a symbolic point of view, it is worth noting that the UK legislature has opted for the in-between category of ‘second female parenthood’ since the HFEA 2008, replacing fatherhood with female parenthood rather than an additional motherhood.

The advantage of this first strategy is that both the protective and symbolic functions of family law are fulfilled. A ‘separate but equal’ approach is avoided by granting a full label that acts as an endorsement vis-à-vis society at large, thus achieving an objective that cannot be reached by merely granting rights and obligations by analogy.

Still, this strategy has two main shortcomings. First, the legislature should be careful not to stretch the content of legal concepts beyond their socially negotiated meaning (Fineman, 1995), as an undesirable gap would then be created between the law and the actual practices it aims to regulate. Secondly, the performative effect of new static legal labels risks reducing the variety and pluralism of socially available kinship practices. The newly defined kinship label forces the persons that are now under its scope to either mimic or assimilate by adapting to the mould or else become legally invisible and unspeakable. Redefining kinship labels or creating new ones to include an ongoing practice risks excluding a variety of other ongoing kinship practices from the realm of law (Groupe de travail Filiation, origines, parentalité, 2014). This strategy would then paradoxically reinforce the existent structural-institutional design of family law, particularly if the traditional labels are recycled as templates for new ones (Aloni, 2014; McCandless and Sheldon, 2010).

A second strategy consists of legally recognising the so-called functional family by applying certain rights and obligations of formal kinship analogously to *akin* family practices (Schneider, 1992), but without creating an equal or even any new status. The legislature would thus engage with parental functions rather than with parental status (Coupet, 2010; Lind and Hewitt, 2009).

This strategy has already been applied in the Netherlands (and to a lesser extent in Germany) with regard to parental responsibilities and is proposed for future reforms as well. The German Arbeitskreis Abstammung (2017), e.g. advises the possible assignment of specific rights and obligations of parental responsibility to ‘social or genetic parents who are not the legal parents’ (my translation). For the Quebec Comité consultatif sur le droit de la famille (2015), even that would be a bridge too far: that legal system merely proposes the right of a child to an ongoing personal relationship with a former stepparent.

A few flaws detract from this strategy. First, creating mini- or *quasi*-civil statuses may create rivalry between hierarchical categories of parents (Groupe de travail

Filiation, origines, parentalité, 2014; Boone 2018 refers to ‘front-seat parents’ and ‘back-seat parents’). The absence of a symbolic parental status, replaced by a mere extension of all or several parental rights and obligations, would deny additional mothers a qualification as family *as such* and would reduce them to familial status–*would-be* parents rather than ‘real’ parents. They would not ‘wear the *-hood*’, so to speak. Secondly, partial legal recognition outside a ‘real’ civil status may deprive those concerned of certain benefits, leaving them worse off than if they had not been recognised at all – e.g. in the context of determination of social benefits on the basis of the parents’ income (Aloni, 2014). Thirdly, in this strategy, as in that described above, formal kinship serves as the template, and legal recognition of functional kinship is modelled after formal kinship by copying and pasting particular legal consequences. Thus, as in the first strategy, this strategy reduces the acceptable degree of variation in social practices. Legal recognition of the functional family may, therefore, actually impede the creation of new kinship networks (Aloni, 2014; Smith, 2013). Fourthly – and in contrast to the advantage of the first strategy – not granting a ‘real’ civil status would in any case constitute an exclusionary policy. ‘Legally, it is only half of an existence’ (Groupe de travail Filiation, origines, parentalité, 2014, p. 60, my translation). Such an approach would again reinforce the traditional family model and strengthen the perceived contrast between the ‘real’ mother and ‘other’ mothers. The attribution of parental status, therefore, remains important both legally and socially (Lind and Hewitt, 2009).

The third strategy, which is not to intervene by creating new legislation at all, is just as unwise. As kinship-in-action is continually evolving, this would enable kinship-in-action to continue to drift away from the different meanings of kinship-in-the-books. Accordingly, the law would fulfil its intended function of regulating and recognising existing relationship to an even lesser extent.

5 Cont(r)actualisation

A fourth strategy, of ‘cont(r)actualisation’, is able to preserve the protective and symbolic roles of kinship categories (thereto Griffiths, 2017; Schneider, 1992) whilst also allowing the persons concerned to shape the legal framework to fit their particular practices. In this strategy, family law could consist of allowing kinship categories to flexibly accommodate kinship-in-action such that the actors concerned become lawmakers themselves. It champions an understanding of the family as a malleable, open-ended assemblage in contrast to the rigid status approach currently embraced by family law systems and thus does justice to the increasing fluidity of family situations (Swennen and Croce, 2017).

This strategy draws on Park’s (2013) portrayal of postmodern kinship formations as a rhizome (comp. the portrayal of parenthood as a web by Smith, 2013). A rhizome is a horizontal stem from which new roots and leaves are produced that may form new connections. One of Park’s starting points for theorising

in this way is her personal narrative, in which her oldest, adopted daughter commutes between Park's home and that of her non-cohabiting female partner Claudia, her ex-husband and his new wife Anne, and her birthmother Trish. This atypical situation is plainly at odds with the normative conception of kinship as a solid order of family structures in which each generation enjoys a well-defined place (Swennen, 2019).

From a social-theoretical perspective, an interesting example of a rhizomatic model of 'queer assemblages' was developed by Puar (2007) on the basis of Deleuze and Guattari's definition of *agencement* in *A Thousand Plateaus* (translation by Massumi, 1987). Like assemblages, new kinship formations are rhizomatic formations that, 'unlike trees or their roots', connect 'any point to any other point', whilst their 'traits are not necessarily linked to traits of the same nature' (Deleuze and Guattari, 1987, p. 21). According to Puar (2007, p. 211), queerness itself is an assemblage, that is, 'a series of dispersed but mutually implicated and messy networks [that] draw together enunciation and dissolution, causality and effect, organic and nonorganic forces'. New kinship formations are non-queer in this sense. They share with assemblages a permeability, fluidity and dispersion that give them a nomadic quality (Collier and Sheldon, 2008; Park, 2013).

Kinship formations, as assemblages, require legal systems to take a radically different methodological approach in establishing rules and categories to govern kinship formations' dynamics. In that regard, Latour (2005) puts forward the idea of deployment as a model for following actors' movements and the traces they leave behind to understand how they *deploy* networks. Deploying is a way to emphasise the activity of social actors without aiming to make them fit any pre-existing categories.

It has been proposed that legal research should take stock of this methodological approach to help positive law make room for family assemblages that existing typologies fail to comprehend. The main virtue of this approach lies in the fact that it programmatically moves away from the objectivism and/or functionalism of the alternative strategies described above. 'Cont(r)actualisation' assumes law-users to be semi-autonomous producers of meanings within interactional contexts. The prefix 'semi' intends to do justice to the structure in which context social actors use both the law and their own jus-generative force (Swennen and Croce, 2017). Legal categories call on social actors to use them as instruments to arrange their ways of 'doing family' along the lines of pre-defined models (Smith, 2013). On the one hand, this pays due heed to people's agency, for it does not represent the actor as the unaware addressee of normalisation processes. On the other hand, it brings to the surface the law's recourse to an extant lexicon, inevitably anchored to existing institutions and their set of meanings (Swennen and Croce, 2017). In short, social actors become the source of their own classification through a re-definitional movement that intends to utilise legal categories to acknowledge social facts and to revise the categories to fit the facts. Emerging practices struggle to sneak into the interstices of legal recognition and visibility when conventional meanings and

models fail to account for what people do and how they feel when engaging in these practices.

In summary, cont(r)actualisation is a legal recognition strategy that opens the door to the creative imaginations of the actors involved in new kinship formations. It follows the connections created by actors themselves and does not impose on them preordained schemes that claim to define what they are doing, according to Latour's (2005) invitation. The law is called upon to trace and account for how law-users get in touch with one another and create points of contact and how they verbalise these contacts in ways that can be contractualised with recourse to a legal proxy. The addition of the 'r' intends to signify a movement from *contact* to *contract*—a formula emphasising the need for legal recognition and visibility of the concrete networks created by social actors as they try to break free of the limits imposed by kinship-in-the-books.

To achieve this recognition and visibility with regard to motherhood, legislatures should, of course, first strip the traditional family through desexualisation, pluralisation and nomadisation of parental status (Collier and Sheldon, 2008; Fineman, 1995; Groupe de travail Filiation, origines, parentalité, 2014; Lind and Hewitt, 2009). In other words, parental status need not be confined to one woman and one man, nor to any pair of two persons, nor to persons who have (had) a sexual relationship with each other, nor to (a) household(s). Uncoupling parental status from coupledness (Coupet, 2010) would allow legislatures to focus on the more fragile parent-child relationship and on the parents' relationships with each other apart from them being, or having been, a couple – e.g. in terms of financial solidarity with each other *as parents* (Comité consultatif sur le droit de la famille, 2015; Weiner, 2015).

Admittedly, recent governmental reform projects hardly augur well for such reform. Most far-reaching are the proposals by the Dutch Government Committee on the Reassessment of Parenthood (2016) to legally recognise multi-parenthood and multi-parenting and by the French Groupe de travail Filiation, origines, parentalité (2014) to introduce quadruple parental status. Both proposals, however, remain within the traditional family model in that they mainly cater to parental couples; their primary aim is to extend parenthood from the separated parents only to the separated parents and their respective new partners. The German Arbeitskreis Abstammung, by contrast, explicitly rejects multiple parenthood altogether. In Belgium, neither the Government (Belgian Federal Government, 2014) nor a Belgian Senate Commission on Institutional Matters (Belgian Senate, 2015) was able to come up with any proposal at all, contrary to what had been planned.

In the new 'cont(r)actualisation' model, motherhoods can be attributed and registered as civil 'mother' statuses available to various persons intended and agreed upon in a fluid and modular supportive legal system (Lind and Hewitt, 2009). The model proposes to step away from parental status as a monolithic status and to divide it into modules or nodes corresponding to its different constitutive parts. This should allow distribution amongst multiple mothers of any or all of

the different kinship roles or functions that make up formally fragmented parental status (Collier and Sheldon, 2008; Lind and Hewitt, 2009; Park, 2013). Parental status would hence be substituted by interchangeable parental roles (McCandless and Sheldon, 2010). The latter could even be labelled in a gender-neutral way, thus abandoning the dichotomy between mother/father or mother/co-mother (Groupe de travail Filiation, origines, parentalité, 2014; see, however, certain references to the danger of politics of sameness: Collier and Sheldon, 2008; Diduck, 2008; Fineman, 1995).

To identify the possible different nodes of parental status, lawmakers can start from the taxonomy proposed by Goody (1982) regarding the functions of parenthood:

- begetting and bearing;
- nurturing;
- educating;
- providing access to financial resources;
- endowing with a(n) identifying) status.

Godelier (2011) merges the latter two functions and supplements the list with the following:

- exercising rights over the child and, hence, liability for damage caused by the child;
- exercising authority and punishing the child;
- complying with certain prohibitions with regard to the child, of which the incest prohibition is the most important.

All of these functions are divisible from each other and could be distributed, and redistributed, between different persons – even from different generations (Godelier, 2011; Goody, 1982; Park, 2013). Differentiation would be possible between the parents in terms of their roles' significance for the (long-term) history and identity of a child (Lind and Hewitt, 2009).

Applied to motherhood (also see Swennen, 2016), the different mothers of a child can be accommodated in terms of several nodes:

- **N** The nurturing and **Ed** educating nodes. Nurturing and educating children are generally referred to jointly as parental responsibility and thus should be maintained as a container concept. Nurturing usually encompasses daily and urgent decisions, whereas education consists of important decisions regarding the child's residence, health, upbringing, formation and recreation and religious or philosophical choices (comp. article 374, § 2 Belgian Civil Code). Both aspects are related to contact with the child.

A daily and urgent decision-making power is already broadly accepted (on a contractual basis: Antokolskaia et al, 2014; Cap and Sosson; Groupe de travail Filiation, Origines, Parentalité, 2014) regarding the persons with whom a child resides and who actually take care of the child and thus includes, for example, those who have a partner relationship with a parent

(‘stepparents’). This is already an existing node in German law (*kleines Sorgerecht*). It need not be limited to a parent’s partner, however, nor to one single person. The activity of this node would anyhow be limited to the duration of the child’s residence with the person concerned, for example, in the case of co-parenting.

A separate node for decision-making power regarding education has sometimes been proposed as well. A Dutch report, for instance, refers to the case of a sperm donor to a lesbian couple whose role could be limited to (a symbolic presence in) important (phase of life) decisions (Antokolskaia et al, 2014).

Contact with a child should be dependent on pursuing the nurturing and educating functions. One should be careful to regard contact with a child as a function of the parent’s own right to respect for his private life, e.g. to know his or her offspring. At the same time, however, one can also be benevolent towards intentional mothers who undertake the work of parenting (Swennen, 2016, 2019).

- **F** The financial node. First and foremost, an obligation to maintain the child financially is required of persons, including mothers, who were involved in the parenting project but are not involved in the nurturing and educating nodes (comp. the “causer pays-principle” in Arbeitskreis Abstammungsrecht 2017 and the proposed compensatory parental allowance in Comité consultatif sur le droit de la famille, 2015). Donors in the context of medically assisted reproduction deserve exemption from maintenance obligations as a principle. Secondly, a maintenance obligation could also be upheld for the person with daily and urgent decision-making power, though this obligation would be limited to that power – e.g. to pay the costs related to an excursion with friends he agreed to. Thirdly, certain parenting costs could also be charged to the people who made certain important decisions regarding education; for example, the fees for a private school could be charged to the parent who decided that the child would attend that particular school.
- **En** The endowing node. One important way to provide children with a social status vis-à-vis parents is by registering the parent-child relationship in the civil status registers. These registers have an important symbolic and performative function for the persons concerned and the society at large (Groupe de travail Filiation, origines, parentalité). A twofold system can be conceived (also Antokolskaia et al, 2014; Groupe de travail Filiation, origines, parentalité, 2014; Mathieu, 2014). *On the one hand*, there should be a register of origins, including all persons that were involved in the begetting and bearing of the child, both on the basis of a genetic or biological bond and on the basis of a parenting project before birth (intention). Existing examples of this node are the recognition of a pre-existing bond of filiation on the birth certificates of adopted children in Quebec (art. 573 Que-

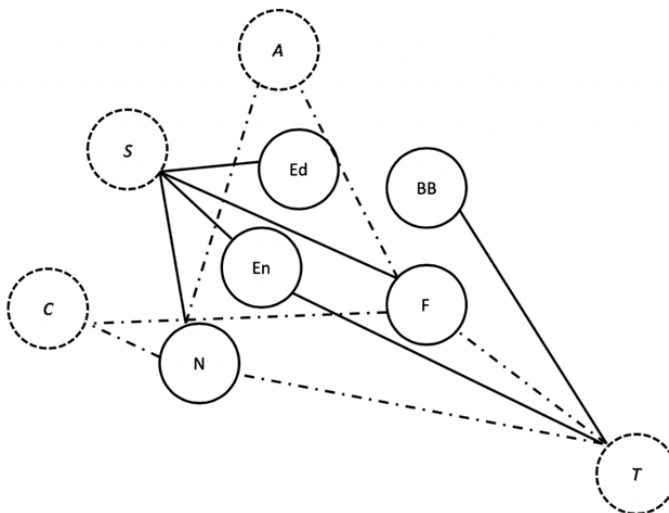
bec Civil Code) and the proposed status-independent judicial determination of genetic parenthood in Germany (Arbeitskreis Abstammungsrecht, 2017). Such a node could easily be extended to intentional motherhoods – e.g. so as to include a mother who consented to medically assisted procreation but did not take up any further role afterward. *On the other hand*, a parental register could contain all consecutive information about the persons who nurture(d) or educate(d) the child or are/were financially responsible for the child.

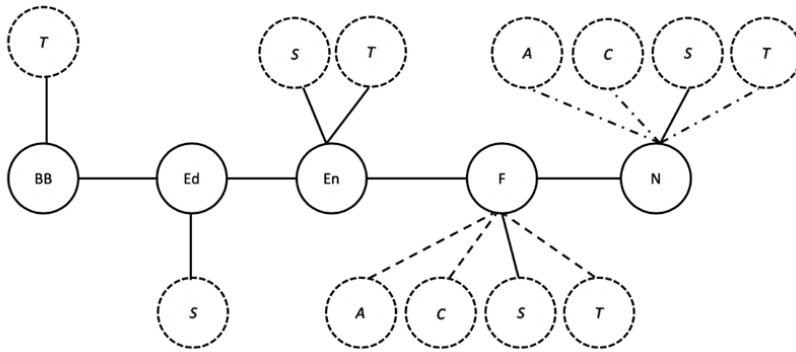
The child's name is also an important status symbol (Herring, 2013). The right to a choice between the mothers' names may, if applicable, relate to more than two parents.

- The additional functions of parenthood proposed by Godelier (2011) could also be revised as separate nodes, such as a liability node linked to the nurturing and educating nodes, or the extension of the prohibition of incest node so as to also include nurturing or educating mothers.

Instead of the state, the actors themselves should be permitted to assemble and reassemble those nodes (Lind et al, 2010; Park, 2013; Smith, 2013).

The litmus test of the proposed model could lie in its application to the abovementioned personal narrative of Park. **S** *Shelley* herself would qualify for all nodes except the begetting and bearing node. The child's birth mother **T** *Trish* would occupy the begetting and bearing node and, as her child was adopted in a semi-open adoption, she would also fulfil the nurturing node during her visits with her birth daughter and the financial node as concerns the related costs. Both **C** *Claudia* and **A** *Anne* would also fulfil those two nodes *mutatis mutandis*. As non-mothers, neither Park's ex-husband nor the child's begetter is included in the scheme (two representations are given of the same situation).





Illustrations by Frederik Swennen

The opportunities resulting from such a nodal approach, however, generate the risk of incomplete or inconsistent parental statuses (Weber, 2005). They might also endanger the best interests of the child (Boone 2018), which should be safeguarded by the state (Matthé, 2016). The proposed model therefore would not go so far as to make the law-users fully autonomous producers of law but rather would keep them as semi-autonomous producers.

Whilst I cannot necessarily endorse Schneider's (1992) arguments favouring the so-called channelling function of family law, some of its purposes justify maintaining a supportive legal framework consisting of the abovementioned nodes. A legal framework is particularly important with regard to the efficiency function of the law. In the absence of a 'menu of well-developed standard alternatives', law-users are expected to 'invent [social institutions] *de novo*'. When such a menu is available, in contrast, it gives third parties something to anchor to when predicting the content of their relations with certain family members. Both functions reduce the social costs of determining family relationships.

Pursuing the best interests of the child also justifies more than purely cont(r)act-based redressal. Family law should offer protection precisely *in loco parentis* when necessary (Brinig, 2000; Matthé, 2016). Yet, there is no reason to believe that this would be necessary more frequently under the proposed nodal approach (comp. Boone, 2018).

By no means would semi-autonomy come down to pouring new wine into old wineskins. On the contrary, the availability of pre-defined nodes would enable law-users to flexibly model or remodel their family lives through deliberation and innovation of the existing nodes and through their application to new situations (Schneider, 1992) whilst safeguarding the best interest of the child.

6 Conclusion

The law should accommodate nodal motherhoods crafted by the legal actors themselves according to the meanings and functions that they have negotiated according to their own thought and practice, even if these fall outside the scripts and patterns of traditional motherhood (Lind et al, 2010; Williams, 2004). In this way, the law can truly serve as a supportive regulatory framework for the norms by which people actually live (Lind, 2010). This approach echoes a perspective that ‘regards cultural institutions like the family from the vantage point of someone *within* a particular culture’ (Coupet, 2010). It approaches the fragmented and pluralised system of parenthood and social reproduction by larger kin groups than the nuclear family unit (comp. Goody, 1982).

Under a malleable, open-ended assemblage, each of the various forms of motherhood will become a ‘badge of uniqueness’ (Park, 2013, p. 2) rather than one of commonness. It will allow people to do away with the limiting power of common classifications on their imagined ways of living and being (Fineman, 1995; Iacub, 2004). It will do justice to the actual fluidity of, and within, motherhoods as blurred and morphing processes resembling rhizomes.

Yet, only a well-understood cont(r)actual model, in which the law-users play a central role within the framework offered by the state, would achieve a recalibration of family law to better fit actual family practices and perceptions. *On the one hand*, state law should be less invasive. It should not normatively pre-define limitative kinship categories and should step away from fixed meanings of kinship categories. Instead, it should offer a supportive legal framework with common categories that are, to some extent, empty signifiers whose applicability to kinship assemblages can be flexibly negotiated and personalised from the bottom up by the law-users themselves (Iacub, 2004; Lind and Hewitt, 2009). It should legally endorse those negotiated formations, which will then become recognised as ‘real’. This strategy would accommodate queerness in kinship formations (Park, 2013). *On the other hand*, cont(r)actualisation of kinship formations is not an end in itself, but merely a public instrument to achieve state legal recognition of those formations and to enable state law to keep pace with reality. The law-users would, therefore, be confined to the flexible supportive legal framework.

The cont(r)actual approach does not underestimate the risks of uncertainties and fuzziness that the elimination of pre-defined categories entails, nor does it ignore the best interests of the child, hence, the permanent need for the state to seek to recognise and regulate kinship formations. The state plays a role that no other public body is in the position to play, at least in the present political scenario. Cont(r)actualisation does not imply that the state simply registers and applies the rules of other normative formations as though it were a neutral arbiter. Instead, it would behove the state to carry out the task of making different models of kinship compatible and, at the same time, to reconcile this scenario with the complex machinery of the state.

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Multiple Parenthood: Towards a New Concept of Parenthood in German Family Law

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1 Introduction

In most legal systems, the law of parenthood is like a tandem on which only two parents can cycle. However, new forms of family life and new medical developments are challenging established norms of parenthood like never before. More and more people can become involved in the conception of children, their birth, and upbringing: surrogate mothers, sperm and egg donors, adoptive parents, and stepparents—to name just a few. Who, of all these people, are a child's parents and what kind of rights—if any—should they have in relation to the child? This article introduces a model to conceptualise and regulate multi-parenthood situations.

The article starts by discussing different cases in which more than two parents contribute to the conception and upbringing of a child. Examples are taken from German and ECtHR case law and the academic discussion. Recently, a number of books have been published that address the challenges of parenthood in German law (Plettenberg 2016; Reuß 2018; Sanders 2018). Issues concerning multiple parenthood were also discussed at the Conference of German Lawyers (*Deutscher*

¹ This article draws on my book *Mehrelternschaft* (Multiple Parenthood) published in 2018. I wish to thank Theresa A. Richarz, Harry Willekens and participants attending the conference 'Motherhood and the Law' for many helpful suggestions. All mistakes and inconsistencies, of course, remain my own.

Juristentag)² in 2016. The topic was also the subject of a working group at the Federal Ministry of Justice and Consumer Protection, which published a final report containing proposals for reforms (BMJV 2017). In March 2019, the same Ministry published draft legislation for a new parentage law as a basis for discussion (BMJV 2019). However, although this article draws on these discussions, knowledge of German law is neither necessary to benefit from this article, nor does the article take a comparative approach. German examples and the new draft law are used simply to analyse the problems of multiple parenthood that many legal systems are facing today (Part II).

Using the problems emerging from the discussion of multiple parenthood situations as a starting point, the article introduces a model with which to analyse the parent–child relationship. The article suggests that a legal concept of parenthood should be based on the different parental connections between parents and children. The article distinguishes between genetic, gestational, initiative, and social connections (Part III). This connection model is then applied to the different cases discussed previously (Part IV). Given that more than two people can establish parental connections with a child, the article suggests that there can be more than one father and mother with rights and duties as parents of a child. Rather than a tandem with two cycling parents, modern parenthood is more like a minibus on which a number of people can travel as possible parents. But who should be at the wheel? In order to provide a child with a stable family, rights and duties must be regulated in line with the child’s best interests and the rights of those people who have established a parental connection with the child. The article concludes with ideas for such a regulation (Part V).

2 The challenge of multiple parenthood

Most legal systems start with the ideal of the two-parent family: two married parents, a mother and father, together raise the children they have conceived through intercourse and to whom the mother gave birth. In this ideal world, all aspects of parenthood are the responsibility of two parents: one mother and one father.

However, the biological and social aspects of parenthood can be split between more than two persons. This makes it necessary to distinguish different aspects of parenthood in order to ascertain what significance the law does and should attach to each of them. This is not a new development. As long as the husband was assumed to be the father of any child his wife gave birth to, it was certainly possible to presume he was the father even if another man had fathered the child. Today, however, with the development of reproductive technology, paternity tests, and greater openness for and acceptance of unconventional family situations, not only can cases of multiple parenthood occur more often; they are also discussed more

² Expert opinion by Helms (2016).

openly. For example, if sperm and egg cells are donated or a pregnancy is carried to term by a surrogate, the question arises as to whether and under what conditions parental rights and duties can be formed without a biological connection, and as to whether and under what conditions a biological connection can be formed without parental rights and duties. This problem of ‘split parenthood’ is at the centre of the discussion on multiple parenthood today (Dutta 2016, p. 845, Dutta 2019).

These current challenges do not necessarily demand that more than two parents take on responsibility in a child’s life. However, the law must provide guidance about the roles different parents should play in that life.

2.1 Two fathers and a mother

If a child is raised by a man who is not the child’s genetic father, social and genetic fatherhood are split. This is nothing new. However, the legal position of the two fathers is still under discussion in many legal systems. Who should have which rights and duties in relation to the child: the man who raises the child with the mother, the man who fathered it, or both? The so called *Anayo case* brought this question before the European Court of Human Rights (ECtHR) and offers a good example of such a parental triangle with children in the middle.³ Mr Anayo had a relationship with a married woman. She became pregnant but decided to stay with her husband who then became the children’s (she gave birth to twins) ‘legal father’. As in most legal systems, in Germany the ‘legal father’ of a child is the man who is married to the mother at the time of birth (section 1592 no. 1 GCC),⁴ even though he is not necessarily the genetic father.

To understand what this means, it is necessary to take a brief look at the meaning of parenthood. Parenthood can be understood as either a question of law or a question of fact (Sanders 2018, pp. 7-16). English and Scottish law, for example, understand parenthood as a fact and presume the rebuttable fact of the genetic fatherhood of the husband.⁵ German law, however, as a typical civil law system, understands parenthood as an, in principle, unchanging legal status established by law of descent. All parental rights and duties such as the right to contact with the child (section 1684 GCC), parental custody (sections 1626–1698b GCC), and the duty to maintain the child (sections 1601–1615 GCC) follow from this status. The law of descent establishes the legal fatherhood of the husband. If the husband finds out later that the child is not his biologically, he does not cease to be the father in a legal sense, but has the right to contest paternity in a family court (sec-

³ ECtHR, 20578/07 (*Anayo v. Germany*), FLR 2011, pp. 1883; previous German decision: Court of Appeal Karlsruhe, 2 UF 206/06, NJW 2007, 60, pp. 922–924. The Federal Constitutional Court (FCC) declined to consider the following constitutional complaint without any reasons.

⁴ See for an introduction, Dethloff (2018, § 10, para 10–13); Bruder Müller (2018, section 1592 BGB, para 3).

⁵ See Privy Council, (*In the matter of the Baronety of Pringle of Stichill*) [2016] UKPC 16; Häcker (2017).

tions 1599 [1], 1600 [1] no. 1 GCC). In the Anayo case, the husband decided to raise the twins with his wife. Both husband and wife denied Mr Anayo any contact with the children. At that time, there was nothing Mr Anayo could do. If there is an established social and family relationship between the legal father and the child, the genetic father is barred from becoming the legal father (section 1600 GCC).⁶ Thus, in relation to the genetic father, German law protects the legal father who has taken responsibility for the child, irrespective of a genetic bond.⁷

However, the ECtHR held that a genetic father must not be barred completely from playing a role in the child's life, even though it did not require the genetic father to become the legal father.⁸ In section 1686a GCC, the German legislator introduced a compromise: a genetic father can ask for information about the child's life if providing such information is not harmful for the child. Moreover, the father can ask for contact with the child if such contact is beneficial for the child.⁹ However, the legal father is and remains legally responsible for the child, and, for example, is obliged to pay child support. If the intestate legal father dies, the child inherits from him, whereas the death of the genetic father has no effect unless he writes a will.¹⁰ This distinction between a 'rightful father' and a 'father with rights (and no duties)' is an interesting invention of family law. It allowed the German legislator to have the cake and eat it too: providing some legal acknowledgement of a multiple parenthood situation without formally abolishing two parenthood and the status of the legal father.

If the 2019 discussion draft law of the German Federal Ministry of Justice and Consumer Protection becomes law, this situation will change. Within the first six months of the child's life, the biological father can contest the legal father's position. If both the biological and the legal father have formed a social connection

⁶ According to the FCJ, this is still the case if not only the legal father but also the genetic father has established a social bond with the child: FCJ, D. f. 15.11.2017 - XII ZB 389/16, *NZ Fam* 2018, p. 76, with a case note by A. Schneider. The Court of Appeal Hamm, D. f. 20.07.2016 had reached another conclusion and allowed the genetic father to contest the fatherhood of the legal father: *FamRZ* 2016, p. 2135 with a case note by P. Reuß.

⁷ This protection is not complete, however, because the child and mother can contest fatherhood within two years of learning about the possibility that another man might be the genetic father. For the child, the limitation period does not start running before the 18th birthday.

⁸ ECtHR, 20578/07 (*Anayo v. Germany*) FLR2011, p. 1883; ECtHR, 17080/07 (*Schneider v. Germany*); ECtHR, 23338/09 (*Kautzor v Germany*) FLR 2012, p. 396; see about this case law in more detail, Löhnig and Preisner (2012).

⁹ See for the legislative history and reasoning of the legislator, *Entwurf eines Gesetzes zur Stärkung der Rechte des leiblichen, nicht rechtlichen Vaters* (Draft bill of the German Parliament), Bundestags-Drucksache 17/12163. Lower instance courts have decided a number of cases in relation to section 1686a GCC. Most cases deal with the question regarding under what conditions meeting a non-legal father can benefit a child's interest and whether the legal parents can decide that. A decision by the FCJ concerns Mr Anayo, who is still fighting for the right to see his children: FCJ, XII ZB 280/15, *NJW* 2017, 70, p. 160 with a case note by Löhnig. Other examples are Court of Appeal Brandenburg, 13 WF 303/17, *NJW Rechtsprechungs-Report Zivilrecht* 2018, 33, p. 583; Court of Appeal Jena, 3 UF 42/16, *FamRZ* 2016, 64, p. 1410; Court of Appeal Frankfurt, 6 UF 98/16 *FamRZ* 2017, 64, p. 307.

¹⁰ See for an interpretation for courts and litigants, Büte (2013), Clausius (2013), and Hoffmann (2013).

with the child, the father with the stronger bond shall prevail (BMVJ 2019, p. 11). The question how section 1686a GCC and the new law could be reconciled will be open for discussion.

2.2 Sperm donations

In the case of a sperm donation, an often anonymous genetic father becomes part of a child's history. As in the previous case, a man contributes to the birth of a child without going on to raise that child. However, the difference is that the sperm donor usually does not have the intention to act as a father. Again, the question at centre is which importance the genetic connection should have. If a child is born to a couple after artificial insemination, the mother's husband (sections 1592 no. 1 GCC.) or—if the mother is not married—the man who acknowledges the child with the consent of the mother becomes the legal father (section 1592 no. 2 GCC, sections 1594–1598 GCC).¹¹ In such a case, it is evident that these men are not the genetic fathers.¹² Thus, one of the partners becomes a parent despite the lack of a genetic connection. This establishment of an immediate legal parenthood with the mother's spouse or the person acknowledging the child at the time of birth is not unique to Germany, but also the law in Austria (see section 144 of the Austrian Civil Code) and England (see Human Fertilisation and Embryology Act 2008). In these legal systems, a second parent can also be determined by a court decision either through contributing to the conception by fathering the child or by consenting to the insemination of the mother.

Section 1592 no. 1 and 2 GCC German law so far establishes parenthood only indirectly via the marriage of the mother with or the acknowledgement of a man and not directly because of a connection established between the parent and the child. A direct connection is taken as the basis for parenthood in the case of section 1592 no. 3 GCC, according to which the genetic father becomes the legal father. As soon as the parental status is created, rights and duties follow. However, the establishment of the status can become difficult, because current law views marriage and acknowledgement in section 1592 no. 1 and 2 GCC as the basis for the father's parental responsibility and not a genetic connection between father and child.

A decision by the German Federal Court of Justice (FCJ)—the highest court for civil and criminal law cases—provides an interesting perspective: an unmarried man had agreed to the insemination of his partner. After the birth, however, the man refused to acknowledge the child. Therefore, he was not the legal father. Despite his refusal, the court held him liable for child support based on the agreement made with his former partner. The man's consent to the insemination could be

¹¹ See in more detail, Dethloff (2018, at § 10, para 15–27); Bruder Müller (2018, section 1592, para 4).

¹² Both the married and unmarried father of a child born using a sperm donation cannot contest their legal fatherhood if they have agreed to the insemination according to section 1600 (5) GCC.

understood as an ‘intentional assumption of parenthood’.¹³ Insofar, it could be compared to the adoption of a child.¹⁴ Thus, the court assumed parental responsibility without legal and genetic fatherhood simply because of his consent to the insemination.¹⁵ Whereas section 1686a GCC created a father with some rights and not duties, this court decision created a father with some financial duties but no rights.

In relation to the sperm donor, the question arises under which conditions there can be genetic fatherhood without parental responsibility. If the mother is neither married nor has a male partner, it is difficult to provide the child with a second parent. Therefore, as long as there is no second legal parent, a man who donates sperm can be made liable for child support as father,¹⁶ even if he had just wanted to help others to become parents. As in many other legal systems, the German legislator has become aware of this problem. Together with an official sperm donor register, a statute¹⁷ provides (section 1600d (4) GCC) that a sperm donor cannot be made the legal father. The purpose of this law was to secure the child’s right to know its genetic descent and to provide certainty for the sperm donor not to be held financially responsible for the child.

However, this law covers only sperm donated to and used in official sperm banks. Moreover, it does not provide a second parent to the child if the mother is neither married to a man nor has a male partner ready to acknowledge the child. This can be the situation if two women decide to have a child with the help of a donor—as Scottish conservative leader Ruth Davidson did with her partner Jane Wilson. However, even if a German mother is married to a woman, adoption is still the only way to co-motherhood.

After same-sex marriage was legalised in Germany in 2017, there was a discussion over whether a mother’s wife could become a parent just like a husband (Löhnig 2017).¹⁸ Although this outcome would be appropriate, the German FCJ held that this would require a change of the law by the legislator, because section 1592 no 1 GCC refers only to the ‘man’ and the ‘husband’.¹⁹

Hopefully, such a change might be introduced soon, if the new draft law of the German Federal Ministry of Justice and Consumer Protection is adopted. According to a draft section 1592 GCC, not only the husband but also the wife of the mother becomes the second parent at birth. Moreover, both male and female partners can acknowledge the child after a joint decision to use donor sperm. A ‘per-

¹³ FCJ, XII ZR 99/14, *NJW* 2015, 68, p. 3434.

¹⁴ FCJ, XII ZR 99/14 *NJW* 2015, 68, p. 3434.

¹⁵ At this time, the sperm donor could have been made the legal father according to section 1592 no. 3 GCC. This point was not discussed in the case, however. Apparently, the court did not assume that this possibility relieved the unwilling man of his responsibility.

¹⁶ Section 1592 no. 3 GCC.

¹⁷ Draft bill of the German Parliament, Bundestags-Drucksache 18/11291.

¹⁸ According to an analogous application of section 1592 no. 1 GCC: (Löhnig 2017).

¹⁹ See FCJ, XII ZB 231/18 *NJW* 2019, 72, p. 153.

son intending to be a parent²⁰ as the draft act puts it, who has later changed her or his mind, can also be made the second parent after a court decision just like a genetic father can be made the second parent by means of a paternity test (BMJV 2019).

Until then, it seems that a fiction of genetic descent from the legal father is at least one of the reasons for his legal parenthood. The current legal situation is also one of the reasons why fertility clinics in Germany still hesitate to provide artificial insemination to lesbian couples. Lesbian couples often use the sperm of private donors or sperm banks from other countries.²¹ Thus, if the mother's female partner refuses to adopt the child after birth, it is as difficult to hold her responsible for child support as a man unwilling to acknowledge the child. Just as in the case of the reluctant man mentioned above, courts have to construct agreements for child support between the former partners, because the law does not establish immediate parental responsibility.

This challenge might just be seen as evidence for the need to reform German family law after the model of other national solutions. Whereas legal reform is to be welcomed, the question raised in this article is how to conceptualise the involvement of donor, mother, and the mother's partner in a way that helps understand the reasons for an appropriate assignment of parental rights and responsibilities. In particular, what is the connection of the mother's partner that justifies the immediate assignment of parental rights and duties if it is not the fiction of the genetic fatherhood of a male partner? This question goes beyond sperm donation and also concerns egg donation and surrogacy.

2.3 Egg donation and surrogacy

As pointed out above, the split between a genetic and a social fatherhood was always possible. However, reproductive technology introduced a number of new opportunities for it, especially the split between genetic and gestational motherhood. As egg donors and surrogates, women agree to play a role in the conception and birth of children without the intention of raising them. Thus, they agree to act as biological but not as social parents in a multiple-parenthood situation. In case of surrogacy and egg donation, there is a split between genetic motherhood, gestational motherhood, and social motherhood.

Whereas sperm donation is allowed in Germany, both egg donation and surrogacy are prohibited. The situation is different in the United Kingdom, where both are permitted under certain circumstances. In Germany, the legislators' intent to avoid 'split motherhood' was the main reason for introducing these prohibitions.²²

²⁰ In German: *intendierter Vater, intendierte Mutter*.

²¹ As for example in FCJ, XII ZB 473/13 NJW 2015,68, p. 1820.

²² *Entwurf eines Gesetzes zur Reform des Kindschaftsrechts* (Draft bill of the German Parliament), Bundestags-Drucksache 13/4899, at pp. 51–52 and 82.

With the same intention, the legislator of 1998 also introduced for the first time a definition of motherhood into the German Civil Code of 1900:²³ Only the woman who gives birth to the child is the mother. The egg donor, who is the genetic mother of the child, has no legal position in respect to that child. She has to adopt the child (Dethloff 2014, p. 930), as German courts held in one case²⁴ in which a woman had donated an egg that was inseminated with the sperm of a donor. The pregnancy was then carried to term by the egg donor's partner. Although both women established a biological bond with their child, only one of them, the birth mother, was seen as the legal mother.

The FCJ reached the same conclusion in a case in which a mixed-sex couple had concluded a surrogacy agreement with a Ukrainian surrogate. Both sperm and egg came from the German couple. Despite the fact that Ukrainian law considered the genetic mother to be the legal mother, the FCJ, applying German law according to German private international law, decided that the Ukrainian surrogate was the legal mother.²⁵ Again, adoption is the only way to legal parenthood for the genetic mother. At least there is some hope that the adoption will not be denied. In another recent case, the Court of Appeal of Frankfurt agreed that another genetic mother could adopt her own genetic child who was also brought to term by a surrogate in Ukraine. The Court held that the German prohibition of surrogacy did not prevent the adoption despite a legal regulation against the adoption of children by the commissioning parents. In this case, constitutional law demanded that the child could be adopted by the genetic mother.²⁶

Whereas these cases highlight the different positions of the genetic mother and the birth mother, many egg donors—just like sperm donors and surrogates—contribute biologically to the birth without the intention of raising the child. The couple receiving the donation or concluding the surrogacy agreement wants to serve as the social parents of the child.

Often, it is not the two partners who agree to use reproductive technology who contribute biologically to the child's conception and birth. However, even the one who does not provide a sperm or an egg or who carries the pregnancy to term still agrees to the use of reproductive technology and intends to become the child's parent. Such a person can be the (infertile) male or female partner of a woman giving birth with the help of sperm donation or a member of the couple concluding a surrogacy agreement. Nonetheless, this person, who does not make a biological contribution, is still part of the 'parental project'.²⁷ Just as it is highlighted in relation to cases concerning sperm donations, the question arises how to conceptualise their position. Understanding and properly regulating the position of such

²³ *Entwurf eines Gesetzes zur Reform des Kindschaftsrechts* (Draft bill of the German Parliament), Bundestags-Drucksache 13/4899, at pp. 51-52 and 82.

²⁴ Court of Appeal Cologne, No II-14 UF 181/14, juris.

²⁵ FCJ, XII ZB 530/17, juris.

²⁶ Court of Appeal Frankfurt, No 1 UF 71/18, juris.

²⁷ ECtHR, 25358/12 para 151, 157 (*Paradiso and Campanelli v. Italy*).

parents is key to solving problems of multiple parenthood. The new draft law of the German Ministry allows the partner of the mother—male or female—who was a partner in the ‘parental project’ to become a parent immediately if donor sperm has been used. Surrogacy and egg donations remain forbidden, however, and there will not be any rights specifically for genetic mothers.

Unlike in the United Kingdom, surrogacy is forbidden in Germany, but more and more couples conclude such agreements abroad and bring the children home to Germany. In the most important surrogacy decision so far, the question put before the FCJ was whether the decision of a Californian court establishing immediate legal parenthood for the commissioning parents—the couple concluding the surrogacy agreement—violated fundamental values of German law and thus the German *ordre public*. The court refused this argument despite the fact that surrogacy is forbidden in Germany. At least in cases in which one of the commissioning parents was also the genetic parent of the child,²⁸ acknowledging the immediate parental position of the other partner had the same effect as the adoption of a stepchild. This did not violate the *ordre public*. Insofar, the court reached the same result as the ECtHR in two decisions of June 26, 2016.²⁹

Cases in which no genetic link was established between the commissioning parents and the child are less clear. In *Paradiso and Campanelli v. Italy*,³⁰ the ECtHR held that denying such commissioning parents the right to raise the child did not violate the convention. A mere ‘parental project’ was not enough to become a parent, the ECtHR held. The German FCJ has not yet decided such a case. It is interesting to note, however, that the German court argued that the immediate establishment of a legal bond with both commissioning parents acknowledged that they had taken responsibility for the child born by concluding a surrogacy agreement.³¹ This approach underlines the contribution of the commissioning parents to the conception of the child and their responsibility for that child, and it leaves room to rely on this argument in cases without a genetic bond.

2.4 Queer families

For some families, the involvement of more than two people in the conception of a child is planned as a way to joint multiple parenthood, and it is not used as a means to found a two-parent family despite biological limitations as in cases of surrogacy, egg donation, and sperm donation. More than two persons may plan a family together: often a same-sex couple and another person or couple of the opposite sex. In Germany, such families are discussed under the term queer family or

²⁸ FCJ, XII ZB 463/13, *BGHZ* pp. 203, 350.

²⁹ ECtHR, 65192/11, (*Menesson v. France*), *NJW* 2015, p. 3211 and ECtHR, 65941/11, (*Labasse v. France*), *NVwZ* 2015, p. 879.

³⁰ ECtHR, 25358/12, (*Paradiso and Campanelli v. Italy*) para 206–216.

³¹ FCJ, XII ZB 463/13, *BGHZ* pp. 203, 350. para. 60. See for a discussion of the decision, Sanders (2018, pp. 238–240).

Regenbogenfamilie (rainbow family). In such a case, multiple parenthood is created and lived openly and intentionally. However, because German law does not allow legal multiple parenthood, some members of the queer family will not have legal rights in relation to the child but will depend on the good graces of the legal parents.³² The draft law of the Federal Ministry of Justice and Consumer Protection will not change this situation. It rather states that legal multiple parenthood would be too complicated (BMJV 2019, p. 2).

2.5 Adoption and stepparents

Many children today grow up in stepfamilies.³³ In stepfamilies, but also in the case of adoption, a child is raised by a person with whom no biological connection has been established. Unlike the couple concluding a surrogacy agreement, however, such parents are not involved in the conception of the child, and only get to know the child later. Stepparents are not a new development. However, whereas in earlier centuries, a stepparent took the place of a deceased parent, stepparents today often build a relationship with a child whose original—usually biological—parents are both still alive but have separated. Despite the fact that stepparents often play an important role in the emotional and economic support of their stepchildren, in Germany, they usually do not have parental rights or duties. Only the spouse of a parent who does not share custody with the other legal parent has the right to make certain everyday decisions.³⁴ If stepparents separate, the former stepparent can ask for visitation rights (section 1685 GCC). Outside these rules, stepparents do not have a formal position under the law.

This can be changed by adoption. However, because German law sticks to the principle of two parenthood, adoption of a minor requires cutting off all legal ties to the original parent. Stepparents rarely take such drastic steps. Recent research also shows that it is in the child's best interest to build and sustain a stable relationship with both stepparents and biological parents (Walper et al. 2016).

2.6 Open questions

In all the cases depicted above, more than two persons are involved in the conception and/or upbringing of a child: some provide the genetic material, one carries the pregnancy to term, and some agree to the use of reproductive technology in order to start a family with their partner. And once the child is born, adoption or the forming of a stepfamily might still bring other people into the child's life. These different contributions challenge established concepts of parenthood and

³² Because parents have the right to determine who has contact with their child, the child's will remains legally irrelevant for a long time.

³³ About one million children; this affects about ten percent of families with children in Germany, see Sanders (2018, p. 257).

³⁴ So called *kleines Sorgerecht* [secondary custody].

require a discussion on the bases of parenthood. What is parenthood and who are a child's parents anyway?

3 The parent-child relationship disentangled

Lawyers, especially civil lawyers who see parenthood as a legal status, discuss parenthood in both a legal and non-legal way. When debating parenthood in a non-legal sense, they discuss which facts justify calling a person a parent. What kind of connection must have been established between a parent and child? Having given birth to the child? Genetic parentage? Figuring out math problems together?³⁵

Parenthood in a legal sense is established when certain legal rights and duties are attached to it in relation to a child because of certain parental connections. The way this is done varies between different legal systems. In German law, as in most civil law jurisdictions, parenthood is not understood as a natural fact as in English and Scottish law (*In the matter of the Baronetcy of Pringle of Stichill* [2016] UKPC 16; Häcker 2017), but as an—in principle unchanging—legal status (Sanders 2018, pp. 11-16; Wanitzek 2002, p. 152). However, as different as these approaches may be, certain rights and duties are assigned at birth according to general criteria such as biological descent, social circumstances, and presumptions (Helms 2014, p. 226). The law of parenthood builds on the fact of certain non-legal connections between a child and an older person and then transforms these connections into legal relationships.

In working towards a framework for discussing parental rights, the next step is therefore to disentangle the different parental connections. Distinguishing between the different connections between a child and various possible parents enables us to discuss the different interests involved in a more structured way.

³⁵ Example used by Herring (2015, p. 394).

I shall start the discussion with a symbolic picture I drew to illustrate different parental connections. This picture does not reflect German law, but attempts to structure parental connections irrespective of the parental rights and duties in different legal systems.

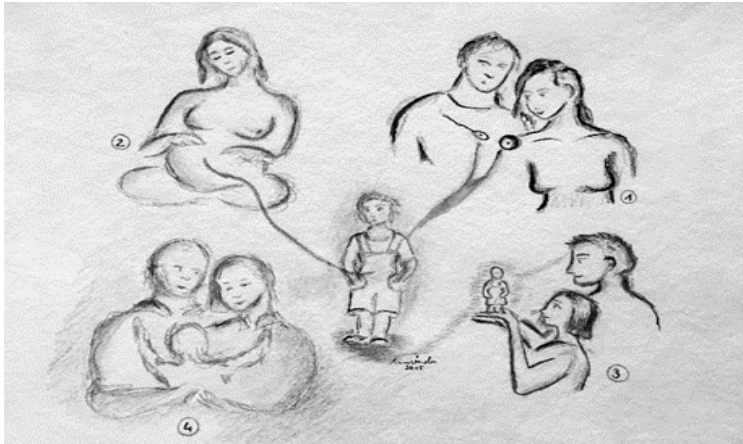


Illustration by Anne Sanders

In the middle, of course, is the child. Seven possible parents are connected with the child in four different ways. There are the ‘genetic parents’, a man and a woman (1); the ‘gestational parent’ or ‘birth mother’, the woman who carries the pregnancy to term (2); what I call the ‘initiative parents’ who cause the child’s conception (3); and finally the ‘social parents’ who raise the child (4). It is important to note that these parents are not necessarily different persons, but could also illustrate different functions of two persons who, in the spirit of the picture, have multiple connections with the child. Such is the case with the traditional couple having sex and conceiving a baby who is born by the woman and raised jointly by the couple. Whereas, (so far) by nature, the biological contribution and thus the sex³⁶ of the genetic parents and the gestational parent matters, this does not matter for initiative parents and social parents. Therefore, the initiative and the social parents in the picture could be same-sex couples.

³⁶ This word is used to focus on the biological contribution of a sperm, egg or pregnancy, not on the gender identity of a parent. There have been cases in Germany in which the FCJ had to decide whether a trans person who gave birth or provided sperm could be registered as the child’s father or mother according to his or her gender identity and registered gender, or whether this person had to be registered as mother or father according to the biological contribution to the conception and birth of the child. The FCJ decided in favour of the latter. See FCJ, XII ZB 660/14, *NJW* 2018, 71, p. 471 and XII ZB 459/16, *NJW* 2017, 70, p. 3379. This article will not discuss this point more fully. While acknowledging the importance of accepting a person’s gender identity also in parenthood, in order to make reading easier, this article will use the terms mother and father in connection with their biological contribution to the child’s birth in a less gender inclusive way.

3.1 Genetic Parenthood

First, there is the genetic connection. The persons whose sperm and egg are involved in the conception of a child will be connected to this child in the most basic way for the rest of their lives. They provide the genetic material for the child's creation. The degree to which genes ('nature') predetermine the life of a person is still in many ways unclear in relation to the circumstances of a child's growing up ('nurture'). Future research might bring increasing clarity, but there is, no doubt that the genetic material ('nature') does exert some influence on a person's appearance and abilities. The genetic connection between the genetic parents and the child corresponds with the child's interest in knowledge of her or his own genetic origin.³⁷ Moreover, it might be argued that genetic parents also have a right to know who is descended from them, even though one might argue that anonymous donors of egg and sperm cells may have waived their rights to such information.

3.2 The gestational parent – the pregnancy connection

Second, there is the connection between the person who carried the pregnancy to term and the child growing in her womb. I will call this the 'pregnancy' or 'gestational connection'. The woman giving birth was traditionally seen as the mother: *mater semper certa est*. As long as egg donation was not possible, the birth mother was always the genetic mother. By the 1980s, this situation had changed. A surrogate could carry a child for the genetic mother. Without a statutory definition of motherhood, German scholars debated over who was the mother of such a child (Coester-Waltjen 1986, 1992; Gaul 1997): the surrogate or the egg donor? Delegates at the Deutscher Juristentag, the biggest German lawyers' congress, voted in favour of introducing a presumption that the birth mother was the child's mother. However, the genetic mother should have the right to contest the legal motherhood of the birth mother (Beschlüsse des Deutschen Juristentags 1992), as today in Greece. However, in 1998, focusing on the unique physical and psychological connection of pregnancy, the German legislator prescribed that irrespective of genetic descent, only the birth mother could be a child's legal mother.

For someone who is not a trained scientist, evaluating the relationship between the birth mother and the child is difficult. Research is still only just beginning, and far more studies need to be undertaken to understand pregnancy and its effects on a child's development more fully. Therefore, everything that is said here must be taken with great caution and might need to be revised at some point. It seems that this relationship lies somewhere between genetic parenthood, which provides the genetic material for the child ('nature'), and social parenthood, which supervises the development of this material in the outside world ('nurture'). There is much

³⁷ FCC, 1 BvL 1/11, 1 BvR 3247/09 *NJW* 2013, 66, p. 847; FCJ, XII ZR 201/13, *NJW* 2015, 68, p. 1098, with a case note by Löhnig.

literature on the many ways in which the physical and mental condition of the woman influences a child's development. After the second trimester, a child hears the gestational mother's voice from inside the womb, feels her heartbeat, tastes her food, and experiences the environment largely through her (Medina 2014, pp. 29-38). The pregnant woman's behaviour such as her diet, her fitness, and the kind of stress she experiences influences the child's mental development (Medina 2014, pp. 40-51). Negative stress, especially caused by feelings of helplessness, can seriously damage a child's mental development.³⁸ Moreover, according to one study, the connection the pregnant woman feels with the child in the womb seems to influence the relationship with the child after birth. Niederhofer (2006) interviewed 121 pregnant women about their feelings of attachment to their child. He studied the quality of the mother-child attachment six months and six years after birth and concluded that there was a high correlation between a mother's feeling of secure prenatal attachment and a secure attachment with her child until school age. Moreover, women who experienced ambivalent feelings or avoided attachment to their child in pregnancy more often developed an ambivalent attachment or even a relationship in which they avoided attachment with their child until school age (Niederhofer 2006, pp. 30-31). This study seems to indicate that the perceived relationship between a mother and her child before birth will continue in many cases after birth. However, these studies do not say that the birth mother is the only person who can care for the child.

3.3 Initiative parents

A person can also be connected to a child because she or he has caused the conception of that child. If a man and a woman have sex and a child is conceived, conception is caused by the couple's behaviour. Even if people have sex using contraception, the causal link is established. If a child is conceived through a sperm or egg donation, however, other people come into the picture. One of the most challenging problems of multiple parenthood is to analyse the position of those persons who agree to the use of reproductive technologies without having their own biological connection. I suggest that such persons establish a parental connection as 'initiative parents' because they—with their partner—initiated the conception of the child. These initiative parents, who agree to an artificial insemination or who conclude a surrogacy agreement, establish a causal or—as I call it—initiative connection with the child. Without their taking the initiative, the child would not have been born. In my drawing, the initiative parents are marked in blue.

Even though 'initiative parenthood' is a new term that I have formulated, its basis can be detected in statutory law and case law not only in Germany. In Austrian and English law, the spouse or civil partner of the woman who gives birth be-

³⁸ See studies reported by Medina (2014, pp. 45-47) and Sanders (2018, p. 291).

comes the child's second parent right away. If the partner has not agreed to the insemination, however, she or he can contest the position of the second parent. I submit that the initiative link is at the basis of these legal rules that give automatic parenthood to the partner of the mother. The old rule that the husband is presumed to be the father is justified today not just because of the genetic connection that the husband is assumed to have established. The presumption is also justified because of a possible initiative connection no matter if established through 'natural' conception or by consenting to the use of a donor sperm. Even though German law has yet to go as far as Austrian and English law, it assumes that through consent to artificial insemination, fatherhood can be made immune to contestation (section 1600 (5) GCC.). Moreover, the FCJ in two decisions depicted above, one on surrogacy³⁹ and the other on the duty of a boyfriend who had agreed to the artificial insemination of his girlfriend,⁴⁰ used the initiative link as a justification to establish parental responsibility. In the surrogacy case, the court argued that by initiating the conception of the child by concluding the surrogacy agreement, contacting the egg donor, and organising the necessary reproductive treatment, the commissioning parents had established responsibility for the child. Describing the commissioning parents as initiative parents, it is submitted, makes it possible to conceptualise this contribution.

Initiative parenthood is established by persons who cause the conception of a child. However, not every person whose actions in some way caused the birth establishes such a connection with the child. A nagging mother in law who wants a grandchild might finally convince a couple to start a family, but does not want to become the child's mother this way. A male doctor performing artificial insemination likewise 'causes' the conception of a child but also does not undertake his actions in order to become a father himself but to help other people become parents. In such a situation, the intentional initiation takes precedent over the actions of other people, including sperm and egg donors and doctors helping the conception. For this reason, these kinds of parents are often called 'intentional parents' or '*Wunscheltern*' (wish parents) in the discussion.

Nevertheless, the initiative connection should not be confused with the intention to become a parent. The intention to become a parent through acknowledgment or adoption is an important way to establish legal parenthood. In their model family code, Schwenzer and Dimsey (2006) introduce the idea of intentional legal parentage established after birth with the consent of the birth mother. However, at this point, my article analyses connections between a child and possible parents that exist without legal recognition. This does not mean that the intention to be a parent is immaterial for a parental connection. This will be discussed later in relation to the question whether parental rights and duties can be waived. However, the initiative connection is not described adequately through the intention to be-

³⁹ FCJ, XII ZB 463/13, *NJW* 2015, 68, p. 479, at p. 481, *BGHZ* pp. 203, 350.

⁴⁰ FCJ, XII ZR 99/14, *NJW* 2015, 68, p. 3434.

come a parent. This can be explained by comparing the connection of initiative parents with adoptive parents. As long as the adoptive parents have not met the child they adopt, their wish for a child is a general wish. Even if the adoptive parents meet and wish to adopt a specific child, they have not conceived it. Initiative parents, however, have caused the conception of a particular child. If they consented to artificial insemination or surrogacy, they did so because they wanted to be the parents of this particular child just like biological parents who fulfil their wish for a child through intercourse. Both do more than wish. Their wish becomes flesh, one could say. Or, more precisely and less biblically, they make their wish become flesh. And it is from these actions and not from their wishes that responsibility comes for the child they have brought into life. This responsibility, I suggest, is or should be at the heart of assigning parental rights and duties to male or female partners of the mother.

3.4 Social Parents

Fourth, there is the social connection between the persons who take care of the child as parents in daily life. Children are born ‘unfinished’. Unlike other animals such as horses, which can walk on their own soon after birth, children require years of intensive parental care to develop (Medina 2014, pp. 49-50). Insofar, pregnancy is only the first part of a child’s development that is continued through parental care for the child after birth. Taking care of and educating a child is not something only parents can do. In fact, it is often the case that a great number of people—teachers, doctors, aunts, uncles, grandparents, neighbours, and nannies—influence the development of a child in a great many ways. However, those people who take care of the child because they are the parents take a unique role in a child’s life. They nurture children and give them the care and education they need.

Social parenthood is highly regarded and protected in many legal systems. In German law, a social connection between the legal father and the child can exclude the right of a prospective biological father to contest the fatherhood of the legal father (section 1600 (2) and (3) GCC). Moreover, social parents such as the spouse of the mother or father of a child can receive some minor rights to take everyday decisions in relation to the child they live with (section 1687b GCC, section 9 *Lebenspartnerschaftsgesetz*, Civil Partnership Act).

4 Challenges re-examined

4.1 The traditional case

Let us assume that a man and a woman want to have a baby. The child is conceived through intercourse (initiative connection) with the sperm of the man and the egg cell of the woman (genetic connection). The woman carries the child to

term (pregnancy connection). The child is born and grows up with the man and the woman who take care of her (social connection). In this case, the woman has four connections with the child; the man, three—both the maximum number of connections. The picture is much more complicated for the challenges modern family law faces today.

4.2 The Anayo case: two fathers and a mother

In the Anayo case decided by the ECtHR, a man had conceived twins with a married woman who later decided to raise the children with her husband. In such a case, the woman establishes a fourfold connection to the child: initiative, genetic, gestational, and social. The husband has established only a social connection with the child; whereas Mr Anayo has an initiative and genetic connection.

4.3 Sperm donation: initiative fathers and mothers

Let us now turn to the case of the unwilling father who denied acknowledging his girlfriend's baby despite having consented to her insemination with a donor's sperm.⁴¹ The German court⁴² interpreted this consent as a wilful assumption of parental responsibility. In English and Austrian law, parenthood is established immediately under such circumstances. The connection model explains why. The mother has established the maximum fourfold connection with the child (initiative, genetic, gestational, and social); the unknown donor, one (the genetic connection); and the consenting man, another one (the initiative connection). It is submitted that this initiative connection justifies the man's responsibility for the child he helped create. The situation would be the same if the mother's partner would not have been a man but a woman who had agreed to the insemination of her partner. No matter the sex of the consenting partner, it is their initiative connection established through their role in the child's conception that justifies holding them responsible for the well-being of that child. As pointed out above, so far, Germany law distinguishes between cases of same-sex and mixed-sex married couples. However, the new German draft law builds on the rationale of initiative parenthood when assigning parental rights and duties to the partners who consented to the mother's insemination (BMJV 2019, p. 2). The draft speaks of 'intended parents', however, and this focuses more on the intention rather than on the causal contribution to the child's conception.

If a woman in a lesbian partnership is inseminated with the consent of the other—as in the case of Ruth Davidson and her partner—both women establish initiative parenthood. If one partner also donates an egg and the other partner carries

⁴¹ FCJ, XII ZR 99/14, *NJW* 2015, 68, p. 3434.

⁴² The court also considered section 1600 (5) GCC stating that fatherhood created through the man's consent to the artificial insemination of his partner is immune to contestation. The consent to the artificial insemination cannot be revoked.

the pregnancy to term,⁴³ both women establish an equal number of connections with the child: one of them, the initiative, genetic, and social connection; the other, the initiative, gestational, and social connection. In these cases, when acknowledging the number of connections the partners have, it is especially problematic that the genetic mother cannot be recognized by German law other than through an adoption procedure.⁴⁴ Whereas this adoption of the spouse's and civil partner's child is open only to the spouse and partner, it is a burden that the legal recognition of the parental connection requires an administrative procedure. Moreover, if the mother dies after birth before agreeing to the adoption or if the partner has a change of heart, the legal parental connection might not be established at all.

In all these cases, if a sperm donor is used who does not want to be the father himself, this donor establishes only a genetic connection.

4.4 Queer family

In a queer family in which all parties concerned agree that the child will be raised by all parents, all parents involved establish initiative and social connections. Moreover, two genetic and one gestational connection are established with two or even three of the partners.

4.5 Surrogacy

In the surrogate case,⁴⁵ discussed briefly above, the surrogacy agreement was concluded between a male couple and the surrogate. The sperm of one of the men was used together with the egg of an anonymous donor. The genetic father thus established two connections with the child (genetic and initiative)—and then three after establishing a social connection. His partner established only one, the initiative connection and then a second one with the social connection. The egg donor and the birth mother each established only one connection with the child. The birth mother and the egg donor had both agreed not to have any rights to the child. This fact and maybe also the number of connections would explain why the FCJ allow the recognition of decisions assigning legal fatherhood to the commissioning couple in cases in which at least one of them has a genetic connection with the child.

5 Who are my parents? And if yes, how many?

The connection model illustrates that people can contribute in three different ways to the conception and birth of a child. Whereas biology plays a role in the case of genetic and gestational connections, parental connections can be established by

⁴³ Court of Appeal Cologne, II-14 UF 181/14, *NZ Fam* 2015, 2, p. 936.

⁴⁴ Court of Appeal Cologne, No II-14 UF 181/14, *NZ Fam* 2015, 2, p. 936.

⁴⁵ FCJ, XII ZB 463/13, *NJW* 2015, 68, p. 479, with a case note by Heiderhoff, *BGHZ*, pp. 203, 350.

people of different genders in different family situations. I suggest that all people who contribute to the conception and birth of a child are parents because they give life to the child. Being a parent in this way means bearing responsibility for that child. Social parents have already established the relationship with the child that every child needs.

Distinguishing between different parental connections in this way raises the question of the relation between the different connections and whether there is a hierarchy between them that would allow us to assign rights to those parents who are higher up in the hierarchy. Although this question is highly important, I shall start with the assumption that every person who has established a connection with the child must be considered a parent. Assigning rights and duties in their relationship with the child depends on the interests of the child and the parents (see section V.1). Second, I shall argue that parents who do not want to take on rights and duties in relation to a child can waive their rights and duties as long as the interest of the child is taken into account. This is nothing new; the law allows it in the case of sperm donation and adoption (V.2). In many cases, possible conflict in multiple parenthood situations can be avoided in this way. Third (V.3), I shall discuss situations in which more than two parents want to take on responsibility for a child. With an eye to human evolution, I argue that this is not necessarily harmful for the child. Fourth, I shall discuss how more than two parents can be involved in a child's life (V.4). There is no problem if all parents agree and get along. However, the law must provide solutions for situations in which there might be conflict that could be detrimental for the child. I suggest that only parents who have agreed to cooperate in a way that enables them to reach a multi-parenthood agreement approved by a family law court should be allowed to act as parents with equal rights and duties. If parents cannot reach such an agreement, two parents should act as main parents who take all decisions for the child. Other parents do not have to be excluded from the child's life completely, however. They can act as deputy parents with minor rights and duties.

But who shall be the main parents? At this point, the question of a hierarchy of the different parental connections comes into focus (V.5). I submit that if a social connection between a parent and a child is securely in place, the law must accept that. Thus, a secure social connection can be said to be at the top of the parental connections. Therefore, the question arises as to who among multiple parents who have contributed to a child's conception and birth should become main parents at birth and thus be placed in the position of building a social connection. I submit that the number of connections a parent has established with the child at birth should be a factor for a legislator assigning parental rights and duties. Moreover, if she does not waive her parental rights and duties, the birth mother should be at the centre, because she has already established a prenatal connection with the child. She and her partner are simply there at the moment of birth and therefore best equipped to take on immediate responsibility. Moreover, there is a high probability that these persons have established the highest number of connections with the

child. Thus, it can be said that among the connections established at the conception and birth of the child, the birth and pregnancy connection is the most important. However, regardless of whoever become main parents, the genetic connection remains important to guarantee a child's right to know her or his genetic origin.

5.1 Rights of children and parents

When regulating multiple parenthood, the interests of children and different parents must be taken into account. In weighing these different interests, I shall draw on German constitutional law that has a fundamental influence on German family law. This is not the same in other countries, but the constitutionally framed arguments of the German discussion might help bring the interests concerned into focus.

The child is the weakest party and her or his interests must be at the centre of attention. First, a child needs parents who take care of her or him and provide the love, shelter, and education needed to develop into an autonomous, happy adult.⁴⁶ This is the social component of parenthood. Therefore, when formulating rules concerning parenthood, the legislator must allow that the people who assume the parental role are—in general—those most likely to provide such parental care and education. This starts, of course, with the person who carried the pregnancy to term, gave birth to the child, and made decisions affecting the child during pregnancy—especially not to have an abortion. German law also fulfils this aim currently by assigning fatherhood to the man who took social responsibility by acknowledging the child or the man who is married to the mother.

Second, children have the right to know their origin. Such an interest of the child can be recognised as being equally strong in relation to either a sperm donor or an egg donor. In both cases, they provided the material for the genetic origin of the child. The information regarding who are the genetic parents is not only important for the child's identity but can also help in avoiding a sexual relationship with a close blood relative or learning about potential genetic diseases. Like all rights, this right must be balanced with the rights of other people—for example the donor's interest in privacy.⁴⁷ At least in those cases in which there is no interest of the egg donor in remaining anonymous, as, for example, in the case of the lesbian couple who used the egg of one partner while the other party carried the pregnancy to term, this information should be registered officially.⁴⁸ In cases of anon-

⁴⁶ The German constitutional court conceptualises this interest as a human right under Article 2 (1) in conjunction with Article 6 (2) of the Basic Law setting out the state's obligation to watch over the care and upbringing of children as the natural right of parents and a duty primarily incumbent upon them (*Recht des Kindes auf staatliche Gewährleistung elterlicher Pflege und Erziehung*); FCC, 1 BvL 1/11, 1 BvR 3247/09, pp. 133, 59, 73-77, para 40-46. See also Britz (2014).

⁴⁷ See a case addressing the right of a child to demand that the mother reveals the father's name: FCC, 1 BvR 409/90, 1724/01 – No. 24, pp. 364, 367-369-370, *BVerfGE* pp. 96, 56.

⁴⁸ This article does not discuss questions of data protection.

ymous and private sperm donation, adequate solutions must be found to ensure that children can learn about their genetic heritage while dealing with the understandable interest of donors in not being made liable for child support. The latter is, however, a question of parental responsibility that will be discussed below. Another question is whether knowledge of a surrogate mother is also important. Given the closeness of the relationship between the foetus and the woman who carries the pregnancy to term, such an interest is difficult to deny (Dethloff 2014, p. 928).

Turning to parental responsibility, the connection model shows that there are potentially more than two parents who have established a parental connection with the child. How many of them should have rights and duties in relation to that child? The child must be at the centre of this issue, not the self-expression of its potentially many parents. Consequently, some might argue that the best way would be to not take any chances and to give the child those two (and only two) parents who maximise the child's well-being.

But how should those best parents be found? And who is qualified to find them? Theoretically, it is possible for state officials to undertake this responsibility. However, as experiences with autocratic systems have shown, state intervention into family life comes at a high risk. According to the German constitution, which was drafted as a response to the appropriation of family life in Nazi Germany and communist countries, it is not the state's job to find the best possible parents for a child (Sanders 2018, pp. 104-111).

Of course, in a way, every legal system decides who a child's parents are by imposing rules on parenthood. The difference lies, however, in how these decisions are reached. The German constitution, the Basic Law, proceeds from the assumption that some people simply are a child's parents, whether we like it or not. Sometimes this is hard, but in general, a society in which the state decides who are allowed to be parents and who are not, is not worth living in. The right of parents to take care of their children is therefore protected as a fundamental human right by the German constitution (Article 6) but also by the European Convention on Human Rights (Article 8). This is a right that protects children, because it must be exercised for the good of the child.

But family rights also protect parents, who fulfil a deep human need of their own by taking care of their children. The human personality expresses itself not only in endeavours such as faith, art, and free speech that are protected by human rights. Because humans are social beings, they also express themselves in relationships with others, in friendship and love, in marriage and family life. Just like freedom of expression and religion, this is a field in which the state must refrain from intervening unless the rights and freedoms of others require protection. Thus, taking a child away from the parents without a very good reason—for example if the parents abuse their child—infringes on the rights of both children and parents. Insofar, the state watches over parents to protect children, nothing more. This

means not only that the state must leave parents and children alone, but also that its officials are not supposed to choose the best parents.⁴⁹

In term of the rights of parents and children, the situation is, in principle, no different if two or more than two parents have established a parental connection with the child. If everybody except two parents are excluded from the child, this means that the state, through family law, choses the best two and meddles in the rights of children and parents. It must have very good reasons to do so.

In principle, I submit, we must accept that some children just have more than two parents. Rather than a tandem on which only two parents can cycle, I suggest we imagine modern parenthood more as a minibus with seats for a number of people. The question is not who a child's parents are but rather, who should make decisions and bear responsibilities in relation to the child. Or, to put it differently: who should be at the wheel of the bus? This means that the question is really who should be allowed to take on the role of social parents. If social parents are already firmly in place, I submit that the law must accept that, regardless of who contributed to the child's birth. The question is therefore rather, who among the people who contributed to the birth of the child should have the right to build the relationship necessary to establish social parenthood and what—if any—the situation of the other parents should be. The problem is made easier if everybody is excluded who does not want to act as a parent.

5.2 Waiving parental rights and duties

Not necessarily all people who have a bond with a child are ready to take daily decisions for that child or—to put it differently—not everybody wants to drive. Parents have duties and rights towards the child, for example the duty to pay child support.⁵⁰ Apart from paying child support, a person who does not want to be a parent cannot really be forced to care for a child. This would also not be in the best interest of the child. This is nothing new. The law already allows it in the case of adoption and sperm donation.

Because a parent is allowed to consent to the adoption of a child, it should, in principle, be possible to waive rights and responsibilities in respect of a child in favour of another person. This possibility is even easier to justify if rights are waived in favour of somebody with a parental connection rather than a person without a parental connection but just a wish to adopt. The possibility of such a waiver can eliminate some conflicts over parental responsibility and should thus be accepted as long as it does not infringe on the interests of the child.

⁴⁹ See for a discussion from the perspective of German constitutional law, Sanders (2018, pp. 114–127).

⁵⁰ The FCC decided on 1 April 2008 that although contact with a child is not only a right but also a duty of a parent, forcing a father to have contact will usually not be in the child's best interest. FCC, 1 BvR 1620/04 – No. 50, pp. 804, 813–818, *BVerfGE* pp. 121, 69.

A young man for example may donate his sperm to earn some money and/or to help a childless couple fulfil their wishes. But he may not be prepared to take on parental responsibility. Nonetheless, he has a connection with the child that will never end. As long as it is not detrimental for the child, such donors can be allowed to waive their rights and duties in relation to the child. In case of sperm donors and parents who give their children up for adoption, this is already accepted. The same should, in principle, also be possible for surrogate mothers,⁵¹ egg donors, and sperm donors.

Such a waiver should not be possible if and inasmuch as it infringes on the interest of the child in question, especially the right of the child to know its genetic and maybe also gestational origin. As research shows, children do not benefit from their parents' attempt to shield them from the knowledge of unusual family situations such as adoption or a birth after sperm donation (Golombok 2015, pp. 93-98). As previously argued, the child has an interest in knowing her or his genetic origin. To ensure this right, a waiver of a sperm or egg donor may not exclude the right of the child to learn about the donor's identity. Since 2018, this has already been done in many countries, including Germany, by introducing donor registration. This kind of parent could be called a 'register parent'.

Moreover, the child has an interest in parental care and education. Ways to ensure this require intensive discussion. I cautiously submit, however, that a person who bears parental responsibility must not simply disappear. Therefore, initiative parents cannot evade their responsibility for a child who was born only because of their actions.⁵² Another question that goes beyond the scope of this article but also deserves discussion, is whether a person (usually a woman) should be free to become a parent deliberately all on her own with the help of a donor if all other parents waive their rights in respect to the child.

Such waivers, can turn multi-parenthood situations into two-parent families.

5.3 More than two?

Through waivers, an initially high number of parents can decrease considerably. If more than two people want to act as the social parents of the child, however, the question regarding who should be at the wheel is more difficult to answer. Is it possible to accept more than two parents playing a role in a child's life? It should be kept in mind that denying parents such a role meddles with their rights and also the rights of their children. Good reasons are required to justify such an exclusion.

Allowing more than two parents to play a role in a child's life might be easy as long as all parents agree on everything. In such a situation, a flexible model of parental rights and duties seems more appealing than a traditional fixed status

⁵¹ Surrogacy shall be discussed briefly at the end of the article.

⁵² This idea was expressed by the FCJ in its decision on surrogacy and sperm donation. See FCJ, XII ZR 29/94, *BGHZ* pp. 129, 297, 302; FCJ, XII ZB 463/13, *NJW* 2015, 68, pp. 479, 484, para 60, *BGHZ* pp. 203, 350.

model. However, reality—and especially reality in family law courts—is far less idyllic. Family law must provide solutions for situations in which parents do not agree. The idea that up to seven fighting people⁵³ need to decide jointly on a child's education or medical treatment seems frighteningly complicated. Organizing a child's upbringing between two separated parents can already be quite difficult enough.⁵⁴ The more people involved, however, the more conflicts are likely to arise. Conflicts are a normal fact of life, and children have to learn that. However, having so many people involved could be stressful and detrimental for a child. This was an argument in a 2003 decision of the German Federal Constitutional Court to limit parental responsibility to only two people,⁵⁵ and it is proposed again by the 2019 draft law of the German Ministry of Justice and Consumer Protection (BMJV 2019, p. 2).

At this point, it should be kept in mind, however, that even one mother and father cycling along on their tandem need to agree on a direction. At this point, I shall make a brief excursion into legal history: Multiple legal parenthood is nothing new in German legal history. Until the 1970s, an adopted child had up to four legal parents with rights and duties. It was only then that all legal ties to the original parents of a minor were cut at the time of adoption. However, while there could be more than two legal parents, until the middle of the 20th century, only one person—the husband and father—could make decisions in relation to a child. One of the arguments in favour of the father's right in the 1950s was that quick and clear decisions were needed. Two people could not reach a majority decision, it was argued, so one person needed to have the upper hand.⁵⁶ Before that, philosophers and lawyers compared the family to a commonwealth, a monarchy. Like the king ruled over and protected his subjects, the father ruled over his wife and children. The family was compared to a miniature state with the father as the king and the wife and children as the loyal subjects in need of education and guidance (Meder 2013, p. 130, fn. 54; Lichtblau 2007, p. 25242). This concept led to clear results, but denied the rights of the mother. When the equality of men and women in family law could no longer be denied, joint decision making became necessary. One could say that equality between man and woman revealed that parental coordination could be a legal problem (Preisner 2014, pp. 204-205). Now, if mother and father cannot agree, in important cases, a court decides which parent should take the decision in the child's best interest (section 1627, 1628 GCC). It is interesting to note that the German constitutional court declared that different opinions of two equal parents enrich a child's life whereas the involvement of more

⁵³ This was the number of people involved in the conception and upbringing of the child in the ECtHR, 25358/12, (*Paradiso and Campanelli v. Italy*), *NJW* 2017, p. 941.

⁵⁴ See regarding this problem, Scheiwe (2013) and the expert opinion by Schumann (2018) on the same topic for the Deutsche Juristentag 2018.

⁵⁵ FCC, 1 BvR 1493/96, 1724/01, *BVerfGE* pp. 108, 82, 103; FCC, 1 BvL 1/11, 1 BvR 3247/09, *BVerfGE* pp. 133, 59, 78, para. 52; see also Wapler (2015, pp. 186-188).

⁵⁶ See FCC, 1 BvR 205, 332, 333, 367/58, 1 BvL 27, 100/58 – No. 2, *BVerfGE* pp. 33-37.

than two endangers a child's welfare.⁵⁷ In the future, in our democratic state, family law might need to find ways to accommodate even more than two parents.

One reply might be that every child has just one mother and father, and that being raised by them and only them is the 'natural' thing to do. Even if this used to be true and still is in many cases, this does not change the fact that today, more and more people are connected to a child, whether we like it or not. Moreover, the 'nature' argument is not as obvious as one might think. We all know the saying 'it needs a village to raise a child'. Research suggests that our current family law model with a nuclear family of mother, father, and one or two children is something quite recent. Previously, children grew up in bigger groups with numerous adults, aunts, uncles, grandparents, siblings, and many other children (Blaffer Hrdy, 2009, p. 24). Everybody, it is argued, helped each other raise children, especially during the mother's necessary recovery after birth or if a mother or father died. Researchers have named this communal parenting 'alloparenting' and described it as necessary for the development of mankind (Blaffer Hrdy 2011, pp. 173-175, 273-276). Together with marmosets and tamarins—other primates that also raise their young in the group—humans will abandon their children if they feel not supported (Blaffer Hrdy 2011, pp. 99-102). There is reason to believe that even today, raising a child in a nuclear family without help is far from easy. A doctor wrote in popular summary of this research: 'If as a parent you feel as though you can't do it alone, that's because you were never meant to' (Medina 2014, p. 14).

Maybe in the future, families will learn increasingly to live with multiple parenthood and to support each other in conceiving and raising children. Maybe multiple parenthood could make family life not only more difficult but sometimes easier for people who are trying to squeeze children, family, career, and caring for elderly parents into a relatively short lifespan.

5.4 Main parents, deputy parents, and their rights

However, it cannot be denied that instability and conflicts between parents may be stressful and potentially detrimental for children: the greater the number of parents, the more conflicts there may be. As pointed out above, this has been the main reason for denying multiple parenthood (see BMJV 2019, p. 2).⁵⁸ The situation is especially difficult if multiple parenthood has developed without the consent of all involved but due to a problem in a couple's relationship—for example because a child was born after a wife had an affair.

If however, more than two people with a parental connection agree in advance not only that they want to bring up their children together but also on how they want to do it (Dethloff 2016, pp. 56-57), as is done in so called queer families, I see

⁵⁷ FCC, 1 BvR 1493/96, 1724/01, *BVerfGE* pp. 108, 82, 103; FCC, 1 BvL 1/11, 1 BvR 3247/09, *BVerfGE* pp. 133, 59, 78, para. 52, see also Wapler (2015, pp. 186-188).

⁵⁸ FCC, 1 BvR 1493/96, 1724/01, *BVerfGE* pp. 108, 82, 103; FCC, 1 BvL 1/11, 1 BvR 3247/09, *BVerfGE* pp. 133, 59, 78, para. 52.

no reason why this should not be possible. In such a case, parents with equal rights and duties could take on responsibility for a child. This might happen not only before birth but also between the birth parents of a child and a stepparent who has built up a solid social parental connection with that child.⁵⁹ This way, the reality that a child actually has three parents can be reflected by law. Moreover, this could avoid adoption that still requires all legal ties with one parent to be cut.

It should be noted that such an agreement does not mean contracting about parenthood. Such an agreement would not create parenthood, but demonstrate that more than two people are willing and able to cooperate as parents exercising equal rights without hurting their child in the process. The parties to such an agreement must already have established a parental connection. A rich uncle cannot be made a parent by means of such an agreement (Sanders 2018, pp. 391-392). This can be done only by means of an adoption. Moreover, such an agreement should require the consent of a family court. If such an agreement is concluded at a time when the child is old enough, the child should also be heard in the process, just as all children are in German family law procedures. If there is no such agreement, however, I consider it difficult to accept more than two parents with equal rights in order to protect the stability of the child's upbringing (Sanders 2018, pp. 403-406). At least for now, there is not enough experience regarding how more than two parents with equal rights interact. Even among two parents, minimum consensus is necessary.

If there is no agreement, this does not mean, however, that other people with parental connections could not have some minor rights and duties, as for example some visitation rights. If a person has not waived her or his rights and duties in relation to the child, the law cannot just remove her or him from the child completely, unless this is necessary for the child's welfare (Sanders 2018, pp. 406-409). In case a stepparent lives with the child, such a person should have some rights and duties in relation to that child's everyday life, just as practiced in so many families. Current law already provides rights to stepparents, biological parents, grandparents, and siblings (section 1685 GCC). Whereas the legal father has more rights and duties, the genetic father, like Mr Anayo, can have visitation and information rights in Germany (section 1686a GCC). In addition to visitation rights, one could think of introducing limited parental duties in legislation: for example, limited duties to support the child, or even a limited right of inheritance. Thus, it is more convincing not to conceptualise and then regulate parental rights in an 'all or nothing' way, but to allow rights and duties of two different degrees. One could use the terms 'main parents' for the parents with all rights and duties and 'deputy parents' for parents with fewer rights and duties (Sanders 2018, pp. 406-409, 421, 427).⁶⁰ This would allow flexibility, but also provide clear legal rules.

⁵⁹ Such a process takes time. Helms (2016) assumes at least five years.

⁶⁰ In my German research, I call the parents with all rights and duties '*Haupteltern*' and those with lesser rights '*Nebeneltern*'.

The above-mentioned parental agreement provides the opportunity for more than two main parents to agree on the basic structure of how they want to raise their child together and thereby show their ability to cooperate. However, this does not mean that all problems could ever be resolved in advance. Every day, decisions must be made and problems solved, such as where a child should go to school. Therefore, some ideas on joint decision making by more than two parents should be discussed. For inspiration, a legislator might even take a look at how decisions are taken in companies and partnerships—structures in which a number of people have to agree on a joint way forward. In partnerships, partners need to take decisions unanimously. German family law also assumes that two parents must make decisions unanimously. If they cannot agree over cases of major importance, parents can apply to a family court (section 1627, 1628 GCC). The same approach could be used for more than two parents. In practice, this might have the same effect as introducing a rule of majority in minor cases and requiring unanimity in cases of greater importance, because an overruled parent could apply to a family court only in such cases. Moreover, if not all main parents live with the child, it seems appropriate that those living with the child take everyday decisions and involve the others only in questions of greater significance (Sanders 2018, p. 410-420).

In principle, all main parents should have equal rights and duties. This means that all of them should be liable for child support (Sanders 2018, p. 423-425). A difficult question is if the child should also be liable to support all parents in old age. Whether the support of the elderly should be a responsibility of society or the family is a difficult issue. However, I would tentatively submit that if a legal system holds children liable for the support of their parents, there is, in principle, no reason why a child should not also be responsible to support more than two parents if the child her- or himself has received support from them. In aging societies, the support of many older people by fewer younger people might become necessary in any case. Of course, children's own needs and those of their own families must be met fully before they can be asked to help their parents.

Deputy parents should have duties in relation to the child including child support (Sanders 2018, p. 426-427). However, because the child is the primary responsibility of the main parents, a deputy parent's responsibilities should either be considerably less or be called upon only if all main parents are unable to provide for the child. This would require more discussion. However, the principle should prevail that in parenthood, rights and responsibilities are linked inextricably for both main parents and deputy parents alike. Deputy parents could become main parents if something happens to the main parents or if the main parents agree to share more responsibility (Sanders 2018, p. 409). Moreover, in family procedures concerning the child's welfare, deputy parents could be heard just like other persons close to a child such as grandparents.

5.5 Who should be the main parents?

Who should be a child's main parents and deputy parents in case there is no agreement? If a social connection is firmly in place, the law should respect that. However, this does not answer the question regarding who should be assigned parental rights and duties at birth. There must be some rules to ensure that every child has parents at birth who take responsibility for that child. Establishing such rules is the responsibility of the legislature. When developing such rules, the principles discussed above should be taken into account.

Somebody who has established the maximum number of connections is a child's parent, whether we like it or not, and must be allowed to care for that child unless it harms the child's welfare. Taking this as a starting point, the legislator could take the number of parental connections established with the baby at birth as indicators for the assignment of legal parenthood. The more connections a parent has, the more likely it should be that she or he also has parental rights. The fewer connections a person has, the more discretion the legislature has when assigning parental rights and responsibilities. In case of an equal number of connections, the legislature has discretion to decide the legal framework with which to assign parental rights. This must, of course, be done with the best interest of the child in mind (Sanders 2018, p. 383). I submit that in some cases, courts have already used this approach implicitly: in the surrogacy case discussed above, the two men concluding a surrogacy agreement had each established an initiative connection with the child. One of the men had also provided the sperm, thus establishing a genetic connection. Thus, he was the only one with two connections with the child. The surrogate, who had established the gestational connection, had given up the child freely; and the egg donor, who had established a genetic connection, had also waived her rights. The FCJ accepted the assignment of parenthood to the couple, stressing the genetic bond of one man and the responsibility of both men for the child's conception.

However, it would be difficult to test the number of connections established with each newborn child. Moreover, merely counting connections will not provide adequate answers in all cases. In some cases, all possible parents have established only one connection each. At this point, finally, the question arises whether some connections are 'more important' than others. One might argue that the genetic connection is the most important one. I agree that it is certainly important insofar as children have a right to know their genetic origin. However, this does not necessarily mean that parental responsibility must be assigned to genetic parents. Traditionally, the legislator worked with rules and presumptions that assigned legal parenthood to those people who were just 'there' at the time of birth and thus most likely to develop into reliable social parents: the woman who gave birth and the partner by her side. They are also the people who are most likely and thus can be presumed to have established the greatest number of connections with the child. I think that this is still a good starting point.

But what should be done if this is not as clear, as for example in the case of a surrogate who gives birth to a child that is not genetically hers? Surrogacy is too sensitive an issue to give it full justice here. It is important to note, however, that as far as research in the United Kingdom shows, both children and surrogates cope well with the arrangement (Jadva et al. 2015 and 2003; Golombok et al. 2004, 2006a, 2006b, 2011). In the United Kingdom, where the studies were undertaken, surrogacy is legal and the birth mother has to agree to the initiative parents taking over legal responsibility for the child. She cannot be forced to give up the child, which is an important aspect. In case a surrogate wants to give up the child, it seems important that the initiative parents cannot deny parental responsibility for the child who was conceived because of their actions. This can best be achieved by making them the child's parents immediately after birth. If an application or court decision is necessary, the initiative parents could escape responsibility by simply not making the application. However, what if the birth mother wants to keep the child? Is the birth connection more important than the genetic or the initiative connection?

Research shows that the majority of women who feel closely connected to their child before birth establish a relationship of secure attachment with that child after birth. Mothers who feel ambivalent about their connection are much more likely not to establish such a secure relationship (Niederhofer 2006, p. 29, 30-31). This research could indicate that if a birthmother wants to keep the baby, she has established a secure attachment with the child that is so secure that it is in the best interest of the child to let her keep it. Another factor that could be taken into account by the legislator is that stress negatively affects the development of the foetus in the womb. The most dangerous stress is apparently that caused by feelings of helplessness (see for a summary of this research, Medina 2014, p. 45-47; Sanders 2018, p. 291). Although there is still no research to back up this assumption, I think that it is possible that the feeling of being forced to give up a child one feels connected to could create a feeling of helplessness that could be detrimental for that child's development.

Whereas the establishment of an early legal bond between the commissioning/initiative parents and the child seems preferable to prevent them from abandoning the child if they change their mind,⁶¹ it is in the best interest of the child to allow the birth mother to keep the child if she wants to (Sanders 2018, pp. 436-437). This could also be supported by the idea that the pregnancy connection is already very close to a social connection that—once it is securely in place—should not be destroyed.

⁶¹ See on that argument: FCJ, XII ZB 463/13, *NJW* 2015, 68, pp. 479, 484 para 58-59, *BGHZ* pp. 203, 350.

6 Conclusion

A new concept of parenthood must accept that today, parenthood is not always like a tandem with two cycling people. It can be like a minibus in which more than two people can travel together. There are initiative parents who have caused the conception of a child because they wanted to be its parents. Whereas adoptive parents have only a general intention to become parents, in the case of initiative parents, this wish has caused the birth of a particular child for which causal parents have responsibility. Genetic parents have provided the egg and sperm and thus the genetic material for the child. The birth mother or gestational parent has carried the pregnancy to term and given birth to the child. According to many legal systems, she alone is the child's mother. Finally, there are social parents, the people who bring up the child and give the love and care children need to develop. In a traditional family, the mother has four and the father has three connections with the child. There is no doubt that such parents bear parental responsibility and can be separated from their children only if they endanger their well-being. However, if more than two people have established a parental connection, all of them are the child's parents, making parenthood more like a minibus than a tandem. The law must accept this and help as much as possible to ensure that the minibus of modern parenthood is steered in the best interest of the child. This can be done by assigning two 'main parents' at birth with all rights and duties who can agree to involve more parents with equal rights and duties if all of these show their willingness to cooperate in the child's interest. Other parents with a parental connection could become 'deputy' parents with lesser rights and duties.

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Parental conflicts over the exercise of joint parental responsibility from a comparative perspective: From daily matters to relocation

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1 Introduction

In most cases nowadays, joint parental responsibility continues even after separation or divorce, and regulation is generally formulated in gender-neutral terms. The dominant paradigm is that the child's best interests require the ongoing involvement of both parents. However, this calls for ongoing cooperation between both parents in making at least some decisions and with regard to the legal representation of the child. This shifts the focus from conflicts over sole or joint custody to conflicts over the exercise of joint parental responsibility if parents disagree over, for example, healthcare decisions, schooling, change of residence, or alternating residences. In most countries, the 'neutered mother' (Fineman 1995) is still the child's main caregiver, but separated parents with joint parental responsibility have a variety of care and contact arrangements ranging from equally shared care arrangements to no or very little contact between one parent and the child. Looking at the legal rules governing the exercise of joint parental responsibility from a comparative perspective, the goal of this article is to analyse how different legal systems regulate which decisions have to be taken either by both parents jointly or by one parent individually, how conflict is resolved, and how the relevant case law developed.

This includes taking a gender perspective on what are, formally speaking, gender-neutral rules on the distribution of decision rights and bargaining power between each parent, and on how this distribution relates to the parents' (equal or different) investment in caring for the child. When family law and conflicts are seen from a relational perspective, the persons involved (the child, a mother, a second parent, and possibly another social parent) have different individual interests, but a more or less caring relationship towards each other that affects cooperation and conflict. How does the law recognize these differences?

Legal comparisons reveal different patterns regarding how parental decision-making rights are structured and who can decide what either individually or jointly. The rules for legal representation also vary. I have developed a typology that distinguishes three models: the autonomy-with-objection model, the weak consensus model, and the strong consensus model (Scheiwe 2018, 2019). In this article, I formulate some hypotheses on how these patterns might affect the relative autonomy, dependency, or enforced cooperation of each parent (and the child) and their resources, and which differences might be expected between jurisdictions. I discuss parental conflicts over *relocation decisions* in depth as an example to illustrate the problem, and I investigate the statutory rules and case law in a legal comparison and from a gender perspective.

In *section 2*, I describe the theoretical insights from social-legal and feminist theories that inspired this article and the ongoing work of our research project.¹ In *section 3*, I give a comparative overview of the statutory law governing the exercise of joint parental responsibility (joint and individual decision-making rights of parents, legal representation of the child by one or both parents). Based on commonalities and differences between a number of European jurisdictions, I develop a typology with three different models and illustrate this briefly with the example of a conflict over a healthcare decision for a child (vaccination). In *section 4*, I discuss conflicts over the intention of one parent to change residence with the child (relocation) from the comparative perspective of two jurisdictions: England and Wales with Germany. I pay particular attention to case law and the judicial interpretation of the 'best interests of the child' (another supposedly gender-neutral legal concept). I test the typology I developed on the case law over relocation conflicts. In *section 5*, I discuss what a relational or care perspective on parental decision rights and conflict resolution might look like, starting with the example of relocation decisions. Then I draw some broader conclusions and discuss open research questions (also with regard to empirical research desiderata).

¹ See <https://www.uni-hildesheim.de/mom-projekt/>

2 Theories from which I took inspiration: Feminist and socio-legal perspectives

We live in times of gender-neutral rules on parental responsibility and of the neutered mother (Fineman 1995). Despite formal equality, the primary caregiver for the children of separated parents is still overwhelmingly the mother; substantial equality is not yet in sight. However, the primary caregiver may disappear behind the veil of formal equality (Boyd 2015). Both strategies—treating a certain group (‘mother’ or ‘main caregiver’) differently or the same (‘parent’, gender-neutral rules)—may affirm difference (Minow 1991 called this ‘the dilemma of difference’). This happens either by attaching a label that reinforces stereotypes or dichotomous thinking, or by using gender-neutral terms or rights that fail to recognize the ongoing inequalities and particular needs of the main caregivers who are mainly mothers.

One very promising approach is the perspective of a caring law (Herring 2013) that should acknowledge and adopt a maternalistic perspective (Herring in this volume). A maternalistic perspective can be taken by a caring parent of each gender (it is not limited to a mother of the female sex). It means that in parental conflicts, the perspective of the person who mainly lives with the child and takes over most care duties in daily life should be given due weight and consideration. This could overcome some of the shortcomings of formal equality, and make the ‘neutered mother’ more visible; it also means that the rules on decision rights have to take differences in parental arrangements of care and support into account (from equal sharing to asymmetrical arrangements or even a no-contact parent who has joint parental responsibility).

In gender-neutral family law, the guiding concept and paramount consideration on how to decide parental conflicts in decision making over the child is the criterion of the ‘best interests of the child’. The neutered mother disappearing behind the veil of equality may become even more invisible when the individual interests of all persons involved are not addressed explicitly and without gender bias. Hence, how is the child welfare criterion interpreted when parents are at odds with each other over a major decision regarding the child? How are the perspectives and interests of the persons involved—each parent and the child—considered and balanced by the courts? What is considered to be a legitimate motive of a parent, and how does gender come into play in the legal construction of the ‘best interests of the child’?

Many years ago, Carol Sanger (1995) asked ‘Are we too cozy with the child’s perspective?’ Although the context was different (she was discussing mothers who separated from a child), it is worth considering the question regarding how the individual but interrelated interests of a mother/main caregiver (and of the second parent) are taken into consideration when a parental conflict over the child has to be decided, and what is considered to be a legitimate interest of a parent in this context. Feminists would widely agree that *a relational perspective* is important; one

that particularly takes into account continuity, care practices and arrangements, as well as the legitimate interests of a parent.² But how could a relational perspective be applied by courts to settle parental conflict? This requires a more detailed discussion of particular situations and conflicts.

Another theoretical approach from which I took inspiration is *bargaining theory* and *exchange theory*. How is the bargaining power of each parent affected by legal rules and procedures about the exercise of joint parental responsibility? Can differences be seen from a comparative legal perspective? Mnookin and Kornhauser (1979) have described the problems in detail as ‘Bargaining in the shadow of the law’, but their description remained at a fairly general level. England and Folbre (2002) have argued that one should explore the links between different forms of parental involvement and the relative bargaining power of mothers and think carefully about the ways in which specific laws and rules may affect intrafamily dynamics. Inequalities that affect bargaining power arise from many sources, such as the division of labour in a couple or differences in income and earning potentials (affected by the ‘penalties of motherhood’). However, they may also arise from preferences, and these may accumulate over time. Wieggers and Keet (2008) investigated similar aspects when looking at the potential risks and dangers of collaborative law and mediation and investigating correlations between gender inequalities and the sources of unequal bargaining power in the context of separation.

Many factors play a role in parental conflicts, and these also include preferences and emotions, fear of loss, or fury about past infringements or broken promises. The past impacts upon actual conflicts. This complexity makes it difficult to analyse the impact of legal rules upon bargaining power, but an analysis of the impact of legal rules on power relations and the distribution of resources and opportunities is essential to feminist legal theory when it aims to be relational. Regulations on how to exercise joint parental responsibility and what can be decided individually or jointly impact on the available action options. They may affect burden of proof, veto points, or even blockade the positions of a dissenting parent; or they may exclude one parent from participating in decision making.

These theoretical insights form the multilayered backcloth of this research. The guiding questions for taking stock of legal regulations and legal comparisons are: How is joint parental responsibility to be exercised when parents live apart? Who can decide what, who can act alone, and when do parents have to act jointly? Can the child be represented legally by one parent, or must it be both? What voice does a child have in parental conflicts? What are the commonalities and differences from a comparative perspective? From a social-legal and a feminist perspective, I shall ask how regulation may affect the opportunities for action and the bargaining power of parents. Finally, I shall evaluate comparatively the commonalities and differences.

² On relational theory and the law, see Barlow (2015); with a plea for a modernized interpretation of the notion of family solidarity, Boyd (2010), Herring (2014), and West (2019).

3 What makes a difference? A comparison of statutory law on the exercise of parental responsibility and conflict resolution: Three models

I shall start with a short comparative overview on the statutory law regulating the exercise of joint parental responsibility by parents living apart and their conflict resolution. On this basis, I distinguish three models (for details, see Scheiwe 2018, 2019). I shall give two examples to illustrate commonalities and differences. The first example is a healthcare decision. The mother (primary caregiver) wants to have her 4-year-old child vaccinated against borreliosis; the father is strongly against it. I shall investigate the second example in more depth. This is about a relocation decision in which mother A wants to move with the child to a town 300 km distant from the current residence; mother B objects to this the decision, because this would endanger the contact arrangement.

Starting with commonalities between different jurisdictions, the *basic rule* for parental responsibility nowadays is that when parents have joint parental responsibility, this will usually continue after separation or divorce without any distinction being made between married or unmarried parents (Boele-Woelki et al., 2007, p. 84; Boele-Woelki et al., 2005; Ferrer-Riba, 2016, p. 308). The existing legal conditions for granting sole parental responsibility to one parent are not discussed here. For parents living apart, the general rules on exercising joint parental responsibility have to be applied, but some exceptions are made for reasons of practicality due to living apart.

First, I should mention a few commonalities: Core issues on which both parents have to act jointly in all jurisdictions³ are putting the child up for adoption, changing the child's name or surname, taking the child for a longer stay abroad, and changing the residence to a foreign country. Some other issues are often, but not always, a matter of joint exercise of parental responsibility. These may include a change of residence within the home country, the choice of school, religious affiliation, or a major health treatment and medical intervention.

Basically, three types of regulation of joint parental responsibility after separation can be distinguished: (1) the *autonomy model*, (2) the *weak consensus model*, and (3) the *strong consensus model*. To be more precise, the first model should be named the *autonomy-with-objection model*. A parent's power to act alone is the general rule, with the dissenting parent having to apply for a court order. In this group of jurisdictions, each person with parental responsibility is authorized to exercise it individually (with some exceptions). This stresses independence and the right to act alone, while a dissenting parent can apply for a court order. Examples are especially Eng-

³ Both have the statutory duty to act jointly to put the child up for adoption (S.16 Adoption Act 1976, sections 12(3), 33(6) CA), to place the child with foster parents; to allow a longer stay of the child abroad to avoid child abduction (S.1 Child Abduction Act 1984), or to consent to the marriage of a minor of 16 or 17 years (S. 3 (1A) Marriage Act 1949, s. 20 CA). Change of residence to a foreign country: Sec. 40(1) Norwegian Children's Act 1981.

land and Wales, but in a somewhat reduced fashion also Poland and Spain (for divorced parents) and Norway (for a parent with whom the child lives permanently). The *weak consensus model* is characterized by the joint exercise of parental responsibility as the general rule, but a presumption applies that each parent acts with the consent of the other, thereby granting more space for the individual exercise of parental responsibility. However, the field of application of this presumption of consent differs: sometimes it is broad (and covers all legal acts for the child); but at other times, it is rather restricted (e.g. limited to the administration of the child's property and legal representation of the child). Examples of this model are Belgium, France, Russia, and Switzerland. In the *strong consensus model*, joint exercise is the general rule for important decisions and for legal representation of the child, whereas a parent can act alone only in 'daily matters', 'usual matters', or with regard to 'non-important' decisions. Hence, acting alone is rather limited. If a parent objects (veto), the other one has to go to court and apply for a leave of court to legally act alone.

With regard to the decision about the vaccination of the child in which one parent wishes to vaccinate the child but the other parent rejects it, the mother/the resident parent can take this decision on her own in England and Wales.⁴ There is not even a statutory duty to inform or consult the other parent, although some courts have stated it,⁵ which is—speaking comparatively—unique. The objecting father would have to go to court in this case and apply for a court order,⁶ which is costly. In *Spain*, in the case of separation, joint parental responsibility is exercised solely by the parent with whom the child lives,⁷ and the mother could take the decision to vaccinate the child. The non-resident parent would then have to go to court and request either the joint exercise or another distribution of functions between the two parental responsibility holders. In *Poland*, the continuation of the joint exercise of parental responsibility after divorce is possible only if both parents apply for it jointly in court.⁸ Otherwise, the parent with whom the child lives can mainly decide and legally represent the child alone. In the overwhelming majority

⁴ The power to act alone is the general principle (s. 2 (7) Children's Act 1989, 'each of them may act alone and without the other (or others) in meeting that responsibility').

⁵ Courts have stated a duty to consult in some cases, see case law on the choice of a school *Re G (Parental Responsibility: Education)* [1995 3 FCR 569], change of the child's name *Re PC (Change of Surname)* [1997 2 FLR 730], *Re T (Change of Surname)* [1998] 2 FLR 620 (EWCA), circumcision *Re J (SIO Muslim Upbringing and Circumcision)* [2000] 1 FLR 571 (EWCA), and vaccination *Re B (A Child) (Immunisation)* [2003] 3 FLR 156. Against a duty to consult, see Eekelaar (1998, p. 337), for a further critical view, Herring (2015, p. 443). Courts have said that 'hotly contested issues of immunisation are to be added to that "small group of important decisions".' In guidelines, it is said for immunisation explicitly that it does not occur where parental disagreement exists, until both parents accept the vaccine or the court orders it (Department of Health, *Immunisation against infectious disease – 'The Green Book' – 2006 updated edition*. <https://www.medicalprotection.org/uk/articles/eng-parental-responsibility>).

⁶ S. 2 (8) CA.

⁷ Art. 156 Spanish C.C.

⁸ Art. 58 § 1a Satz 2 Kodeks rodzinny i opiekuńczy as amended on 9 March 2017.

of divorce cases, Polish courts transfer the right to exercise parental responsibility to mainly one parent and assign only partial rights of joint decision making and legal representation to the other parent. These co-decision issues have to be listed explicitly in the court decision, and if not listed, the other parent can decide and perform legal acts alone (Mecke and Scheiwe, 2018, p. 65f.), even if this involves important matters that generally should be decided jointly.⁹ Thus, in most cases, a divorced mother could decide on a vaccination without the consent of the father. In *Norway*, a special right to act alone is given to the primary caregiver if a child lives permanently with one of the parents. The parent with whom the child resides permanently can widely act alone with regard to important decisions on care for the child. In this case, the other parent with parental responsibility cannot contradict decisions such as whether the child will attend a day care centre, where in Norway the child should live, or other major decisions concerning everyday life.¹⁰ Although this rule was contested, the provision was upheld in 2010, but an obligation to notify change of residence 6 weeks prior to the move was adopted (Sverdrup, 2011, p. 306). Thus, the Norwegian mother with whom the child resides permanently could decide on the vaccination on her own.

Summing up, in the group based on the *autonomy-with-objection model*, the power to act alone is granted generally (England and Wales), under certain conditions of divorce or separation (Spain, Poland), or for the particular group of primary carers (Norway). The objecting parent has to go to court if he or she wants to oppose the decision about vaccination.

In the *weak consensus model*, joint exercise is the rule, but the legal presumption of the consent of the other parent allows one party to act alone. In *Belgium*, the presumption applies to all acts,¹¹ thus allowing the mother to have her child vaccinated and sign all contracts involved, whereas the father would have to go to court if he is informed about the issue before vaccination takes place (because once it has taken place, it is irreversible).

The *strong consensus model* stresses the joint exercise of parental responsibility and of legal representation of the child, but supplements this by a limited right to act alone in 'daily matters' or 'usual matters' and in cases of emergency—although without any presumption of consent applying (Germany, Greece, Italy, Lithuania, the Netherlands, and Sweden). Therefore, what matters is whether vaccination is considered to be a 'daily matter' or an 'important decision' to be taken jointly.

⁹ Art. 97 §§ 1 and 2 Polish Family and Guardianship Code states that important decisions should be taken jointly.

¹⁰ Art. 37 Norwegian Children's Act 1981 *Decisions that may be taken by the person with whom the child lives permanently*: If the parents have joint parental responsibility, but the child lives permanently with only one of them, the other parent may not object to the parent with whom the child lives making decisions concerning important aspects of the child's care, such as the question of whether the child should attend a day care centre, where in Norway the child shall live, and other major decisions concerning everyday life.

¹¹ Art. 373 para.2 Belgian C.C. for acts concerning the person of the child and Art. 376 para. 2 C.C. for other acts.

Opinions differ, and case law is contradictory across countries. The main tendency seems to be to consider it to be an important issue due to potentially serious long-term effects.

One particular case is Sweden that has no statutory definition of ‘daily matters’. A definition was rejected explicitly in the legislative process in 1998 (Jänterä-Jareborg n.d.). Also access to court decisions is limited in Sweden if parents cannot reach agreement. A Swedish court will not go into the details to settle a conflict about ‘daily matters’; the parties can apply only for sole parental responsibility before the court in cases in which contact, residence, or family violence and maltreatment are at stake in the conflict. Because this is not the case in a conflict over vaccination, parents are expected to settle their conflict themselves, or seek advice or mediation in a ‘cooperation discussion’ under the supervision of the administrative social welfare committee.¹²

German law strongly emphasizes the joint nature of the exercise of parental responsibility¹³ and requires the joint legal representation of the child.¹⁴ ‘Decisions in daily matters’¹⁵ are defined as those that have to be made frequently and do not have consequences for the child’s development that would be hard to reverse.¹⁶ This is a problematic definition and causes a lot of litigation. Family courts are kept busy applying these distinctions (e.g. cases deal with short holiday trips abroad, enrolment in kindergarten, and health care measures such as a dental retainer, vaccination, etc.).¹⁷ Vaccination was considered to be an important matter by the Federal Supreme Court in 2017.¹⁸ It cannot be decided by one parent alone. In a case of conflict, the court gave the right to decide to the parent whose wish was in accordance with the recommendations of a medical commission¹⁹ whose guidelines were accepted as medical standards by the court in the child’s best interests. The main caregiver’s position was overruled, although it was also ‘good enough’ and did not endanger the child’s welfare (no mandatory vaccination exists in Germany, although it is under discussion). The consequence might be that the mother, as main caregiver, might have to bear the practical consequences such as organizing care if the child has a fever or if there are other practical implications of vaccination. This is quite distinct from the Swedish approach mentioned before. Generally speaking, the *strong consensus model* brings about stronger pressure towards cooperation and court intervention. It opens up more space for a dissenting parent to block or veto decisions or legal acts of the other parent.

¹² Chapter 6 Sec. 18 Swedish Children and Parents Code.

¹³ § 1627 German C.C.

¹⁴ § 1629 s. 1 phrase 2 German C.C.

¹⁵ § 1687 German C.C.

¹⁶ Para.1687 sec.1 German C.C.

¹⁷ For details of case law, see Staudinger (2017), § 1687 and § 1628 BGB.

¹⁸ BGH (FCJ), XII ZB 157/16, NJW 2017, p. 2826.

¹⁹ Recommendations of the Standing Committee on Vaccination at the Robert Koch Institute.

Do these models affect the bargaining power of parents differently? This is to be expected, because Model 1—the autonomy-with-objection model—grants more autonomy to a parent to make decisions individually or to represent the child legally alone than Model 3—the strong consensus model. The weak consensus model (2) is situated somewhere between the other two, because the presumption of consent of the other parent gives more leeway to a parent to act alone. But this depends on whether the range of the presumption (which acts are covered) is broad or more limited. One can also expect differences concerning legal procedures regarding who has to take action and how frequently action might be taken. In Models 1 and 2, the dissenting parent has to go to court and initiate legal procedures if he or she objects to a decision, whereas in Model 3, the parent who wants to take an important decision that the other one opposes is the one who has to take legal action. In this case, the objecting parent has a veto position, whereas in Model 1 (and often also in Model 2) the dissenting parent bears the burden of applying for a court order. Speaking generally, the strong consensus model produces stronger pressure to cooperate and brings about more frequent court intervention in case of parental dissent, because the parent who wants to take an action that is legally valid needs a court decision that allows her or him to take that decision for the child without the consent of the other parent.

Comparatively speaking, one can expect the transaction costs of parental decision making in case of conflict to be distributed differently over the three models. In the autonomy-with-objection model, the dissenting parent (most often the father) has to go to court and bears the higher transaction costs. In the strong consensus model, the main caregiver (mostly the mother) has to bear higher transaction costs: she has to apply to the court and wait for a decision if she proceeds in accordance with statutory law. This is a gendered effect that should be investigated in more depth. One would expect to have more court proceedings under the strong consensus model and more mothers/main caregivers as plaintiffs, whereas in the jurisdictions of Models 1 and 2, one would expect to have fewer court procedures and more fathers as plaintiffs. With regard to legal procedures, it would be interesting from a comparative perspective to have more empirical knowledge on the frequency of court proceedings, the gender of the plaintiff, and the outcomes.²⁰ Unhappily, as far as I know, no such comparison exists.

²⁰ Blankenburg (1980; Blankenburg et al., 2000) has performed similar comparative empirical research on civil court procedures. See also Rösler (2012, p. 207).

4 Parental conflicts over a change of residence with the child from a comparative perspective

Conflicts between separated parents about relocation with the child are among the most frequent and often very difficult cases to be decided by courts. A change of residence of a parent with the child may have very far-reaching consequences, because this might well make the other parent's possibility of contact with the child or care arrangements more difficult. Obviously, the destination of the intended move makes a difference: whether it is abroad or within the home country, how big the distance is, whether the child can travel alone or not, and so forth. It also depends on the former care arrangements the parents had. Where the non-resident parent had little or no contact with the child, a change of residence will impact less than in a shared-care arrangement or when both parents spent equal time with a child. The latter case—although not that frequent—may be the most dilemmatic situation (Zafran 2010). On the other hand, the chances and rights of the parent who wants to move with the child (whatever the reasons for moving may be, ranging from a new job, a new partner, better support by family networks, returning to the home country after the breakdown of a relationship, or other) are seriously curtailed if she or he cannot move except without the child.

There is extensive literature on relocation especially from the Anglo-Saxon countries,²¹ but it is hard to find comparative literature that goes beyond common law countries.²² The gender dimensions of relocation conflicts have been scrutinized by various authors,²³ but not from a comparative perspective.

The purpose of this section is to apply the comparative framework described above to the solution of parental conflicts over relocation. First, I shall compare the statutory regulations across several countries; and in a second step, I shall take a closer look at case law and judicial interpretation, but then limit the comparison to two legal systems: England and Wales—the prototype of the *autonomy model* in parental decision-making—and Germany—as an example of the *strong consensus model*. When moving from the comparison of statutory law to the analysis of case law, the leading questions are what commonalities and differences can be found, and what are the gender dimensions—especially with regard to the bargaining power of each parent.

4.1 Comparing statutory rules on relocation decisions

With regard to *external* relocation to a foreign jurisdiction, the general rules are the same for all countries that have ratified the Hague Convention on the Civil Aspects of International Child Abduction. In all countries considered, the change of

²¹ See George (2012, 2014); Glennon (2008); Herring and Taylor (2006); Parkinson and Cashmore (2015); Taylor (2013, 2016); Taylor and Freeman (2012); and Thompson (2015).

²² Exceptions are Coester-Waltjen (2012) and Eschelbach and Rölke (2012).

²³ Boyd (2010, 2011); Young (2011); Taylor and Freeman (2012).

residence of a parent with the child to a foreign country requires the consent of both parents (only short trips to a foreign country may be exempted from this requirement, as in England and Wales).

Most European countries, for example Germany or England and Wales, do not have special statutory rules on domestic relocation and apply the general rules for the exercise of parental responsibility. However, a few countries have special statutory clauses on relocation decisions (e.g. Austria, France, Italy, Norway, Switzerland).

4.1.1 Internal relocation in jurisdictions following the autonomy-with-objection model

If the resident parent decides to move within the home country (internal relocation) and if there is no special regulation imposing limits on that decision, the resident parent can simply take that decision, while the objecting parent has to go to court and apply for a court order (as is the case in *England and Wales*). In Norway, the special rule for a primary caregiver explicitly allows a decision to move with the child within Norway, if the other parent does not share care for the child. In *Austria*²⁴ and *France* as well,²⁵ there is a prerogative for the main caregiver to decide on domestic relocation combined with a duty to inform the other parent.

4.1.2 Internal relocation in jurisdictions following the weak consensus model

In the *weak consensus model*, the question is whether the decision of a parent to relocate within the country is covered by the presumption of consent. In *France* the presumption is restricted to ‘routine decisions’. Therefore, a change of residence, as an important issue, is not covered by the presumption—when both parents care equally for the child. But for a primary caregiver, there is special regulation in *France*²⁶ granting a prerogative for the main caregiver to decide alone on domestic relocation combined with a duty to inform the other parent. The same principle applies in *Austria*, but distinguishes between a situation in which the parents or the court determined who will mainly care for the child in her or his household—when the main caregiver then has the right to decide alone on a change of residence with the child²⁷—and other situations that require the consent of both parents.²⁸ In *Portugal*, the presumption of the agreement of the other parent²⁹ is valid in general, except when a statute expressly requires the consent of both parents or when it is an act of special importance.³⁰ However, this is not the case for a change of resi-

²⁴ § 162 Austrian C.C.

²⁵ Art. 373-2 (3) French C.C.

²⁶ Art. 373-2 (3) French C.C.

²⁷ § 162 (2) Austrian C.C.

²⁸ § 162 (3) Austrian C.C.

²⁹ Art. 1902 No.1 Portuguese C.C.

³⁰ Art. 1902 No.2 Portuguese C.C.

dence within the country. The same holds for *Russia*.³¹ In contrast, *Switzerland* is the country within this group in which the presumption of consent is very limited and applicable only to the legal representation of the child.³² However, Switzerland has a special regulation for the change of residence, and deals with relocation in line with the strong consensus model.

4.1.3 Internal relocation in jurisdictions following the strong consensus model

The countries applying a *strong consensus model* regard one parent's decision to change residence with the child as an important matter and not a daily affair. This generally requires unanimity of both parents with joint parental responsibility. In case no consensus can be reached, a parent who wants to move has to initiate court procedures to gain a leave of court.

Most countries in this group do not have special rules on domestic relocation and apply the general principles. This also holds for Germany, as will be discussed in more detail below. However, *Italy* and *Switzerland* have enacted special regulations. According to *Italian* law, consensus of both parents is needed,³³ and there is no presumption in favour of a primary caregiver. In case of disagreement, a court decision has to be obtained. In Switzerland, the parent intending to move with the child needs the consent of the other parent if the change of residence will have a considerable impact on the contact arrangement with the other parent.³⁴ If the other parent opposes the decision, the court or the child protection agency can grant a leave.

4.2 Case law on relocation: Comparing Germany with England and Wales

By comparing the case law of England and Wales with Germany, I can look beyond statutory rules in relocation cases, see how courts interpret the child's best interests, and balance this with the legitimate interests or rights of each parent. This analysis has a bias towards higher instance court decisions, because decisions of lower courts are less well documented and accessible.

When comparing statutory rules, England and Wales on the one hand and Germany on the other represent the 'most different' cases on a scale ranging from autonomous decision rights of one parent to enforced consensus. In England and Wales, the parent who objects to the decision of the resident parent has to take legal action, whereas in Germany, the parent who does not obtain the consent of the other one has to take this step. That makes a big difference. But what about

³¹ Art. 65 Russian Family Code. Consent is required to take the child abroad, to change the child's name or family name, to change the child's nationality, or to allow adoption of the child.

³² Art. 304 phrase 2 Swiss C.C.

³³ Art. 337ter (3) Italian C.C.

³⁴ Art. 301a Swiss C.C.

commonalities and differences in the case law on relocation once the conflict has been brought to court?

4.2.1 German case law on parental conflicts over the change of residence with the child

The right to determine the child's residence³⁵ is part of parental responsibility.³⁶ Consent of both parents with joint parental responsibility is needed, because relocation is considered to be an important matter. In case of conflict, the parent who wants to move with the child has two possibilities: to apply to the court for a single issue order, asking for the transfer of the right to decide alone on the intended change of residence,³⁷ or to apply for the sole right to determine the child's stay and residence in general.³⁸ The latter has a broader meaning and also encompasses future changes of residence. It is used more frequently by applicants, and the court will grant it if this partial revocation of joint parental responsibility corresponds best with the child's welfare.³⁹ The question is whether the child will be better off by going with the parent who wants to move or by staying with the other parent.

The child's welfare test developed in case law⁴⁰ includes the following criteria: the educational competence of a parent, the competence to support and foster a child; the tolerance of the child's bonds to the other parent; the child's ties and attachment to each parent, to siblings, or to other persons playing an important role in the child's life; continuity; and the child's will. Each aspect may be weighed differently according to the circumstances of the individual case. The court's duty is to inquire into all relevant facts, and no presumption applies. If both parents are competent parents and, all else being equal, one parent is the primary caregiver with whom the child has strong bonds, this would suggest a court decision granting the primary caregiver the sole right to determine the child's residence.

In 2010 and 2011, the Federal Court of Justice (FCJ) decided two leading cases on external relocation. In the *2010 Mexico case*,⁴¹ the mother and main caregiver wanted to move with her 8-year-old daughter to live with her new partner in Mexico, start a career with him in his construction firm, and also run a holiday guesthouse on his property. The court granted her leave and the right to determine the child's residency, because the child's best interests were not endangered in Mexico, and her reasons for moving had more weight than the father's contact rights. The court could not restrict her freedom of movement, and her motives for relocating could be relevant only if they were to affect the child's best interests. If the motive for relocating were to hinder contact with the other parent, this would question the

³⁵ § 1631 German C.C.

³⁶ § 1626 German C.C.

³⁷ § 1628 German C.C.

³⁸ § 1671 (1) German C.C.

³⁹ 'dem Wohl des Kindes am Besten entspricht', § 1671 (1) Nr. 2 German C.C.

⁴⁰ BGH (FCJ), IVb ZR 66/88, *FamRZ* 1990, pp. 392, 393.

⁴¹ BGH (FCJ), XII ZB 81/09, *NJW* 2010, p. 2805.

childrearing competence and ‘Bindungstoleranz’ [tolerance of the attachment to the other parent] of the main caregiver and affect the child’s welfare negatively. The other parent’s right to contact with the child would not automatically gain priority over all the other criteria determining the child’s best interests. Even if relocation considerably impedes the other parent’s contact with the child, this does not lead to a general or presumed infringement of the child’s best interest. In the Mexico case, generous contact during holidays (57 days in Germany per year during holidays) and sharing the costs of contact had been offered.

In the 2011 case,⁴² the non-married parents with joint parental responsibility had different nationalities (the father was French, the mother German). Shortly after the child was born in France in 2002, the mother separated and took the child to Germany where she grew up and attended school. The parents had conflicts over contact and the choice of school for the child. The lower court granted sole custody to the father. However, the FCJ reversed this decision based mainly on the argument that the child herself had not been heard in court procedures. The basic principles described above were upheld by the FCJ.

Respect for constitutional rights implies that the freedom of a parent to move cannot be questioned by a court. Both the FCJ and the literature stress that due to constitutional rights, a parent who wants to move should not be forced to legitimize this personal choice (Coester-Waltjen, 2012; Mexico case of the FCJ⁴³).

Hence, the just cause of a parent to change residence should play a role only when determining the best interests of the child—for example when the parent’s intention is to hinder the other parent’s contact with the child or when migrating to a foreign country would be harmful for the child. But this blurs the lines, because the plans and intention of the relocating parent still come into play, but under a different label—for example the parent’s competence in rearing the child that might be deficient if the parent is accused of being selfish and relocating just to keep the other parent out of play; or the competence to support and foster the child might be questioned if the parent has not made proper plans on how to live or how to secure a living after moving with the child.

Therefore, the motivation of the parent who wants to relocate enters the scene not explicitly, but implicitly through the child welfare test. On the one hand, the rights-based approach that stresses the constitutional rights of parents and disapproves of scrutinizing their motivation is convincing, and it respects constitutional rights and freedoms. It is not the parent intending to move who has to legitimize the decision (by plans to either repartner or marry; for economic reasons, career, or job prospects; because of better support from the extended family; nationality; or other). On the other hand, in a relational web such as parent–child relationships, the motives of the parent who wants to move and the arrangements in the new location will play a role even under the welfare test, for example if the objecting

⁴² BGH (FCJ), XII ZB 407/10, *NJW* 2011, p. 2360.

⁴³ BGH (FCJ), IVb ZR 66/88, *FamRZ* 1990, pp. 392, 393.

parent claims that the other parent is acting for selfish motives or has no proper plans regarding how to secure the child's welfare after moving. However, such a rights-based approach has the advantage of clarifying what constitutes the parameters of the welfare check: what has to be checked is whether the child is better off with the parent who wants to move, or with the other parent who remains.

4.2.2 Case law and court guidance on relocation cases in England and Wales

In England and Wales, removing a child abroad for more than one month requires the written consent of both parents.⁴⁴ To travel abroad for shorter periods, a parent generally does not need the consent of the other one; and only in rare cases will a parent not be allowed to travel abroad with a child for a short holiday (unless there are strong reasons to believe that parent and child will not return). Relocation to a foreign country seems to be treated differently from internal relocation in case law. It is said that the court will normally be reluctant to restrict a parent from moving within the country, arguing that such a restriction would harm the child, and that this would happen only in truly exceptional cases (Herring 2015, p. 556), such as in a case where a shared residence order existed.⁴⁵ However, whether internal relocation should be restricted only in exceptional cases is currently under debate.

Regarding relocation to another jurisdiction, in the leading case *Payne v Payne*,⁴⁶ the court developed a number of questions to be asked: whether the application is realistic and reasonable; whether it is *bona fide* (not motivated by some selfish desire to exclude the father from the child's life); what the motives for the father's opposition are, what might be the detriments to him and his future relationship with the child were the application to be granted; and what would be the impact on the mother of a refusal of her realistic proposal. It was said that refusing the primary caregiver's reasonable proposal to relocate is likely to impact detrimentally on the welfare of the child. These appraisals have to be integrated into a review of the child's best interest as paramount consideration, and the statutory checklist of the child welfare criteria should be applied as far as it is appropriate. Leave of court would be granted if it is not shown that migrating to a foreign country with the parent would be contrary to the welfare of the child. The view of the child has to be heard and gains importance with the child's increasing age. Often when leave is granted, this includes an arrangement for the child to return to the United Kingdom for longer stays with the other parent during holidays.

Following *Payne*, the relocation would be refused when a parent had failed to think out plans adequately or when the move was motivated entirely by a desire to stop contact with the other parent (Herring, 2015, p. 550f.). Later case law clarified

⁴⁴ Sec. 13 (1) (b) Children Act 1989.

⁴⁵ *Re L (A Child) (Internal residence order)* (2009) 1 FCR 584.

⁴⁶ *Payne v Payne* (2001) FCR 425.

that there is no presumption in favour of allowing relocation for a primary caregiver, but that the paramount consideration is the welfare of the child. The factors to be taken into account by courts are, first, the reasons for the wish to relocate: they have to be reasonable (such as the pursuit of a career or educational opportunities, joining a new partner, enabling that partner to pursue a career or educational opportunities, or even the hope of establishing a new life in a new place).⁴⁷ The second factor is the impact of the refusal on the primary caregiver, and the resulting effect on children. The wishes of children, especially of elder children, are also weighty factors. The court will check the proposals for contact as part of the child welfare check. In one case in which there was a shared-care arrangement between both parents, it was said that the court should also consider whether the non-resident parent should move with the resident parent. The judge would be entitled to ask the father why he does not move with them, if the resident mother had good reasons to move.⁴⁸

There are some controversies about the Payne approach. From a feminist perspective, the emphasis on the impact of a refusal to relocate upon the primary caregiver might be a welcome appreciation of the fact that the child's welfare is tied up with the welfare of her or his primary caregiver (Boyd 2011). On the other hand, it was criticized that this would induce a self-representation of the main caregiver as weak or especially vulnerable, because in one case, an important aspect was that refusing leave might be considerably detrimental for the mother's health (Heneghan 2011). I think this is not necessarily the case: asking how the refusal to relocate might impact on the primary caregiver is very reasonable, because the potential losses and curtailments in this case have to be part of the balancing of interests and the assessment of the resulting effect on children.

Others have criticized that human rights perspectives have not been considered sufficiently in case law, such as the rights of the child and the non-resident parents under the Human Rights Act. Herring and Taylor argue that the human rights basis for judging relocation cases should be strengthened, but point out that this would not lead to a change in the outcome, because the autonomy rights of the resident parent and child would normally be more weighty than other rights of the non-resident parent and child (Herring and Taylor 2008).

4.2.3 What does this review of German and English case law on relocation conflicts reveal?

First, England and Wales have less case law on internal relocation or short stays with the child abroad than Germany does. In England and Wales, the resident parent has more autonomy to decide on internal relocation and on short stays abroad than in Germany. This is what one might have expected from the analysis of statutory law models, with England as the prototype of the 'autonomy-with-

⁴⁷ See the case law reported by Herring 2015, p. 550ff.

⁴⁸ *K v K (Relocation: shared care arrangement)* (2011) EWCA Civ 793, cited by Herring 2015, p. 554.

objection' model and Germany as an adherent of the 'strong consensus model'. There are quite a number of court decisions in Germany on applications by a parent claiming that a short trip to a foreign country with the child is an important matter, not a daily affair, and should not be allowed in terms of the child's best interests.⁴⁹ Examples include short holidays with the child in Turkey, in the United States, in Egypt, and in the United Kingdom for language studies (Scheiwe, 2019, p. 392). I did not find much case law in England and Wales on such issues, but two cases in which there was serious concern that the child would not be returned from, for example, India.

In general, one would expect the frequency of family court proceedings in Germany to be much higher than in England and Wales, due to various factors including the availability of legal aid or the role of (compulsory or voluntary) mediation. But detailed research on the number of cases and court proceedings concerning parental conflicts over the exercise of joint parental responsibility is lacking. Conclusions can be drawn only from published court decisions in the literature or the judicial databases I used for this analysis. This results in a bias towards litigating parents, high conflict cases, and higher instance court decisions.

Second, what is very similar in the case law of both jurisdictions is also that the child's view also has to be taken into account and can even be decisive, depending on the child's age, maturity and understanding, and reasonable grounds. This is not discussed in detail here.⁵⁰ The problem is that under the paradigm of the child's best interests, one often finds that an adult's interest is represented and disguised as the child's best interests.

Third, if one compares case law on relocation conflicts in more depth, it is more similar than one might have expected from two countries located at the opposite poles of the models developed above. Regarding the main principles applied by the courts and their interpretation, the differences between English and German courts do not seem to be so large in cases that concerned mainly external relocation to a foreign country. Obviously, the child's best interests are the paramount consideration (art. 3 UN-CRC). These child welfare considerations require an investigation of all aspects of the individual case, and no presumptions are applied. What differs at first sight is how the interests of all persons involved (the parents and the child) are weighed and balanced under the child welfare tests, because English courts tend to ask some questions concerning the motives of the adults that German courts would not ask explicitly. But at a second look, these differences diminish: what English courts ask directly is taken into account by German courts in an indirect way.

The motives of the parent who intends to change residence with the child (most often the mother as main caregiver) are taken into account by courts in both

⁴⁹ For details of case law, see Staudinger (2017), § 1687 and § 1628 German C.C.

⁵⁰ On the rights of children to participate in family court procedures, see Berrick et al. (2018), Bilson and White (2005), Kilkelly (2010).

countries, but in a different way. In England, the questions regarding the motives of the parent who wishes to relocate are formulated straightforwardly by the court (see *Payne v Payne*). In Germany, motives are not scrutinized explicitly, because based on a constitutional law argument, the relocating parent does not have to legitimize her choices and motives: she enjoys freedom to move (or to remarry or make another autonomous choice). But when it comes to the child welfare check and the criteria that define the best interests of the child, such as 'educational competence of a parent' and 'capacity to foster and support the child', the motives and plans of the parent who wishes to relocate will play an important role, and she will have to explain her intentions as being reasonable in terms of the child's best interests. If she wanted to hinder contact with the other parent and exclude him from the child's life, her motives would be considered to be unreasonable and against the child's best interests. English courts are less prudish when it comes to asking questions about personal plans and affairs. I find it remarkable that a court even asked the objecting father with shared care why he did not move with the other parent who had reasonable grounds to relocate. Such an approach is reasonable from a gender perspective, but I can hardly imagine a German judge asking this question.

However, from a gender perspective or a relational approach, it would be necessary to go even further and oblige the non-resident parent who wishes to move a considerable distance to inform the resident parent beforehand. As it stands, the non-resident parent is free to do so without any child welfare tests or consideration of how this affects the care arrangements or the employment chances of the main caregiver. But if the non-resident parent also intends to move, he or she should be obliged to inform the other parent so that they can discuss whether current arrangements between parents (contact, child support, etc.) need to be adapted. From a relational perspective, their relationships and certain care and work arrangements may be interconnected. Having a child brings about restrictions of personal rights for each parent anyway. So why should a judge be reluctant (as it is argued in the German case) to ask the non-resident parent why he does not move as well if the other parent has reasonable grounds for the intended change of residence with the child.

If the aim is to make gender aspects visible in cases involving conflicts over care and contact with the child, even the former care arrangements and the division of labour in a couple plays a role, because they affect potential losses for each parent. This may be discussed in the courtroom when checking the 'continuity' criterion under the law's child welfare test. But not all former arrangements can be subsumed under the child's best interests criteria; an explicit discussion of the legitimate individual interests of each parent should stand on its own. Not only the non-resident parent has a right to contact and to family life; the parent who wishes to relocate also has a right to family life (which justifies the English court's question regarding what would happen to the main caregiver if it were not to grant leave to relocate with the child), and she also has a right to autonomy and self-

determination, although most main caregivers are ‘hostages of love’ and would not relocate without their child.

From a relational perspective, several interests, motives, and conflicting rights and obligations have to be taken into account and weighed in each individual case. Parental responsibility is *not only* a duty towards the child or a sort of a trust, as is sometimes claimed. A parent also has rights of her or his own to enjoy life and the company of the child (a right to family life, art. 8 ECHR, art. 6 German Basic Law) as well as rights to autonomous decision-making in his or her own interest. A rights-based approach should not hinder asking all the questions the English courts asked in *Payne v Payne*. The non-resident parent should also be asked such questions. In most cases, the inequality between parents remains that the main caregiver is more vulnerable if a leave to relocate with the child is not granted than the non-resident parent who does not have to legitimate personal choices (e.g. to move for reasons of work, career, or to remarry or repartner). The non-resident parent’s motives to move are never scrutinized or questioned, although they might endanger former (care) arrangements and contact with the child as well. It is cynical to say that each parent is equally free to move without the child. Formal equality should not hinder an inspection of the substantial inequalities that may be based on former promises and choices of distribution of work and resources between the parents.

I opt for a formulation that includes a discussion of the parents’ legitimate interests in the balancing of factors, such as that formulated explicitly in German law in the context of applications to the family court for an amendment of former decisions (§ 1697a BGB): the court should take the decision that best suits the child’s welfare while considering all actual circumstances and opportunities as well as the legitimate interests of the persons involved. Making this explicit opens up more space for equity and gender considerations and for a discussion over inequalities and losses. In contrast, the current tendency is to hide this behind the veil of the child’s best interest or to rephrase adults’ interests as objective truth about the child’s welfare.

5 Some comments on how law impacts on bargaining power: A transdisciplinary perspective

One central question in our research takes a comparative perspective and asks how legal regulations across different jurisdictions on the exercise of joint parental responsibility affect the chances and opportunities as well as the bargaining power of each parent. Therefore, I drew up a typology of statutory law models along a continuum from a strong emphasis upon autonomy on the one side to consensus and joint exercise on the other. In a second step, I analyzed case law in more depth, especially with regard to relocation decisions, in order to seek commonalities and differences in legal procedures between two jurisdictions. Finally, I came back to

the question of how this may affect the bargaining power of a parent differently by drawing upon *bargaining theory*. England and Folbre (2002) suggest that bargaining models might offer a more integrated and interdisciplinary approach to parental involvement and bargaining power than the more fragmented approaches of psychologists, which focus on emotional dimensions; of economists, which focus on transfer of income; and of sociologists, which focus on the effects of family structures and social norms. Parental involvements include different resources on which bargaining power can be built—both economic and non-economic—such as money, time and emotional care. The fundamental idea is that the more one has access to a resource that one is sharing with the other but that one could withhold and use for oneself, the greater one's bargaining power that can be used for negotiation. To analyse how resources may affect one parent's power in bargaining with the other, economists use the concept of 'threat points' (England and Folbre 2002). This means the fallback position of each partner if the relationship dissolves. It includes the economic resources, custody for the child, maintenance and child support, the family home, chances to repartner or remarry, career opportunities, and so forth. Contributions of non-market work or emotional care can be a source of power if the contributor can credibly threaten to withhold them. The legal rules on parental responsibility, care, and contact arrangements as well as child support affect individual parental threat points and therefore bargaining power.

In a situation of separation or divorce, different contributions or resources are dealt with at the same time, and these may offer some bargaining space (especially under English and Welsh law, in which the judge has more discretion to distribute financial assets and the family home and to 'melt it all in one pot' than under German law). However, if the conflict is only over single items of parental responsibility and care for a child between separated parents, the space for bargaining is more limited. Promising or withholding emotional access or contact with the child may play an important role in bargaining, but its weight depends also on preferences and the relative resources of each parent. Child care is often not very credible as a bargaining chip for main caregivers, because they are mostly a sort of 'prisoner of love' (England and Folbre 2002). For example, if the court were not to grant leave and the main caregiver could relocate only without the child, many would renounce the plan to change residence and remain with the child. On the other hand, the non-resident parent who intends to move is not barred by any legal rules from doing so, and if this is compatible with his or her preferences (among others, regarding contact with the child and possibly little or no contact with the child), there is no way the main caregiver could hinder it or bargain about changes of parental agreements. Take the example of a part-time working or a shift-working main caregiver who has been able to follow her working time schedule because the non-resident parent took care of the child for these hours. However, he decides to move, with the consequence that the main caregiver cannot continue her employment as before due to a lack of accessible child care or the much higher costs for

it. Her bargaining power in such a situation is very limited, and the regulation of parental responsibility or of maintenance and child support law have very little to offer to her in this situation. Compare this to a situation in which both parents are involved if not equally, at least substantially in caring for the child, and the resident parent wants to relocate with the child: the bargaining power, the preferences, and also the legal rules differ considerably from the above-mentioned scenarios. The legal norms on how to decide such a case in court impact on potential gains and losses, and a closer look at the gender dimensions of alternative arrangements should be taken.

These few examples illustrate that it is worth investigating in detail the links between different forms of parental involvement and the relative bargaining power of mothers. The ways in which specific laws and rules may affect intrafamily dynamics can vary, and formally gender-neutral norms may have different effects upon parents depending on not only their arrangements of care for and contact with the child but also their preferences. ‘One fits all’ may make these differences invisible, and there are strong arguments for graduated rules on the exercise of parental responsibility (Scheiwe 2018, p. 58) that would link the degree of individual or consensual and cooperative decision making of a parent with joint parental responsibility to the comprehensiveness of participating in the child’s care, contact, and upbringing.

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Who is a child's legal mother? Must a child have exactly one mother, can it have two or three, or can it have two fathers, but no mother? Or has the concept of motherhood become obsolete and should we just talk of parenthood in a gender neutral way? Questions such as these would have appeared esoteric only a few decades ago, but as a result of new social developments (such as frequent family reconstitutions, gay and lesbian emancipation or surrogacy) and of technological innovations (such as egg and embryo donations) they have become issues in a vehement debate. The interdisciplinary contributions to this book focus on the legal definition of motherhood, on the way in which legal conceptions structure the social discourse on motherhood (and vice versa), and on the influence of legal rules on power relations between mothers, fathers, children and the state. Among the issues addressed are

- the challenges to our understanding of the legal regulation of motherhood by developments in reproductive medicine;
- the challenges to our understanding of the legal regulation of motherhood by parental constellations deviating from the mother-father-model (single motherhood by choice, same-gender parenthood, multiple parenthood);
- the exercise of parental rights in case of parental separation and the impact of legal rules on the bargaining positions of mothers and fathers.

Band 24 der Reihe „Göttinger Juristische Schriften“

Die Reihe wird von der Juristischen Fakultät der Georg-August-Universität Göttingen herausgegeben und macht Veranstaltungen an der Fakultät einer interessierten Öffentlichkeit zugänglich.



GEORG-AUGUST-UNIVERSITÄT
GÖTTINGEN

ISBN: 978-3-86395-425-3

eISSN: 2512-6849

Universitätsverlag Göttingen