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GENDER AND PARENTHOOD: THE CASE FOR REALIGNMENT

Sheelagh McGuinness & Amel Alghrani

I. INTRODUCTION

For those not intimately involved, one of the delights of the burgeoning reproductive business is the glittering constellation of ethical and legal questions reproductive medicine poses for us. Some of those questions, endlessly debated, are deeply philosophical (and for some of us theological). What is the nature of human life itself? Does possessing human DNA have any moral significance? Others require us to reflect on just what intrinsic rights are involved in procreation. Few might dissent from a rhetorical assertion that men and women have a right to found a family. Begin to debate what that right entails and who enjoys it and dispute resurfaces. Yet other questions are, for lawyers, delightfully technical as much as morally significant. Before 1979, paternity might on occasion be dubious, but even a rather dim child generally knew his mother.¹

In discussions of procreative autonomy and reproductive liberty the rights of many have been examined. Whether infertile couples², single and lesbian women³, prisoners⁴ and even HIV **discordant** individuals⁵ should be assisted in their desires to procreate has all attracted attention and academic debate. One group that continues to

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1 M. Brazier 'Regulating the Reproduction Business?' (1999) 7 *Medical Law Review* 166-193 at 168.

2 B. Steinbock 'Regulating assisted reproductive technologies: an ethical framework' (1996) 6 *Womens Health Issues* 167-174; J. Harris, *Clones, Genes, and Immortality: Ethics and the Genetic Revolution* (Oxford: Oxford University Press; 1998) at 233.

3 E. Sutherland, 'Man Not Included – Single Women, Female Couples and Procreative Freedom in the UK' (2003) 15 *Child and Family Law Quarterly*, 155; G Hanscombe, 'The Right to Lesbian Parenthood' (1983) 9 *Journal of Medical Ethics* 135.

4 J. Williams, 'The Queen on the Application of Mellor v Secretary of State for the Home Department Prisoners and artificial insemination - Have The Courts Got It Right?' (2002) 14 *Child and Family Law Quarterly* 218-228; *Dickson v. The United Kingdom* (Application no. 44362/04) [2007] 3 FCR 877; Helen Codd, 'Policing Procreation: Prisoners, Artificial Insemination and the Law' *Genomics, Society and Policy* (2006) Vol.2, No.1, pp.110-117.

5 S. Sharma et al. 'Assisted Conception in couples with HIV Infection' (2003) 79 *Sex Transm Infect* 185-188 at 187; A. Drapkin Lyerly & J. Anderson, 'Human immunodeficiency virus and assisted reproduction: reconsidering evidence, reframing ethics' (2001) 75 *Fertility and Sterility* 843-858 at 849; A. Apoola et al 'Access to infertility investigations and treatment in couples infected with HIV: questionnaire survey' (2001) 323 *British Medical Journal*, 1285.

be neglected in such discussions comprises individuals who have undergone sex reassignment surgery. The government's decision to overhaul the legal framework regulating assisted reproduction reignited much debate on issues surrounding assisted conception and the rules relating to parenthood.⁶ In these discussions we see a chance being missed to consider the needs of transsexuals. In our paper we address this lacuna, and highlight the needs of this group in the context of assisted reproduction and parenthood. We consider whether there is any reason to refuse transsexuals the same options as other individuals in the context of assisted reproductive technologies. We examine whether such individuals who may wish to found a family are being hindered rather than helped by the current legal framework.

Transsexuals, as a consequence of opting for sex reassignment surgery, lose their 'natural' reproductive capacities. This is not because reproduction is impossible; to the contrary, prior to surgery, transsexuals can be counselled about having their gametes frozen and stored for later use. As science advances, more options will become available for transsexual individuals.⁷ What harms might children brought up by these people suffer as a result of their influence? The reproductive options of transsexuals, and whether they ought to be assisted in their desire for children, is neglected in legal and ethical discourse. Why are transsexuals, prior to surgery which

6 See Review of the Human Fertilisation and Embryology Act: Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos), Cm 6989, December 2006; Human Tissues and Embryos (Draft) Bill (Cm 7087); Joint Committee on the Human Tissue and Embryos (Draft) Bill, Draft HL Paper 169-I and HC Paper 630-I; Written and oral evidence published as Volume II. Government Response to the Report from the Joint Committee on the Human Tissue and Embryos (Draft) Bill, Cm 7209; Most recently Human Fertilisation and Embryology Bill [HL]. We will use the new proposed legislation which the government is considering as a starting point for our discussion. The time is ripe to address the present deficiencies and allow individuals who have undergone sex reassignment surgery to achieve their potential for genetic parenthood should they desire it. At the time of writing this, it seems however that this is something that is going to be overlooked.

7 W. Fageh et al, 'Transplantation of the human uterus' (2002) 76 *International Journal of Gynaecology & Obstetrics*, 245-251; I. Evans, 'Womb transplants could be two years away, experts claim' *The Times*, 05/09/2006.
<http://www.timesonline.co.uk/article/0,,8122-2342896,00.html> Accessed on 20/11/2006.

will affect their ability to reproduce, not being counselled on fertility preservation or reproductive choices available to them?⁸

Our paper will have two principal foci. Firstly, we will examine whether there are any justifications for not barring transsexuals from assisted reproductive technologies. In the absence of such justifications, we shall consider what should be done to remove discriminatory practice in this area and to widen the options available to transsexuals wishing to take advantage of reproductive technologies.⁹ The second part of our paper will analyse the challenges posed by current legal definitions of parenthood to those transsexuals who wish to reproduce. We believe that the current legislation is unable to deal satisfactorily with this issue. There are those who may believe that transsexuals are not a 'suitable' category of parent. Similar arguments to those that were at different stages in the past aimed at 'adulterous' women and homosexuals are now reserved for transsexuals.¹⁰ These arguments have been shown to hold little weight in the past¹¹ and the few studies that have been carried out suggest that they are unlikely to hold weight in the present discussion either.¹²

8 W. Meyer, et al. 'The Standards of Care for Gender Identity Disorders-Sixth Version' (2001) 5 *International Journal of Transgenderism* http://www.symposium.com/ijt/soc_2001/index.htm Accessed on 08/01/2007.

9 The focus of this paper will be attempts to remove discrimination in practice. We will not focus on legal measures against discrimination.

10 D. S. Dooley, 'Immoral because they are bad, bad because they are wrong: Sexual orientation and presumptions of Parental Unfitness in Custody Disputes', (1990) 26 *California Western Law Review*, 395-424; Judith G. Fowler 'Homosexual Parents: Implications for Custody Cases', (1995) 33 *Family And Conciliation Courts Review*, 361-376.

11 S. Golombok et al, 'Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal' (1983) 24 *Journal of Child Psychology and Psychiatry* 551-572; R.W Chan et al, 'Psychological Adjustment among children conceived via donor insemination by lesbian and heterosexual mothers' (1998) 69 *Child Development* 443-457.

12 R. Green, 'Sexual Identity of 37 Children raised by Homosexual or Transsexual Parents' (1978) 135 *American Journal of Psychiatry* 692-697; R. Green, 'Transsexuals' Children' (1998) 2 *The International Journal of Transgenderism* <http://www.symposium.com/ijt/ijtc0601.htm> Accessed on 08/11/2007.

II. EQUAL TREATMENT

Transsexualism is an extreme form of gender dysphoria.¹³ An individual with transsexualism is born with the primary and secondary sexual characteristics opposite to that of their gender. Brothers and Ford give the following definition:

...a persistent desire to be of the opposite sex combined with persistent discomfort about one's assigned sex or gender role. The diagnosis requires the absence of physical intersex conditions and the presence of clinically significant distress or impairment of psychological function.¹⁴

The gender of these individuals remains constant. It is their sex which is changed during reassignment surgery and hormone therapy to match their gender.¹⁵ This process, often referred to as 'transitioning', leads to the loss of an individual's natural reproductive capacity.¹⁶ Assisted reproduction offers many options which transsexual individuals could use in order to preserve their reproductive capacities. These are options regularly used by cancer patients, about to go through treatment which will render them infertile.¹⁷ The standards for treatment of transsexualism are set out in the Harry Benjamin International Gender Dysphoria Association Standards of Care. These guidelines have recently included reference to the importance of reproductive

13 P. De Sutter 'Gender Reassignment and assisted reproduction; Present and future reproductive options for transsexual people' (2001) 16 *Human Reproduction* 612-614 at 612. It is also a mental disorder as per F64.0 of the ICD-10.

14 D Brothers & W. C Ford 'Gender Reassignment and assisted reproduction: An ethical analysis' (2000) 15 *Human Reproduction* 737-738.

15 For the purposes of this paper we will take gender to be primarily a psycho-social concept and sex primarily to be a biological feature. For a discussion of this in relation to the Gender Recognition Act 2004 see J. Coggon, N. Hammond and S. Holm, 'Transsexuals in Sport- Fairness and Freedom, Regulation and Law', *Sports, Ethics and Philosophy*, (Forthcoming 2008).

16 P. De Sutter 'Gender Reassignment and assisted reproduction; Present and future reproductive options for transsexual people' (2001) 16 *Human Reproduction* 612-614 at 612.

17 Consider the recent discussion about the lack of funding available for cancer fertility services for cancer patients: <http://news.bbc.co.uk/1/hi/health/7187291.stm> Accessed 07/02/2008; <http://www.cancerbackup.org.uk/News/Mediacentre/Pressreleasesstatements/2008/96619968> Accessed 07/02/2008; [http://www.politics.co.uk/press-releases/royal-colleges-say-nhs-should-fund-fertility-services-cancer-patients-\\$484202.htm](http://www.politics.co.uk/press-releases/royal-colleges-say-nhs-should-fund-fertility-services-cancer-patients-$484202.htm) Accessed 07/02/2008; <http://www.guardian.co.uk/society/2008/jan/15/nhs.cancer> Accessed 07/02/2008.

options for transsexuals.¹⁸ Transsexuals should have the same reproductive rights as other categories of people who need assisted reproduction in order to have children. What such rights entail are not the focus of this paper, instead we will consider the (un)equal treatment of transsexuals.¹⁹

There is some evidence which suggests that transsexuals are not being counselled about their reproductive options pre-operatively.²⁰ This may be due to the fact that in the past infertility was seen as a 'price to pay' for transitioning - being a transsexual and being a parent were seen as mutually exclusive.²¹ We reject the notion that transsexuals have in some way chosen to be infertile and that this negates their rights to access artificial reproductive technologies. It is, correctly we believe, no longer accepted that same sex couples have somehow waived any options to parent by the mere fact they have elected to be in a relationship where natural reproduction is not possible.²² Nor do patients who elect treatment that may affect their fertility waive their reproductive interests; it is recognised that patients undergoing cancer treatment should be counselled about fertility preservation techniques.²³ Transsexuals should not be deemed to have chosen to be infertile by opting for a treatment that results in infertility. And nor should transsexuals be excluded from parenting simply because they have elected for sex reassignment surgery.

18 *The Harry Benjamin International Gender Dysphoria Associations Standards Of Care For Gender Identity Disorders*- Sixth Version at 17.

19 For the views of one of the authors on reproductive liberty see A. Alghrani & J. Harris 'Reproductive Liberty: Should the foundation of families be regulated?' (2006) 18 *Child and Family Law Quarterly* 191-210.

20 P. De Sutter et al 'The Desire to have Children and the Preservation of Fertility in Transsexual Women: A Survey' (2001) 6 *The International Journal of Transgenderism* http://www.symposion.com/ijt/ijtvo06no03_02.htm Accessed on 08/01/2007.

21 P. De Sutter 'Gender Reassignment and assisted reproduction; Present and future reproductive options for transsexual people' (2001) 16 *Human Reproduction* 612-614 at 612.

22 See the provisions for same sex parents in the Human Fertilisation and Embryology Bill.

23 Royal College of Physicians, Royal College of Radiologists, Royal College of Obstetricians and Gynaecologists. *The effects of cancer treatment on reproductive functions: guidance and management*. Report of a Working Party. (London: RCP, 2007).

Transsexuals using their own gametes post-operatively may cause problems for the definitions of ‘parent’ under the Human Fertilisation and Embryology Act, which may soon be substantially amended by the Human Fertilisation and Embryology Bill. In the discussions (so far) of the proposals contained in the Bill there has been little, if any, mention of transsexuals. Transsexuals seeking to store gametes for future use may encounter problems in gaining access to treatment in a licensed clinic as it is unclear whether a clinic would be prepared to facilitate this procedure. The fact that the Gender Recognition Act 2004 has only recently come into force means that there have been only speculative suggestions that this Act makes it possible for transsexuals to be named as mother or father on birth certificates in accordance with their acquired gender.²⁴ This recognition depends on how section 12 of the Gender Recognition Act is interpreted – something discussed further later in this paper.

A. Transsexuals’ Reproductive Choices

Most pre-operative transsexuals will be fertile in the sense that their reproductive organs will be fully functioning. They will have viable eggs or sperm. Post-operatively they will be irreversibly infertile.²⁵

1. Transsexual women

24 S. Sheldon ‘Fragmenting Fatherhood: The Regulation of Reproductive Technologies’ (2005) 68 *Modern Law Review* 523-553; L. Smith ‘Is three a crowd? Lesbian mothers’ perspectives on parental status in law’ (2006) 18 *Child and Family Law Quarterly* 231-252. Both Sheldon and Smith suggest, in footnotes, that in the wake of the Gender Recognition Act 2004, s.28 of the Human Fertilisation and Embryology Act would allow for a female-male transsexual to be recognised as the father of a child. This would be premised on his position as the male partner in a recognised heterosexual relationship. Later in this article we discuss this possibility further. Neither Sheldon nor Smith discuss this possibility in much detail. The situation may be complicated if a male-female transsexual wished to use her own gametes.

25 P. De Sutter ‘Gender reassignment and assisted reproduction’ (2001) 16 *Human Reproduction* 612-614 at 612.

For transsexual women (male to female transsexuals) there are two main ways by which they can realise their reproductive potential. The first is through the cryopreservation of sperm prior to surgery. Sperm could be stored for use at a later date, which would mean she could still have a genetically related child. For transsexual women who identify as lesbians the most straightforward option will be artificial insemination of their partner.²⁶ Evidence suggests that many in this group would be interested in this option.²⁷ Transsexual women may alternatively wish to consider surrogacy (or partial surrogacy).²⁸ Her gametes could also be used to fertilise a donor egg which would then be implanted in a surrogate and carried to term. The use of a surrogate may prove more difficult as there is a need first to find an individual willing to act in this capacity and possibly also to secure donor eggs. Furthermore, there is the need to ask a licensed clinic to implant an embryo, produced through IVF of the donor egg, into the surrogate. The Human Fertilisation and Embryology Authority's Code of Practice permits licensed clinics to become involved in surrogacy only where "no person commissioning the surrogacy arrangement is able to carry a child or, where a person commissioning the arrangement is able to carry a child, her health may be seriously impaired by doing so".²⁹ Surrogacy agreements are not legally binding on either party in the UK;³⁰ thus the commissioning surrogate can renege on the agreement prior or subsequent to the birth. And the surrogate, as the woman who gives birth to the baby, is deemed to be the legal mother.³¹

26 Ibid.

27 A. Lawrence 'Meeting the Reproductive Needs of Transsexual Patients' *The 2nd International Congress on Sex and Gender Issues* 21/06/1997 <http://www.annelawrence.com/repro.html>.

28 Surrogacy is "the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth." - Report of the Committee of Enquiry into Human Fertilisation and Embryology (Warnock Committee Report), Cmnd. 9314, 1984, para 8.1.

29 HFEA Code of Practice 7th edition, S.7.6.9.

30 Surrogacy Arrangements Act 1985.

31 Human Fertilisation and Embryology Act 1990, section 27(1) "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child." Clause 33 of the Human Fertilisation and Embryology Bill

The second option which may become possible in the near future is womb transplantation. Scientists in the US are working on attaining the first human pregnancy as a result of a womb transplant.³² If womb transplants become a safe procedure, this would allow transsexuals to experience gestation and pregnancy and fully identify with their now recognised sex. Consider the following comment from Paul De Sutter:

...quite a few women answered that having their own child is one thing, but that being pregnant and giving birth is what they would love most of all. Many transsexual women feel that the impossibility of biological motherhood is one of the major features missing from their femaleness. They would be more interested in future options of uterine transplantation techniques than in sperm freezing.³³

2. *Transsexual men*

Transsexual men (female to male transsexuals) have similar options; they could undergo hormone-induced super-ovulation and ova retrieval pre-operatively. The ova could then be stored, or alternatively, through IVF, the eggs could be fertilised with donor sperm, and embryos frozen for use post surgery.³⁴ These embryos may subsequently be implanted into a surrogate to be gestated, or implanted in a female partner.³⁵

re-enacts this section. "It will remain the case that the woman who carries a child following assisted reproduction anywhere in the world is the child's mother, unless the child is subsequently adopted or parenthood is transferred through a parental order.", See the Explanatory Notes for the Human Fertilisation and Embryology Bill at p.29.

32 See M. Hutchinson, *BBC News* "Womb transplant baby 'within three years'" Tuesday, 1 July, 2003. Accessible at <http://news.bbc.co.uk/1/hi/health/3035628.stm> and L. Andrews, "Male Pregnancy Is In the Future" *The Daily Princeton* Wednesday May 8 2002. Accessible at <http://www.dailyprincetonian.com/archives/2002/05/08/opinion/5154.shtml>.

33 P. De Sutter et al 'The Desire to have Children and the Preservation of Fertility in Transsexual Women: A Survey' (2002) 6 *The International Journal of Transgenderism* http://www.symposion.com/ijt/ijtvo06no03_02.htm Accessed on 08/01/2007.

34 All of this depends on a licensed clinic being prepared to facilitate it.

35 A. Lawrence 'Meeting the Reproductive Needs of Transsexual Patients' The 2nd International Congress on Sex and Gender Issues 21/06/1997 <http://www.annelawrence.com/repro.html>.

B. The Crux of the Issue: Should Transsexuals be Allowed to Parent?

What of the welfare of any child born to a transsexual parent? The Human Fertilisation and Embryology Act 1990 is founded upon ‘twin pillars’³⁶: child welfare,³⁷ and consent to treatment.³⁸ For the former, section 13(5) of the Act currently imposes a mandatory condition on treatment licences, requiring that:

A woman shall not be provided with treatment services unless account has been taken of the welfare of the child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.³⁹

Much literature has emerged expressing concern with regard to the interpretation of this statutory ‘welfare principle’.⁴⁰ Is it being used as a smoke screen to hide prejudices regarding the parental fitness of prospective patients? As the welfare of the child is of paramount concern, might it be questioned whether transsexuals can

36 S. Sheldon, ‘Case Commentary *Evans v Amicus Healthcare; Hadley v Midland Fertility Services* – Revealing cracks in the “twin pillars”?’ (2004) 16 (4) *Child and Family Law Quarterly* 437 – 452.

37 Human Fertilisation and Embryology Act, s. 13(5).

38 Human Fertilisation and Embryology Act, Schedule 3.

39 The Human Fertilisation and Embryology Authority is required to provide guidance on this provision via its code of practice for licence-holders. In relation to the need for a father, the current guidance states: “Where the child will have no legal father the treatment centre is expected to assess the prospective mother’s ability to meet the child’s/children’s needs and the ability of other persons within the family or social circle willing to share responsibility for those needs.” (*Human Fertilisation and Embryology Authority Code of Practice*, 7th Edition, paragraph G.3.3.3.) . The new Bill will remove ‘the need of the child for a father’ from this section.

40 E. Jackson, ‘Conception and the Irrelevance of the Welfare Principle’ (2002) 65 *MLR* 176; S. Millns ‘Making Social Judgements that Go Beyond the Purely Medical: The Reproductive Revolution and Access to Fertility Treatment Services’ in J. Bridgeman and S. Millns (eds) *Law and Body Politics: Regulating the Female Body* (Dartmouth 1995), E. Sutherland, ‘Man Not Included – Single Women, Female Couples and Procreative Freedom In The UK’ 15 (2) (2003) *Child and Family Law Quarterly* 155.

adequately provide for the welfare of any future children?⁴¹ This is a concern that has been echoed by transsexuals themselves. Paul De Sutter describes this feeling:

Other individuals believe they would not be good parents and would therefore choose not to have children anyway. They believe the psychological trauma they had to go through because of their gender dysphoria would impair a normal parent-child relationship.⁴²

However this lack of self-confidence must not be mistaken for proof that this group would be unsuitable parents. There is nothing to suggest that a parent who has undergone reassignment surgery is necessarily mentally imbalanced or that being a transsexual will necessarily affect their ability to parent a child. Evidence demonstrates that post-operative transsexuals are much happier and, arguably, are in a better state to parent (although they may now need assistance) than they would have been had they not had the surgery.⁴³ Consider the following quote from Brothers and Ford supporting this contention, in which they cite Pierre Banzet, a surgeon who specializes in sex reassignment surgery:

... with rigorous selection, gender reassignment offers the prospect of long term psychological health. He described operations on 98 males and 68 females over the past 15 years, all of whom were subjected to a thorough diagnosis with a rigid selection system to

41 P. Banzet & M. Revol 'The Surgical Experience' (1996) 180 *Bull. Acad. Natl. Med.* 1395-1402 as quoted in D Brothers & W. C Ford 'Gender Reassignment and assisted reproduction: An ethical analysis' (2000) 15 *Human Reproduction* 737-738 at 737.

42 P. De Sutter et al 'The Desire to have Children and the Preservation of Fertility in Transsexual Women: A Survey' (2002) 6 *The International Journal of Transgenderism* http://www.symposium.com/ijt/ijtvo06no03_02.htm Accessed on 08/01/2007; A. Lawrence, 'Factors Associated With Satisfaction or Regret Following Male-to-Female Sex Reassignment Surgery' (2003) 32, *Archives of Sexual Behavior*, 299-315; G. De Cuyper et al Long-term follow-up: psychosocial outcome of Belgian transsexuals after sex reassignment surgery (2006) 15 *Sexologies*, 126-133. All these citations suggest that sex reassignment surgery offers an improvement in psychological functioning. However it seems to be true that the incidence of suicide amongst post-operative transsexuals is higher than that of the general population. Whether this necessarily justifies prohibitions on treatment on the basis of the welfare of the child remains unclear. The final study cited, which is also the most recent, suggests that certain factors influence the incidence of suicide including the age of the individual when they first appear for treatment and the acceptance that they receive post-operatively. This suggests to us that improved access to sex reassignment surgery and societal acceptance of transsexuals may lead to lower incidence of suicide over time. However we acknowledge the role that hormone treatments may have on the incidence of suicide. Given this uncertainty we suggest that a blanket prohibition on treatment will be inappropriate although in some cases treatment may be legitimately refused.

43 P. De Sutter 'Gender reassignment and assisted reproduction' 2001 16 *Human Reproduction* 612-614.

ensure that the individual had intact reality awareness and stable ego strength. In every case the outcome after surgery was positive.⁴⁴

Others who have carried out research in the field have come to similar conclusions.⁴⁵

There is little evidence to support the notion that a child is harmed by having a transsexual parent. Although there are very few studies of children raised by transsexual parents, those that exist show that such children do not fare any less well than children reared in other family units.⁴⁶ There is no evidence to indicate a child's welfare would be adversely affected by being raised by a parent who has undergone sex reassignment surgery. Unless clear evidence can be provided to show that harm would result from being raised by a transsexual parent, or that the child's welfare would be adversely affected, reproductive assistance should be available to such individuals. Transsexualism in itself should not automatically debar an individual from accessing assisted reproductive technologies.⁴⁷

C. The Importance of Preserving Fertility

In other areas of medical practice it is seen as good practice to counsel patients about the fact that their treatment may cause them to become infertile. They are also told of the options available to them before their therapy begins. A prime example is the guidance from *The Ethics Committee of the American Society for Reproductive Medicine* on the treatment of cancer patients. As chemotherapy may result in a loss of the patient's reproductive capacities, good practice for treating cancer patients encompasses offering options for sperm and ova retrieval to be stored for future use

44 D Brothers and W. C Ford 'Gender Reassignment and assisted reproduction: An ethical analysis' (2000) 15 *Human Reproduction* 737-738 at 737.

45 L. Webster 'Female to male gender reassignment' (1998) 25 *Br.J.Sex.Med.* 8-10.

46 R. Green, 'Sexual Identity of 37 Children raised by Homosexual or Transsexual Parents' (1978) 135 *American Journal of Psychiatry* 692-697; R. Green, 'Transsexuals' Children' (1998) 2 *The International Journal of Transgenderism* <http://www.symposium.com//ijt/ijtc0601.htm> Accessed on 08/11/2007.

47 D Brothers & W. C Ford 'Gender Reassignment and assisted reproduction: An ethical analysis' (2000) 15 *Human Reproduction* 737-738 at 738.

and, in some cases, more experimental therapies. This is seen as being in accordance with acting in the patients' best interests.⁴⁸ Pre-treatment discussions regarding future infertility and options to preserve the chance to reproduce are made available to young children. Such counselling is even, in some circumstances, offered to pre-pubescent children, albeit with the cautionary note for sensitivity and tact.⁴⁹ It is indicative of the value placed on reproduction that we think clinicians ought to go to such lengths to preserve the reproductive capacities of children, and consider options as radical as the cryopreservation of testicular and ovarian tissue, even though this is a group so young that reproduction could not have been further from their contemplation. 'Good practice' in the treatment of young cancer patients highlights the importance placed on preserving, where possible, future reproductive choices. Similar standards exist in the UK.⁵⁰ The needs of this group have also been considered at law. The difficulty with obtaining a valid consent (to the storage of their gametes) from minors led to recommendations that the Human Fertilisation and Embryology Act be amended.⁵¹ Thus the Human Fertilisation and Embryology Bill proposes:⁵²

"Cases where consent not required for storage
9 (1) The gametes of a person ("the child donor") may be kept in storage without the child donor's consent if the following conditions are met.

48 'Fertility preservation and reproduction in cancer patients' *The Ethics Committee of the American Society for Reproductive Medicine* <http://www.asrm.org/Media/Ethics/FertilityPreservation.pdf> p.2 Accessed 27/06/2007.

49 'Fertility preservation and reproduction in cancer patients' *The Ethics Committee of the American Society for Reproductive Medicine* <http://www.asrm.org/Media/Ethics/FertilityPreservation.pdf> p.4 Accessed 27/06/2007.

50 'Managing the treatment of male fertility patients- RCN Guidance for oncology and haematology nurses' http://www.rcn.org.uk/publications/pdf/managing_fertility_male_cancer_patients.pdf Accessed 27/06/2007.

51 *Review of the Common Law Provisions Relating to the Removal of Gametes and of the Consent Provisions in the Human Fertilisation and Embryology Acts 1990* (HMSO London 1997) para. 2.6.

52 Human Fertilisation and Embryology Bill [HL] Schedule 3, section 12.

(2) Condition A is that the gametes are lawfully taken from or provided by the child donor before the child donor attains the age of 18 years.

(3) Condition B is that, before the gametes are first stored, a registered medical practitioner certifies in writing that the child donor is expected to undergo medical treatment and that in the opinion of the registered medical practitioner-

(a) the treatment is likely to cause a significant impairment of the fertility of the child donor, and

(b) the storage of the gametes is in the best interests of the child donor.

That it is seen as appropriate that such steps be taken in order to facilitate the preservation of fertility of young cancer patients highlights the extent to which the needs of transsexuals are being overlooked. We suggest that such counselling should be considered necessary when acting in the patient's best interests.

The importance of fertility is clearly recognised in the context of patients electing cancer therapy which may impair their fertility, and guidance recommends that such patients should be counselled on their fertility preservation. We recommend that clinicians also bear in mind that transsexuals undergoing gender reassignment surgery should similarly be informed and counselled on fertility preservation and artificial reproductive technologies which are be available to them.

III. REDEFINING PARENTHOOD

Legal rules governing parenthood were in the past predicated on biological essentialist criteria for motherhood and common law presumptions about marriage for fatherhood.⁵³ The changes proposed in the Human Fertilisation and Embryology Bill will go some way to bridging the gaps that exist in the law at present but problems remain. Although much discussion and attention is given to the definition of parents

53 S. Edwards *Sex and Gender in the Legal Process* (London, Blackstone Press Limited, 1996) .

in the Bill before Parliament, the needs of transsexuals are not considered at all, nor were they considered in the report of the Joint Committee⁵⁴ on the initial draft Bill.

A. Past

Prior to the Human Rights Act 1998 and the Gender Recognition Act 2004, the jurisprudence relating to transsexual parents was confusing as we can see from the following case. *X, Y and Z v. United Kingdom*⁵⁵ dealt with the question of whether a transsexual male could be acknowledged as the father on the birth certificate of a child. X a transsexual male was in a long term relationship with Y, his female partner. Y had successfully conceived a child as a result of donor insemination. In the course of this treatment, X was required to consent to his being the father of the child in accordance with section 28(3) of the Human Fertilisation and Embryology Act. This is something that X did. Section 28(3) states:

If no man is treated, by virtue of subsection (2) above, as the father of the child but—

(a) the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services provided for her and a man together by a person to whom a licence applies, and

(b) the creation of the embryo carried by her was not brought about with the sperm of that man,
then, subject to subsection (5) below, that man shall be treated as the father of the child.

X subsequently enquired of the Registrar General whether there was an objection to his being registered as the resultant child's father. In the reply, the view was taken that only someone who was born genetically a man could be acknowledged in this role. Subsequent to the birth of Z, the couple decided to try to register her in X's name

54 Joint Committee on the Human Tissue and Embryos (Draft) Bill, Draft HL Paper 169-I and HC Paper 630-I. Written and oral evidence published as Volume II.

55 *Case of X, Y AND Z v. The United Kingdom*, (75/1995/581/667) Judgment, Strasbourg 22 April 1997 <http://www.pfc.org.uk/node/340>.

anyway but this met with objection and only Y's name was put on the register. The refusal to acknowledge X as a man for these purposes meant that when Z was born she was registered as the child of one parent. X and Y were told that Z could lawfully bear X's surname, but only a biological man could be regarded as a father for the purposes of registration. As X was not considered to be a 'man' he could not marry Y, therefore the common law presumptions regarding fatherhood did not apply.

Because the Registrar General took the view that only biological men would satisfy the requirements of section 28 of the Human Fertilisation and Embryology Act 1990 that section could not apply to make X the father of his child.⁵⁶

The applicant complained to the European Court of Human Rights that there had been a breach of Articles 8, 12, 13 and 14. The court rejected this claim in its entirety. Of particular interest is the court's comment in relation to whether there had been a breach of Article 8. It was accepted that X, Y and Z were connected by *de facto* family ties and that they would be regarded as a 'family' for the purposes of Article 8. However, it was held that the State had a wide margin of appreciation in how it acknowledged the legal status of transsexuals as parents. The court also suggested that Z could be protected from the distress of X not being acknowledged as her father if X's transsexual status were kept secret; that way his not being acknowledged on her birth certificate would be no different from other families where the father's name was not on the birth certificate.

The Court does not find it established that any particular stigma still attaches to children or families in such circumstances.⁵⁷

56 C. Lind 'Case Commentary: Perception Of Sex In The Legal Determination Of Fatherhood' (1997) 9 *Child and Family Law Quarterly* 401-408.

57 *Case of X, Y AND Z v. The United Kingdom*, (75/1995/581/667) Judgment, Strasbourg 22 April 1997
<http://www.pfc.org.uk/node/340>.

This seems to be an unsatisfactory answer, especially when contrasted with the recent dicta of the Law Lords' in *Re R*:⁵⁸

... it is even more important that the very significant legal relationship of parenthood should not be based on a fiction (especially if the fiction involves a measure of deception by the mother).⁵⁹

X, Y and Z can also be contrasted with the approach of the legislature in the aftermath of *R v HFEA, ex parte Diane Blood*.⁶⁰ The Human Fertilisation and Embryology (Deceased Fathers) Act 2003 allows for the name of deceased fathers to be named on birth certificates. The rationale for this Act is the importance of a parent being identified on a birth certificate even when this is likely to have little practical or legal effect. This perceived importance of having the name of the father on the birth certificate seems to have been overlooked in *X, Y and Z*.⁶¹

B. Present & Future

In the wake of the Human Rights Act 1998, the Gender Recognition Act 2004, and with the changes proposed in the new Bill, how might transsexual parental status be dealt with? We will next go through some scenarios, discussing the definitions of 'mother' and 'father'.⁶²

58 See S. Fovargue '*Re R(IVF: Paternity of Child): assisting conception for the single infertile*' (2006) 18 *Child and Family Law Quarterly* 423-444.

59 *Re R (IVF: Paternity of Child)* [2005] 2 FLR 843 at 859 *per* Lord Walker of Gestingthorpe.

60 *R -v- HFEA Ex Parte Diane Blood* [1997] 2 All ER 687.

61 We are grateful to an anonymous reviewer for this point.

62 Given the current flux in the law we acknowledge that this may have changed by the time the paper goes to print. This is a commentary on the Human Fertilisation and Embryology Bill as it stands at the time of writing.

Our scenarios look to the reproductive choices available to transsexuals. They expose some interesting problems with the Human Fertilisation and Embryology Act's definitions of parents⁶³:

- 1) Jessica, a post-operative transsexual woman, stored sperm pre-operatively believing that the day would come when she could have a womb transplant and could use the sperm to gestate her own genetically related child. In 2009, she has a womb transplant and receives treatment at a fertility clinic. An embryo created with her sperm and a donor egg is implanted into her new womb. Nine months later she gives birth to a healthy baby.
- 2) Rebecca, a post-operative transsexual woman, also stored sperm pre-operatively. She and her partner Lois, in 2008, wish to use this sperm to artificially inseminate Lois so that Lois may carry their child. Lois is fertile and so the treatment is straightforward and without complication. Nine months later, Lois gives birth to a healthy baby.
- 3) Martha, a post-operative transsexual woman, has stored sperm pre-operatively. She secures a surrogate who is implanted with an embryo created using this sperm and a donor egg. The surrogate gives birth to a healthy baby. Martha applies for a parental order under, what is now, section 30 of the Human Fertilisation and Embryology Act 1990 so that she can acquire parental rights.

63 It could be argued that conceptual difficulties with parenthood are due to technological advances more generally. See L.J. Hill, 'What does it mean to be a 'parent'? The claims of biology as the basis for parental rights' (1991) 66 *New York University Law Review* at 354 "In this manner, science has distilled the various phases of procreation- coitus, conception, and gestation- into their component parts, wreaking havoc on our prevailing conceptions of parenthood...".

- 4) Tom, a post-operative transsexual man, has stored embryos pre-operatively. These embryos were created with Tom's eggs and donor sperm. He and his wife, Jean, now wish to use these embryos. They want the embryos to be implanted into Jean's womb so that she may gestate their child. The embryos are implanted, and nine months later Jean gives birth to a healthy baby boy.

- 5) Mark, a post-operative transsexual male, has stored eggs pre-operatively. He and his partner, Paul, now wish to use these eggs in order to gestate a child. They seek to have the eggs fertilised with Paul's sperm. The resultant embryos are placed into a surrogate's womb. Nine months later a healthy baby boy is born. Mark and Paul apply for a parental order.

How might the Human Fertilisation and Embryology Act (as amended by the current Bill) define parents for the purposes of the children's birth certificates?⁶⁴

In our first scenario, having carried and gestated the child, Jessica would be the legal mother. Womb transplants (if successful) could allow transsexual women to enjoy the full status of 'motherhood'. The Bill does not change the definition of 'mother':

The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.⁶⁵

64 It is worth noting that defining parents according to a male/ female dichotomy is problematic in other areas. See the remarks of Lady Hale as reported in 'Lesbians should both be called mother' *The Telegraph*

<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/06/19/nlesbians119.xml> Accessed 20/06/2006.

65 Human Fertilisation and Embryology Bill, cl 33(1).

In addition to being the legal mother, having donated the sperm, Jessica would also be the genetic father, but, she would not be the legal father. If Jessica were married, or being treated together with a male partner, then her husband (or partner) would be the legal father of the child.⁶⁶ If Jessica were in a civil partnership at the time of treatment (when the embryo was implanted into her transplanted womb) her partner would be treated as the parent of the child, unless it was shown that she (the partner) did not consent to the placing of an embryo into Jessica's womb:

If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership, then subject to section 51(2) to (4), the other party to the civil partnership is to be treated as the parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).⁶⁷

If Jessica is single then the answer would seem to be that she is the legal mother and the child is legally fatherless.⁶⁸ However, this would not be the case. Clause 41 of the Bill deals with the circumstances in which a child may be legally fatherless. It states:

(1) Where the sperm of a man who had given such consent as is required by paragraph 5 of Schedule 3 to the 1990 Act (consent to use of gametes for treatment of others) was used for a purpose for which such consent was required, he is not to be treated as the father of the child.

We can see from paragraph 5 of Schedule 3 of the Human Fertilisation and Embryology Act that the option of 'legally fatherless' is not applicable to this situation.

5.(1) A person's gametes must not be used for the purposes of treatment services unless there is an effective consent by that person to their being so used and they are used in accordance with the terms of the consent.

66 Ibid cl.35(1).

67 Ibid cl..42(1).

68 Human Fertilisation and Embryology Act 1990, schedule 3, para 5. (as amended by Human Fertilisation and Embryo (Draft) Bill, s.41) .

(2) A person's gametes must not be received for use for those purposes unless there is an effective consent by that person to their being so used.

(3) *This paragraph does not apply to the use of a person's gametes for the purpose of that person, or that person and another together, receiving treatment services.*⁶⁹

Subsection 3 states that the gametes used in situations which give rise to legally fatherless children can not be the gametes of the individual(s) seeking treatment. In this example, the child could not be legally fatherless as the sperm used belongs to Jessica. There is no reason why the sperm would not be considered to belong to Jessica. The following sections of the Gender Recognition Act 2004 can be interpreted as support for this.

9. (1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

If we take the above section to mean that the (legal) 'person' remains the same, before and after transition, then the stored sperm is the product of Jessica, the person wishing to use it. Jessica stored the sperm for the purposes of using it later. If in this case she had wished for the sperm to be used for anonymous donation then this decision would also still hold (although this may pose a problem to any future children wishing to gain access to information about their genetic parents⁷⁰). Anonymity is no longer guaranteed to those who donate sperm for use in assisted

⁶⁹ *Ibid* (emphasis ours).

⁷⁰ Gender Recognition Act, s.22: Prohibition on disclosure of information.

reproduction.⁷¹ We can see from this that the law can not account for cases like Jessica's and does not provide a clear answer as to how the baby's father is defined.

The second case is more straightforward. Lois would be the legal mother. The definition of 'mother' is absolute and defined as the woman who gestates the child. As mentioned already, if Lois and Rebecca are in a civil partnership (and the current Bill goes through) then Rebecca could be the child's 'parent' and, if the new changes are put into force then, even if Rebecca and Lois are not in a civil partnership, Rebecca could still be described as the parent according to clause 42(1) of the Bill. However, all of this is subject to the problem posed above about what is meant by 'legally fatherless', and the use of the gametes belonging to one of the parties being 'treated together'.

The third example again raises the problem that using the gametes of a party to treatment precludes the possibility of having a 'legally fatherless' child. In this case the surrogate would at first be the legal mother of the child. However, Martha could (if married/ in a civil partnership/ in an enduring relationship)⁷² make an application for a parental order under clause 54 of the Human Fertilisation and Embryology Bill. If she is single, this option is not available to her, although she could still apply to adopt the child from the surrogate mother. The following section from the explanatory notes of the Bill describes the situation:

185. In clause 54 there are new provisions extending the categories of couples who can apply for a parental order (fast track adoption) where a child has been conceived *using the gametes of at least one of the couple*, and has been carried by a surrogate mother. Currently, only married couples can apply for a parental order. Under the new provisions, civil partners would also be able to apply, as would unmarried opposite sex couples or same-sex couples not in a civil partnership. The other provisions relating to parental orders remain

71 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004.

72 Again we acknowledge that this is so provided that the current Human Fertilisation and Embryology Bill goes through.

the same as the existing provisions of the 1990 Act. A single person remains unable to apply, but would be able to apply to adopt the child from the surrogate mother.⁷³

It remains to be seen how the courts would treat applications for parental responsibility, based on genetic relatedness, by a transsexual who used gametes that they had stored pre-operatively. Whether such an individual would be acknowledged in the parental role which accorded with their gender or which accorded to their biological contribution is a further question to which current legislation provides no definitive answer.

In the fourth scenario outlined above Tom would genetically be the ‘mother’ of the child. Having gestated the child Jean would be the legal mother; this is not affected by Tom’s eggs being used in the creation of the embryos as the following section from the explanatory notes states:

Clause 47: Woman not to be other parent merely because of egg donation

180. Clause 47 makes clear that where a woman has not carried a child she will only be treated as a parent of the child if the provisions relating to parenthood of the mother’s partner apply, or she has adopted the child. Egg donation will not make a woman the parent of a child carried by another woman. Parenthood could however be conferred by other legal provisions in this case (for example, if a woman donated an egg to her female partner, and the agreed female parenthood conditions were met in relation to her).⁷⁴

In this case, Tom would be recognised as the child’s father as he is married to Jean. Whether similar objections to those raised by the Registrar General in *X, Y and Z v. The United Kingdom* would also be raised in this case is unclear. Whether the Gender Recognition Act goes any way to resolving this also remains open to speculation.⁷⁵

In the final scenario, Mark and Paul are in a similar situation to Martha. In this case the surrogate would be the legal mother and Paul the legal father. Mark could

⁷³ Human Fertilisation and Embryology Bill, Explanatory Notes, p.33 (Italics ours).

⁷⁴ Human Fertilisation and Embryology Bill, Explanatory Notes, 32.

⁷⁵ Again see the anecdotal evidence referred to in S. Sheldon ‘Fragmenting Fatherhood: The Regulation of Reproductive Technologies’ (2005) 68 *Modern Law Review* 523-553; L. Smith ‘Is three a crowd? Lesbian mothers’ perspectives on parental status in law’ (2006) 18 *Child and Family Law Quarterly* 231-252.

make an application for a parental order under clause 54 of the Draft Bill or he could apply to adopt the child from the surrogate mother.

All of these examples must be considered in light of section 12 of the Gender Recognition Act. This section deals with parentage and states that parental status will not be altered by the Act.

The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.⁷⁶

This section is open to considerable interpretation. If the section relates to children born prior to transitioning, because these children are entitled to keep the parents they are born with, then we are accepting the principle that novel accounts of parenthood can be acceptable. If the section relates to children born to a transsexual individual at any stage then it seems extreme and at odds with legislation in other areas. It creates the problem that Hill describes, where we have a definition that gives rise to theoretical order but is not in line with the common usage of the term.⁷⁷ By forcing definitions to stretch so that males are acting as 'mothers' and females as 'fathers' we are tacitly accepting that enforced definitions of gender roles are more important than an acknowledgement of the reality of these situations. Defining parental roles according to gender rather than sex will not be a perfect solution for all those in novel parenting situations. The Civil Partnership Act 2004 states that the Children Act 1989 should be amended such that:

'child of the family', in relation to parties to a marriage, or to two people who are civil partners of each other, means- (a) a child of both of them, and (b) any other child, other

⁷⁶ Gender Recognition Act 2004, s.12.

⁷⁷ L.J. Hill, 'What does it mean to be a 'parent'? The claims of biology as the basis for parental rights' (1991) 66 *New York University Law Review* 353-420.

than a child placed with them as foster parents by a local authority or voluntary organisation, who has been treated by both of them as a child of their family.⁷⁸

Gender specific parental roles will create confusion for same sex couples.⁷⁹ This problem is one which the law is taking steps to address. However, as we have mentioned, there seems to be no attempt to bridge the gap between the reality of parenting for transsexual individuals and the situation at law. Where parental roles are still being attributed in accordance with the male/ female dichotomy they should be attributed in accordance with gender rather than sex. The current definitions of parents that exist at law are unsatisfactory. This is despite the fact that it is evident that the law attempts to be flexible in how parents are defined in other aspects.⁸⁰ No such flexibility is evident in the law relating to transsexuals. In fact the opposite is evident if we take section 12 as imposing an absolute prohibition on transsexuals being recognised in the parental role which would traditionally accord with their ‘acquired’ gender. There seems to be strong arguments for not wishing to change the birth certificates of existing children. It could, for example, be the case that “the need to record the father’s name as a simple matter of recording ‘the historical truth’”.⁸¹ For children born after transitioning, the injunction of section 12 may mean that they can not similarly record the truth- as is evident in our consideration of the effects that section 12 may have for Tom and Jean’s baby, as discussed above.

78 Civil Partnership Act 2004, s.75.

79 B. Hale ‘Equality in Equal Measure’ *The Sixth Annual Law Reports Lecture* 18/06/2007 <http://www.lawreports.co.uk/AboutICLR/Lecture%20PDF/ICLRLecture2007Lady%20HaleTrans.pdf> p.18

Accessed on 26/06/2007.

80 S. Sheldon ‘Fragmenting Fatherhood: The Regulation of Reproductive Technologies’ (2005) 68 *Modern Law Review* 523-553 at 530.

81 S. Sheldon ‘Fragmenting Fatherhood: The Regulation of Reproductive Technologies’ (2005) 68 *Modern Law Review* 523-553 at 540.

These legal deficiencies could be resolved if the Human Fertilisation and Embryology Bill adopted a broader account of parents, specifically considering the needs of transsexuals. The examples serve to highlight the procedural difficulties that transsexual men and women may encounter in their quest to become parents. However these difficulties should not be sufficient to justify lack of counselling with regard to the choices available. Rather they show that we need to reconceptualise our account of what it is to be a parent.

For parenthood to continue to be recognized as perhaps the most fundamental social relationship in our culture, carrying with it the basis for a number of basic human rights with which it has historically been associated, a continuity of core meaning must be maintained. To stipulate a meaning for 'parenthood' which is fundamentally distinct from the traditional way in which the term is used is to open the door to a changed, and perhaps diminished social significance for parenthood as an institution.⁸²

Rather than needing gender specific roles within the definition of 'parent', perhaps instead it could be acknowledged that there are variations that may or may not be present. This would largely be a reflection of the way that families exist at present; parents take many and varied forms and a child may typically have anything from one to four, with other less common variations also in existence. Parenting roles, while often still gender specific, are not always like this and more importantly need not be like this.⁸³

IV. CONCLUSION

82 L.J. Hill, 'What does it mean to be a 'parent'? The claims of biology as the basis for parental rights' (1991) 66 *New York University Law Review* 353-420 at 361.

83 J Risman 'Intimate Relationships from a Microstructural Perspective: Men Who Mother' (1987) 1 *Gender and Society*, 6-32; A, Doucet, 'Gender Equality and Gender Differences in Household Work and Parenting, (1995) 18, *Women's Studies International Forum*, 271-284; A Doucet, 'There's a huge gulf between me as a male carer and women': gender, domestic responsibility, and the community as an institutional arena' (2000) 3 *Community, Work and Family* 163-184.

We must try to ensure where possible that our institutions do not advocate outdated heterosexist agendas. There are many ways in which social institutions and social policies re-enforce what are now arguably redundant beliefs about human beings only falling into two specific categories⁸⁴ and the superiority of the male-female relationship.⁸⁵ Traditionally men and women both needed to be involved in the procreative process. This does not mean that this is the way the reproductive process should always be. Similarly, just because genetically related men were fathers and genetically related women were mothers does not mean that this is the way it should be. Genetic links are no longer necessary for parental status to be granted. Being a parent should not be merely a matter of biological fact.

Acknowledging transsexuals in the parental role of the ‘acquired’ gender is also consonant with how we have seen the law relating to marriage develop. Traditionally transsexuals could not enter into a valid marriage in their acquired gender.⁸⁶ This was because for a marriage to be valid both a male and female needed to enter it, and the definition of ‘male’ and ‘female’ in accordance with the sex in which they were born.⁸⁷ This position evolved from a sex-based to gender-based definitions of ‘male’ and ‘female’ allowing transsexual marriages to be recognised as valid. This move away from focusing on sex is welcomed for it compelled ‘a transsexual person to assume as a matter of law, a gender, which he or she may no

84 R. De Sousa, ‘Gender Dichotomies, Sexual Continua, and Emotional Taxonomy’ <http://www.chass.utoronto.ca/~sousa/GENDEREMO.pdf> Accessed on 03/11/2007.

85 This is often described as: ‘heterosexism- discrimination or prejudice against homosexuals on the assumption that heterosexuality is the norm’ http://www.askoxford.com/concise_oed/heterosexism?view=uk Accessed on 03/11/07.

86 S. Gilmore, ‘Case Commentary *Bellinger v Bellinger*-- Not Quite Between the Ears And Between The Legs—Transsexualism and Marriage in the Lords’ (2003) 15 *Child and Family Law Quarterly* 295-311.

87 Section 1(c) of the Nullity of Marriage Act 1971, re-enacted in section 11(c) of the Matrimonial Causes Act 1973, provides that a marriage is void unless the parties are ‘respectively male and female’. See also *Corbett v Corbett* [1971] P 83, 104 and *Bellinger v Bellinger* [2003] UKHL 21.

longer be capable of assuming as a matter of fact'.⁸⁸ It could be suggested that the move towards a gender based account of parenting is not a move far enough. Why not dispense with the categories of mother and father altogether?⁸⁹ This is not something that we would have a principled objection to. However, the argument we put forward is consonant with the law in similar areas.

In the absence of clear and reliable data to support the contention that transsexuals are not fit to parent, the only reasons to exclude them from procreation are social prejudices and speculative concerns which simply can not justify depriving transsexuals of their chance to be parents. Unless there is evidence to the contrary, loss of reproductive potential should not be the price to pay when transitioning. When individuals undergo sex reassignment surgery, it is not a precondition that they waive any rights to parent, or that they must cease having contact with any existing children. Upon electing to undergo such surgery, the law does not mandate that any existing children be automatically removed and placed into care, and/or the transsexual parent be refused contact. Quite the opposite in fact; we insist that the parental status with regard to these children should remain secured. Support for this is found in the following extract from the explanatory notes for the Gender Recognition Act:

Section 12: Parenthood

43. This provides that though a person is regarded as being of the acquired gender, the person will retain their original status as either father or mother of a child. The continuity of parental rights and responsibilities is thus ensured.⁹⁰

It would be arbitrary to assume that sex reassignment surgery automatically bars one from being a loving and caring parent. We should be consistent and

88 S. Gilmore, 'Case Commentary *Bellinger v Bellinger*-- Not Quite Between the Ears And Between The Legs—Transsexualism and Marriage in the Lords' (2003) 15 *Child and Family Law Quarterly* 295-311.

89 We thank an anonymous reviewer for this suggestion.

90 Gender Recognition Act: Explanatory Notes <http://www.opsi.gov.uk/acts/en2004/2004en07.htm> Accessed on 05/03/2008.

explicitly accept that there is no evidence to suggest that transsexuals fare any worse in the parenting domain, and thus we should make them aware that they can preserve their reproductive choices post surgery. We should also be consistent in recognising these individuals fully in their 'acquired' gender.