

## Articles

### Recognition and protection: a conversation

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with Fatima Ahdash, Liam Davis, Claire Fenton-Glynn, Maebh Harding, Emily Jackson, Dafni Lima, Alice Margaria, Julie McCandless, Beth Tarleton, and Sarah Trotter

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Note from the editors: in the conversation that follows, which took place on Monday 14 October 2024, members of the project discuss the five reflection pieces that feature in the *recognition and protection* section of the special issue: Alice Margaria's paper 'What happened to *Marckx v Belgium*? The European Court of Human Rights's minimalist approach to legal parenthood claims by non-traditional families', Julie McCandless's paper 'Regulating parenting through legal parenthood: the case of surrogacy', Maebh Harding's paper 'Reconceptualising legal recognition of the parent/child nexus through interdependency', Emily Jackson's paper 'Assisted reproduction as a disruptor of legal parenthood', and Liam Davis's paper 'Towards viewing birth registration as a "tactic"'.

CLAIRE: What's in a name? This is the idea that Liam touches on in his paper. Why is calling someone a parent, why is calling someone a mother versus second legal parent, important?

LIAM: I've been thinking about this quite a lot, thinking about how to reform birth registration, and I ultimately say that it should be gender neutralised. And obviously that has so many problems that come with it – you know the feminist literature on neutrality and the law. But what I try and do in this reflection is point out that you can categorise good and bad parents through the way in which gendered terms are currently bestowed. Only the good ones who conform to cis/heteronormative ideas and partake in procreative sex can access these gendered terms. Trans parents can get access to them, but it's then flipped so that the trans man is the mother and the trans woman is the father. I think it's an example of how you can see the law constructing good and bad parents and families.

If you look at somebody's birth certificate, you wouldn't know that the child was born to a non-traditional family on the face of it. But my biggest gripe with the case law that says 'oh, but the number of times that you have to produce the long birth certificate is immaterial' as a justification as to why these families don't have to be registered as they perceive themselves is that if you know what you're looking for – that is, if you know that parents through surrogacy or adoption are put as parent and parent, or if you know to look at the actual wording on a parental order certificate – you can tell instantly that these children are born to different families. So why not just make it so that everybody goes through the same birth registration system and has access to the same certificate, so that you can't tell on the face of

it that they were born to a different type of family? If everyone had the same certificate, everyone had the same documents, you would get around the law categorising families in this way. So that's something I've been thinking about and ultimately I say that we need the same system, because otherwise if you know what you're looking for, you can tell instantly. And is that acceptable? I don't think it is.

ALICE: I'm wondering whether de-gendering legal parenthood will eventually make a big difference in helping everyone look the same and reduce the visibility of non-traditional families as 'different'? I'm thinking about other jurisdictions where they use seemingly gender-neutral categories like 'parent one' and 'parent two'... It's not exactly the same as just calling everyone 'parent' – as there is a 'one' and a 'two' so they're still different – but, in any case, what I want to say is that, ultimately, even without explicitly gendered legal categories like 'mother' and 'father', practices of registration might still record something specific and reflect specific roles, such as giving birth. Birth certificates would still have two spaces to fill in, and for instance everyone would know that the first space for 'parent' or 'parent one' is for the gestational parent. Therefore, unless we rethink the criteria for assigning legal parenthood, a trans birthing man, even if listed as 'parent' or 'parent one', might still stand out as different from the conventional gestational parent/biological mother. So while I agree that language is an important factor, it also seems to me that what we really need – and maybe this ties into Emily's paper – is a rethinking of legal parenthood in a very fundamental way, rather than just specific reforms addressing specific issues. Here, it might be relevant to briefly share the Swedish experience with the regulation of trans legal parenthood.<sup>1</sup> In Sweden, trans birthing men are registered correctly as 'fathers', following a reform to the parental code in 2019.<sup>2</sup> But in order to ensure that trans birthing men are not discriminated against based on the fact that they changed their legal gender, they're basically treated as 'mothers' for all other purposes. And so, while the Swedish approach has been widely and rightly praised as trans friendly, it also ends up making trans legal parents a kind of hybrid category – and I would argue that this is partly because of the *ad hoc* nature of the reform that focused exclusively on trans legal parenthood. And it might be interesting to contrast this with, for instance, the Ontario All Families Are Equal Act 2016, which was a much broader reform aimed at accommodating family diversity in all its forms – not just LGBTQI+ families, but also blended, reconstituted families and so on. And, as part of that reform, there was not only a shift to degendered language, but also a fundamental rethinking of parenthood, for instance, by allowing multi-parenthood. So I think it's crucial to approach these issues in their multi-layered dimensions. Language is undoubtedly one of them, but I think we should also consider, for instance, legislative techniques, especially given our interest in discussing regulation.

DAFNI: I just want to make a point about the relationship between law and language that I think is one of the aspects that is emerging here, especially this idea – set out in the Human Fertilisation and Embryology Act – of the second female parent or rather the second parent. There is this idea that the law is regulating something in order to reflect reality and to provide a channel within which people can meaningfully construct and regulate their own relationships; and I think this is one of the instances where that belief in the system is completely undermined, because no child will call one person 'mum' and the other 'parent'. They will use the same language; they will think of them in the same way. And this is one of these instances where the law emerges as a closed system and says 'I also have a self-interest

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<sup>1</sup> See further D Alaattinoğlu and A Margaria, 'Trans parents and the gendered law: Critical reflections on the Swedish regulation' (2023) 21 *International Journal of Constitutional Law* 603.

<sup>2</sup> Lag om ändring i föräldrabalken (SFS 2018:1279) (Swed).

in self-perpetuating the things that are important for what I conceive as the cohesiveness of the system'. And this is really salient, I think, in cases like *McConnell*,<sup>3</sup> where one of the main arguments that was used was this administrative clarity argument – an argument that is really not meaningful at all to the family that has to deal with the repercussions of that decision, but is very meaningful to the system of law as a whole ... Or one can say that it is meaningful, right? I think this is where the battlefield moves. Whether something is meaningful or reflects social reality is one of the arguments, but another one of the battlefields for having this discussion is whether this is really important for the system of law. Is this administrative clarity construed properly? Is it important? Could we still achieve administrative clarity through other ways that are more inclusive? And I think looking back at the history of the inclusive versus exclusive function of family law, we see it again and again – first with same-sex marriage and then generally in this idea that 'oh but we're excluding certain "diverse" ways of doing this X thing in family law because that would confuse the system'... And I think this is one of the areas where we can question whether this really is the way to gain administrative clarity... I mean as a lawyer, I guess I'm a little bit more conservative or doctrinal in that sense – and this is also in response to Liam in the previous session. I understand the need to have cohesiveness and comprehensiveness, and to have categories you can work with, but I think this is another one of the levels in which you can criticise the law and ask: is this really clarity? Is this really important for preserving the limits and the function of this system of thought?

EMILY: I really agree with that, Dafni. I am thinking of the *P v Q* case that I talked about.<sup>4</sup> There is a bit in the first instance judgment of Mrs Justice Knowles where she says that it would be to the child's benefit, to the child's identity 'legally speaking', to transfer legal parenthood,<sup>5</sup> and I don't know what she means. That case is so different from those disputed paternity cases where there's some sense that the child needs to know the biological truth. And whatever one might think of that, at least I understand what they're saying. But here I don't understand what it means to say that rewriting the birth certificate benefits the child 'legally speaking'.

CLAIRE: In many ways this is a preoccupation of lawyers and maybe goes back to what was said earlier about how this only really comes into question when things go wrong. In most families, it never arises ... How many of us has looked at our birth certificate? Well, probably with us, all of us. But how many non-lawyers, non-family lawyers would have actually looked at their birth certificate and would know what is written on it?

DAFNI: It's also the same in terms of social acceptance and recognition, which functions without the need to be mediated by a certificate.

MAEBH: It's different for people who don't fit the heteronormative look. It doesn't matter when it fits, but when it doesn't fit, it does matter, and it shows that we have a very conservative core of what we think family should look like and that is constantly being reinforced by state infrastructure.

CLAIRE: I think you're absolutely right, Maebh.

SARAH: Can I just go back to the point that Dafni was making earlier about administrative clarity? Because I think it's really interesting insofar as it also reveals a kind of split between the function of the system and the idea of the system. So much of what seems to go on in

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<sup>3</sup> *R (McConnell) v The Registrar General for England and Wales* [2020] EWCA Civ 559, [2021] Fam 77.

<sup>4</sup> *P v Q* [2024] EWFC 85, [2024] 2 FLR 1178.

<sup>5</sup> *Ibid*, para 53.

some of the cases – and I think this goes also to Emily’s point about *P v Q* – is about the idea of the system itself and the idea that it can offer clarity, even though in practice it operates in a way that doesn’t. And I wonder how much of this is about that – about maintaining some idea of the system.

ALICE: That’s exactly the point that I also wanted to follow up on. Thinking about the *McConnell* case, I still struggle to see the coherence of the birth registration system that the courts referred to, which, according to them, is preserved by registering a trans birthing man as mother. What’s coherent about registering someone who obtained a Gender Recognition Certificate and is legally a man as ‘mother’? So even if we accept – and I am not sure I do – that there is a public interest in preserving the coherence of the system which ought to prevail over private interests, still please explain to me what is coherent about the legal solution proposed by the court in that case, including the definition of ‘mother’ as a freestanding term disconnected from legal gender.

JULIE: There’s something about temporalities, isn’t there? About that moment of birth? The law’s trying to pinpoint certain things. I always think of Ed Kirton-Darling’s work around coroner records and the kind of stories around kinship that coroners used to write in their reports and the certificates.<sup>6</sup> From my experience of registering the birth of my own children, it was like the registrar was terrified of the documentation. The day I went, the IT infrastructure was down. So she actually had to write out all the information, and there was this real concern of getting it wrong and the sense that there would be a real truth about the birth certificate and what went in it. And it wasn’t just the truth for me and my husband and the children. It was also for the future, for people who would be doing family history research. What would they understand by the word ‘academic’ as an occupation? It was thought that that wasn’t cognisable to others, so it had to go down as ‘lecturer’. So there’s something about the rigidity of the bureaucracy, as if there’s only one way of telling the story, one way of regulating it, and this importance of looking back at the moment of birth to see what was understood about the truth or whatever we want to call it. But then in some circumstances, like Fatima’s example of the immigration context, it might be what’s on birth certificates, but it’s also responsibilisation in another way in terms of the finances or the ability to provide for dependents. There’s something about how we’re not curious about that truth or what’s on the birth certificate as long as we’re never challenged about it, because then you don’t have to think about it. But it’s whenever people are challenged or when something goes wrong that it seems to matter more. It’s probably not surprising. So what that all means for regulation, I don’t know, but it’s the rigidity for things that are not necessarily rigid.

ALICE: But I think that there is also room for creativity. In my fieldwork, I met a trans father who was registered as ‘gestational parent’ in Spain before the new law was introduced. So it’s also about the individual civil servant who is doing the registering. One of my research participants in the UK, a trans birthing father, told me – now that you, Julie, were talking about professions – that he was listed as a ‘mother’ and ‘full-time dad’ under his profession. So, this might not be as creative as it gets, and the Spanish example is certainly more groundbreaking, but still, I think it’s important to recognise that there is room for creativity, and often the IT system is blamed as the problem, whereas in reality people working at the registry sometimes have, depending on the jurisdiction, a certain margin of manoeuvre.

JULIE: And maybe it’s how you bring that creativity to the law reform. So if we do what

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<sup>6</sup> E Kirton-Darling, *Death, Family and the Law: The Contemporary Inquest in Context* (University of Bristol Press, 2022).

Emily's suggesting, such as with the Human Fertilisation and Embryology Act, which started off with a blank slate, rather than grafting on to what we already have, where could we go with that? How could you embrace the diversity rather than trying to contain it or sort of conscript it all into the nuclear family model?

LIAM: And this is why I always go back to abolition as the answer. In terms of whether we can start with a blank slate, I always think – and Julie, I know you've said this in loads of your articles<sup>7</sup> – if you start with a blank slate, is there the chance that we're going to reify the same norms over time? How do you stop doing that? And I just don't know what the answer is to that.

JULIE: But maybe we can't control it. We don't have the answers for everything. And sometimes you maybe have to see how something goes and whether it does allow more room for subjectivity or creativity while serving operationally the functions that you need it to serve in terms of regulation. I think I'm a bit uneasy with just abolish everything ...

LIAM: I mean it in a sense of get rid of it to then build it back up. My biggest problem is with how much the nuclear family seems to underpin everything. I'm not saying that in abolishing it, we're going to suddenly get rid of the tenacity of the sexual family form.<sup>8</sup> But I feel like if we at least had nothing to start from we can then have those discussions and work out the basis that we want it to form. And the family might still come up as a thing we want to feature, but I think if we're working within the systems we've still got, I think we're still going to end up with the same underpinning norms.

ALICE: Abolishing might be one way of tackling the issue, but at the same time, what's really crucial is challenging the underlying rationales, right? We see the relevance of this, for instance, in discussions around legal gender recognition and sterilisation requirements ... There is work on this done by Peter Dunne, for instance, showing that while sterilisation requirements have been gradually abolished in Europe, the rationales behind these requirements have not been challenged – including the need to preserve natural reproduction and enforce child protection, implying that trans people shouldn't be allowed to reproduce and wouldn't be suitable parents.<sup>9</sup> Because these rationales haven't been challenged, they keep re-emerging and manifesting in different forms, such as by keeping the regulation of trans legal parenthood separate rather than treating it as a ramification of legal gender recognition. So maybe these considerations can also be applied to discussions on legal parenthood – abolition may be an answer but, at the same time, it's important to ensure that the rationales underlying the current system of attributing legal parenthood, which discriminates against non-traditional families, are truly challenged.

MAEBH: How come birth registration in the UK had a sort of image change in the last century about what it was actually about? I mean, the idea of birth registration is very much opposed in other countries as a way of colonising the state and also clamping down on concealment of birth and things like that ... And that's kind of gone away and the attaching of parental responsibility to having fathers and births gives it a new birth, as this sort of proof of a nuclear family relationship, which isn't present in other areas. So the unconvincing logic

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<sup>7</sup> See, for example, J McCandless, 'Reforming birth registration law in England and Wales?' (2017)

<sup>4</sup> *Reproductive Biomedicine & Society Online*, 52; J McCandless, 'Response to Chapter 2 – Legal Parenthood and Birth Registration: Time to Respond to Diversity in Family Formation?', in C Bendall and R Parveen (eds), *Family Law Reform Now: Proposals and Critique* (Hart Publishing, 2024).

<sup>8</sup> J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73 *Modern Law Review* 175.

<sup>9</sup> P Dunne, 'Transgender Sterilisation Requirements in Europe' (2017) 25 *Medical Law Review* 554.

of *McConnell* is also based on a revisionist history of what birth registration is supposed to be about. What do we actually need to know? We need to know someone was born, but is birth registration the best administrative information about the relationship between an adult and a child? Because they do change, there is room for these things to change. So I mean, we've all said how unconvinced we are by the *McConnell* logic, but the idea that birth registration has always been some kind of benevolent thing really annoys me about it as well.

JULIE: Maybe I can bring in something else. In family law, we have some quite undefined regulatory concepts. There is the welfare principle, the paramountcy principle. There's a lot to define, a lot of judicial discretion. But like many things that are very open, they start to get populated by certain ideas. So I'm interested in that – in the norms that get attached to the nuclear family and how they then relate to the interpretation of the welfare principle. The mutually constitutive relationship between the two. And whether we can get away from that. Or do we want to? Are those norms there because they're valuable to people? They're valuable to some people.

LIAM: I'm just thinking about that and your paper Julie ... There's something about giving birth, and you're obviously a bit reserved about wanting to do away with that, especially in the context of surrogacy. It made me reflect, because up until reading that I had thought that surrogates don't want legal parenthood. So what's the point of giving it to them? It's weird, it's odd that the surrogate has parental responsibility up until six weeks... But in reading your reflection I just wonder whether in ascribing anything in the context of surrogacy – be it legal parenthood, parental responsibility, or whatever – again reifies ideas of parenthood? Does it reify ideas of parenthood if we ascribe an automatic status, especially in a context where we know people don't want it? Does it reify gestation as something inherently valuable? And maybe it is, but I don't know.

JULIE: I think this maybe relates to the regulatory side of the workshop. I've been thinking a bit about why the Law Commission went with parental responsibility and not legal parenthood, and again, I think it's to do with temporality, so that because legal parenthood is seen as this lifelong status, I imagine they were concerned about the connections with succession rights and all of that. So they've done what I also haven't done, which is to think of a new form of status that would meet some of these things without the lifelong obligations. But in being reserved about this, I'm also thinking about the regulation of pregnancy. And I just think that if you don't have that legal status when other people do, it says something. Maybe this is connected to property again. It's like you alienate the gestational role to be something more separate; and it's an embodied role, but you start to see the role of surrogacy as another reproductive technology, more akin to IVF. And I know surrogacy can involve IVF, but it's something people do in collaboration, in solidarity. I think that tends to be there, especially in the surrogacies that work really well. And if you disintegrate that, and you don't have that formal recognition for the gestational role, the child becomes more fragmented, more separated, and then what does that do with control over pregnancy? And I'm not convinced that you can just put into the regulatory schema various rights for this, however important they are. I think there's still something about the moment of birth. And who is seen as having a valuable connection to the child that's born? Even if that changes over time – it doesn't have to stay the same as what it is at birth. So my concern is backward-looking, possibly more than actually forward-looking.

SARAH: Julie, is the concern more about recognising the person who's given birth because of the pregnancy and fact of having given birth? Or is it about the connection with the child, the relationship to the child?

JULIE: I think it's about the fact of having given birth. There are all sorts of interventions.

Everybody has a view on pregnancy. It's highly policed, it's highly regulated and if there's more and more of a fragmentation between the gestational role and the child that's born, those policy interventions become even more possible, I think.

SARAH: I'm just thinking about the distinction in French law between maternity and motherhood reflected in the anonymous birth model,<sup>10</sup> because that seems to be quite an interesting way of framing it or thinking about it, if that's what the concern is, with recognition ... It reminds me a little bit also of what Emily speaks of in her paper in relation to the possibility for recording the gestational parent, although that still indicates the relationship with the child.

EMILY: There's an interesting surrogacy case where the surrogate refuses to consent to the parental order, not because she wants to be the legal mother of the child, but because she wants to have a role in that child's life.<sup>11</sup> She doesn't want to be the mother, but she wants to be an important person to the child and I think that is very much along the lines of what Julie is suggesting – that we've got this all or nothing thing with parenthood – you're either a full legal parent or you're not anything – and that that somehow doesn't work here. So of course the courts try to find some way of navigating this with things like child arrangements orders. But the reality is that there is a status here that maybe isn't mother, but is something else that the law just doesn't have. I think again it's another example of the law not reflecting the reality of people's lives, where the surrogate in many cases continues to play a role in the child's life, but it's a kind of weird, shadowy figure ...

JULIE: There was so much work that legal parenthood had to do because of what you say, Emily, that either/or, and I think the whole outcome of that case is like your *P v Q* example. It's really unsatisfactory for everybody. And if we got away from the either/or, could it have been a more creative solution that was better for everyone?

FATIMA: It struck me, Julie, when you were talking, that there's a difference between birth as an experience and parenthood as a relationship, but then both of them are kind of a status. So I'm trying to understand this idea of experience versus relationship. I feel like you want to articulate a kind of recognition of the experience of birth, and that might or might not necessarily lead to a recognition or facilitation of a relationship, but that it's also a status ... And if that is the case, then is there another example of any other human experience being accorded that kind of status in that way?

JULIE: Because we don't have another status or another language, I think I'm conflating my concerns into the status of legal parenthood. So I may be guilty of what I'm criticising, which is making this status do too much. So maybe that is the conclusion of the think piece. It's thinking about a different type of status that's not nothing, but sits alongside something that's more intention-based. Thinking of another example, it's really hard, because when you're at the moment of birth you don't have the trajectory of the functional family to look back on.

MAEBH: Julie, is there a synergy between this problem of you're either a mother or you're not and the way that states are dealing with legacies of forced adoption? Because that's the same kind of idea – that you have these women who have given birth in very trying circumstances of state coercion. And they're now looking for lots of things – recognition, apologies, compensation. But when you talk to people, the wording is very heated, like how

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<sup>10</sup> See K O'Donovan and J Marshall, 'After Birth: Decisions about Becoming a Mother', in A Diduck and K O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge, 2006); K O'Donovan, "Real" Mothers for Abandoned Children' (2002) 36 *Law & Society Review* 347.

<sup>11</sup> *Re C (A Child) (Surrogacy: Consent)* [2023] EWCA Civ 16, [2023] 2 FLR 109.

to call these women – do you call them birth mothers ...?<sup>12</sup> And again, it's this problem that in those circumstances, we want the acknowledgment they've given birth to be recognised. We need something sometimes to recognise their relationship to the child that they gave birth to, even though that child was subsequently adopted. And then the law is doing weird things around that. I mean, we've seen people being given nationality based on genetics.<sup>13</sup> So again, it's this idea of law's obsession with all or nothing, with two parents there for life. The only kind of fragmentation is around parental responsibility and fathers. But the orthodox thing is maybe you might get someone to substitute in a very highly regulated circumstance, but we can't have lesser roles and we can't have multiple people and we can't have a change over our life course. And I think all of those things are now up for discussion, because those limits are what is holding family law back from being able to adapt with the reality of people's lives. It's very sensitive, obviously, the birth mother role within the forced adoptions, but I think it's a similar problem of law not being able to understand these roles that women have taken either voluntarily in the case of a surrogate or not voluntarily in the case of forced adoption in institutional homes or whatever. It's a lack of being able to understand that with the really awful tools of legal parenthood we have at our disposal that do not reflect the nuances of life.

DAFNI: As you were talking I was thinking again – and this relates a little bit to my paper, and maybe to Sarah's paper – about who the law understands can be a parent, what does a parent look like, and who is allowed to be recognised as a parent. It is an all or nothing, right? And what if we can recognise different ways of participating in a parental relationship with a child? And I think it comes back to what our instinct is when we talk about more people getting involved. I think law tends to have this anxiety about conflict – if you bring more people in, there will be more conflict, there will be less clarity, it will be less straightforward, so we just want to pick and choose the path of least resistance in the sense that the fewer people who get involved, the fewer instances there will be for the law to need to step in. And I am reminded a bit of the work that I cite in my paper that Courtney Joslin and Douglas NeJaime are doing over in the US when they look at multiple parenthood.<sup>14</sup> They've done a lot of empirical work looking at the kind of cases the courts are dealing with when recognising more than the parent. And they found that it is really, in their understanding, the opposite – that usually when multiple people are recognised as parents, it is in order to alleviate conflict in order to recognise someone that is already connected to the child, already performing a function that is important for the child, and it is giving them the legal toolkit that they might need in order to keep doing that. I think there's a lot of a knee-jerk reaction that if we recognise the surrogate in some function, or a third parent in some form, that this will lead to a messier situation. Whereas it seems that it can be the opposite, right? There might be a situation that is already more or less messy. And recognising that is one of the ways to deal with that messiness in the way that is constructive most of all, for the welfare of the child.

SARAH: I was thinking also about Maebh's paper and the interdependency argument. This relates to the point about the messiness in relation to multi-parenthood, because there's also a

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<sup>12</sup> C McGettrick, M O'Rourke and L O' Nolan, *Birth Information and Tracing Bill 2022 Briefing Note and Amendments* (2022), available at: [http://clannproject.org/wp-content/uploads/Clann\\_A8A-Briefing-Note\\_Information-Tracing-Bill\\_28-02-22.pdf](http://clannproject.org/wp-content/uploads/Clann_A8A-Briefing-Note_Information-Tracing-Bill_28-02-22.pdf), last accessed 14 January 2025.

<sup>13</sup> R McGreevy, 'US academic believes he is the first person to gain Irish citizenship based on DNA test' *Irish Times* 21 July 2024, available at: [www.irishtimes.com/ireland/2024/07/21/dna-detectives-help-adopted-american-man-who-never-knew-biological-parents-to-obtain-irish-citizenship/](http://www.irishtimes.com/ireland/2024/07/21/dna-detectives-help-adopted-american-man-who-never-knew-biological-parents-to-obtain-irish-citizenship/), last accessed 14 January 2025.

<sup>14</sup> CG Joslin and D NeJaime, 'Multiparenthood' (2024) 99 *New York University Law Review* 1242, 1249–1250.

sort of ambivalence about the way in which adult-child relationships can fluctuate and give rise to different dependencies over time. Maybe we see the same reluctance in relation to recognising multi-parenthood there as well?

MAEBH: Yeah, I do think that. It's trying to find ways of thinking constructively about these really unassailable normative concepts in legal parenthood, like the ideas of finality and certainty, and how they get spun. Like the idea that certainty is good for children ... It might be generally, but sometimes it isn't. But I think that because family lawyers are inherently pragmatic, they tend to be focused on different points. But also it doesn't all have to be coherent. Sometimes the messiness works for people. That's another aspect of it – it doesn't all have to be tied up with a bow, you know? I think we could have a better core concept that includes more people. But we're always going to have to have some contestation around the edges, otherwise we're going to exclude people by rules in the middle. What I liked about the idea of interdependency is that it can take the emphasis off the adult behaviour slightly, so that you can think more about the two-way. But then how would that actually work practically? We can't start on the basis that everyone goes to court to decide if they're a worthy parent, because that's just not functional. So you will have to obviously have some assumptions attached to various things, but I think the conflation through birth registration of legal parenthood as functional status and part of adult civil identity has been very problematic. So the question is: how do we get out of that again? Is it to rethink how this relationship works entirely?

JULIE: Yeah. Or even the idea that birth registration confers the status, because birth registration doesn't confer it. There are legal rules, and birth registration was only ever used as a piece of evidence for the evocation of those rules. But then with the recent changes around parental responsibility, it becomes something else entirely.

MAEBH: Yeah, because we don't have that in Ireland, and I'm always trying to fight it, always saying don't attach more things to this problematic piece of paper. If you want fathers to have parental responsibility, just give it to them. It's very strange what happens because we don't have spaces that properly reflect these roles. So then we started attaching some things to strange administrative acts – like also putting people on passports used to be a thing, until children started having to have their own passports. It's interesting where the spaces are created in which we're trying to get legal reflection of the realities of our lives.

EMILY: I was just going to say something about step-parent adoption, which I think is quite interesting given that for most people who have step-parents, it's a kind of *de facto* status, not a legally recognised status. So step-parent adoption cases are unusual, where the point of the adoption order is to exclude and include, but most step-families don't need it. I think this goes back to something which Julie said earlier about the law stepping in when there are problems, to resolve difficulties – I think step-parenthood is a good example of how most families navigate this without any recourse to the law, and it's only in a very few cases where the status of step-parent and step-parent adoption becomes a legal thing.

MAEBH: I think step-parent adoption has become more politically a thing because LGBT couples aren't fitting into the pathways that the state designed for them, so there's a new political interest in step-parent adoption, because that's the way that you get to be parents, because the route that they have designed for you doesn't work. But you're right ... I was just thinking that that's a secondary way in which the step-parent option has now become more contested.

ALICE: I was just thinking about the understanding of legal parenthood as an adult-centred status, and I totally agree. At the same time, if we look at what the European Court of Human

Rights is doing in, for instance, surrogacy cases ... Whenever non-recognition of the intended parent is considered to breach Article 8, the Court frames it as a violation of the child's right to respect for private life. Of course we can disagree on the weight that is given to genetics in these cases, but still I think it's interesting to note that the Court uses the child's right to an identity to sanction non-recognition as incompatible with the Convention. And, given the concrete implications this conclusion has – basically requiring national systems to provide intended parents with some form of legal recognition – it seems to me that it's not just a question of framing. And this might be an example of how your interdependency framework, Maebh, is helpful in discussing the regulation of legal parenthood: so the idea that looking at parent-child or parent-parent relationships as separate sets of ties leaves out the interdependency between family members, and it is this interdependency that eventually determines the real-life consequences of legal regulation.

MAEBH: That's one of the problems, and because it's framed in this way in the European Court of Human Rights it seems like it's going to be hard to get much progress ... It's also to do with the way cases come to it – the cases where children are actually part of the case are quite a minority and they don't consider the children's interests, and then you get this really adult-focused looking ... It's a very limited place to expect the nuanced discussion about all of this ...

ALICE: Maybe I should spend a bit of time reflecting upon the European Court of Human Rights as a regulatory actor playing a role – perhaps a limited role – in these kinds of discussions.

SARAH: Yeah, I was just going to say – because this goes to your paper as well – that the way in which the European Court of Human Rights is using family life and private life and locating families in different spaces on either of those terms is also an interesting thing to observe and take note of. It has very direct consequences for the recognition of the relationship – for whether it's recognised as being a facet of someone's identity as opposed to a relationship that deserves recognition and protection in its own right.

EMILY: I always think the private life cases, or the use of Article 8, is really interesting in the sense that privacy seems quite an odd word to use in this context. I know private life is kind of shorthand for family life, but normally when we think of privacy, we think of being able to shield something from scrutiny and keep it private and keep it away from being looked at and scrutinised by people. And yet when you look at these Article 8 cases, it's all about slotting into the right box in order to have access to Article 8. So it's very far from private. You're not shielding it from view, you're exposing it in order to be able to claim something. So it's a weird use of privacy in that context.

CLAIRE: I think one of the ways that they use it, particularly in the European Court of Human Rights, is this idea of privacy as control – that the idea is not about shielding from view, but about being able to control what people know about your identity and what people don't. And if you don't have that connection, if that doesn't exist in law, then you don't have control over it. I'm not saying I advocate this, but that's the reasoning behind it as far as I'm aware.

SARAH: I think that point is right, because it's also to do with the way in which privacy is interpreted as being about identity. These cases are interpreted as being identity cases. And that's, I think, where the control dimension comes in as well, Claire – the control over sense of identity or account of identity, or ...

ALICE: A question that I was asking myself when writing my paper is: if the court finds a violation of Article 8 in the private life limb – so through the child's right to an identity –

why should we care if it doesn't find a violation under the right to respect for family life? Well, I do care but I still need to understand why it matters so much because, in fact, the concrete implications are the same – apart from the fact that intended mothers tend to benefit less than intended fathers.<sup>15</sup> I think the Court is very much aware of the sensitivity of the concept of 'family', so maybe it prefers to use the more neutral concept of 'private life' to make these slow advancements in the case law.

SARAH: On my reading of your paper why you care is because there's not a recognition of their family life. That's the issue, right? So it goes back to what we were saying earlier about recognition. The implication is going to be the same on the finding of a violation of either limb, but there's no recognition of the family relationship.

CLAIRE: And I think this is something that a lot of people have that same gut reaction to, Alice – you know we all automatically just go 'this just isn't right. It's a fudge. They're avoiding it'. But very few have taken the next step that you're taking and said 'but why do I find this so problematic?' Because, as you say, it's technically the same. It is that idea of symbolism. It is that idea of you know what it's saying about this relationship – that it's not quite a family.

JULIE: And it's hard to have protection if you don't have recognition. So I think that even the title that Sarah and Fatima gave the session is generative. Do you need recognition to have protection? When I took my family law classes last week – introduction to family law – one of the questions was: what do you think the purpose of family law is in society? And quite widely the answer is, well, it's about protecting. Whether family law does protect or not – it's uneven ...

LIAM: I just can't shake that idea – and I know I mentioned it earlier – of why do we care? And I guess I care because people are being treated differently. So, appealing to notions of liberal equality and all the rest of it, if some are being recognised, then all deserve to be recognised. But then I think on a more fundamental basis, why do we care about getting recognition from the state in how we live our lives? I quote all the time from Edward Higgs, who wrote a lot of stuff on birth registration, and he kind of says are we not internalising the norms of the bureaucratic state in wanting recognition on the birth certificate in the context of trans parenthood?<sup>16</sup> Are we not internalising those norms? And yes, we are to an extent, but I guess it's always against the fact that these people have recognition, so we want it too. But then that's just underpinned by this liberal idea of rights and equality and inclusion and all this kind of stuff when a lot of people don't really care about that. I wonder whether a broader question could be asked: if we didn't have these systems, would we care and could we live more flourishingly without this system that we call law dictating and telling us what we can do?

MAEBH: There's a fun article from the 70s or 80s about what we would do if we didn't have marriage, about how we could resolve all these things very differently.<sup>17</sup> And it's really interesting. But then at the end, we do have marriage, and people like it ... It's the same idea. I think, Liam, this is the problem sometimes: law is inherently normative whatever way we choose to take it; it's going to impact on the way people understand their identity and their

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<sup>15</sup> A Margaria, 'Surrogacy before European Courts: The Gender of Legal Fictions' in M-L Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press, 2024).

<sup>16</sup> E Higgs, 'UK Birth Registration and its Present Discontents' (2018) 5 *Reproductive Biomedicine and Society Online* 35.

<sup>17</sup> E Clive, 'Marriage: unnecessary legal concept?', in J Eekelaar and S Katz (eds), *Marriage and Cohabitation in Contemporary Societies* (Butterworths, 1980).

family lives. So I think we have to accept that we might come up with a better way of doing it, but it's still going to be normative. My real problem with it is you could argue that some people choose to live their lives in a way that they don't want state recognition. I'm not necessarily making this argument, but you could choose to make this argument. But then when we start giving children status based on what their parents did, that's really weird. That's a return to the ideas of legitimacy. And it's because we can't understand it in any other way. It just kind of shows the inadequacies of our concepts to be able to give people who are, you know, children, the same equal recognition, the same recognition by the state, and the same rights that would suit their lived reality when we don't know what their lived reality is going to be ...