

# Gay and lesbian collaborative co-parenting in New Zealand and the UK: “The law doesn’t protect the third parent”

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## Abstract

In many jurisdictions, legislation reflects, retains and reiterates heteronormative two-parent models of family. Lesbian and gay individuals and an increasing number of heterosexual individuals who choose to parent outside the paradigm of the conjugal couple relationship find neither their interests, nor the welfare of their children, are sufficiently protected in law. This article is based on the findings of two empirical research projects investigating the procreative autonomy of lesbians and gay men in New Zealand and the UK. It focuses on collaborative co-parenting families formed by lesbian couples and gay men, with reference to the allocation of legal parenthood in these kinds of families and case law across both jurisdictions. Two such families are introduced. Attention is drawn to the ways the law hampers these families’ preferred parenting arrangements. The article highlights the need for legislative change. It concludes that a more flexible, inclusive concept of legal parenthood that honours the intentions of those involved in these arrangements, would potentially benefit all people interested in non-traditional parenting.

## Keywords

Same-sex parents; collaborative co-parenting; assisted reproduction; family law

## Introduction

The increasing number of planned families formed through the use of assisted reproduction technologies requires an expanded concept of family to reflect the reality of the myriad forms that exist, and to ensure that children’s interests are adequately protected...Assisted reproduction is used by heterosexual couples experiencing infertility, including those who are concerned about genetic issues or are unable to carry a fetus to term, and by lesbian couples, gay male couples, persons intending to become

single parents and persons intending to form families with more than two parents. They may use anonymous or known donor sperm, ova or embryos, or some combination of donor genetic material and surrogacy. The families that result are varied and diverse, and each has a unique and distinct network of social and extended family relationships (Manitoba Law Reform Commission, 2014: 2-4).

In New Zealand and the UK, gay and lesbian collaborative co-parenting arrangements are part of the variety and diversity referred to in the quote above. Bremner (2017) defines collaborative co-parenting as 'reproductive collaborations' between gay men and lesbians that are characterised by the intention of each of the adults (often more than two) to play some sort of parental role in the child's life. The New Zealand Law Commission's (2005) report, *New Issues in Legal Parenthood*, recommended amending existing law to allow for the recognition of three legal parents where a lesbian couple and the biological father conceive and raise a child together. This recommendation, while not acted on in New Zealand, was referenced in the lead up to the 2013 British Columbia Family Law Act, which legislated for the possibility of three legal parents. Meanwhile in the UK, although this issue has not been addressed legislatively, there have been various judicial attempts to afford some recognition to gay and lesbian families where there are multiple parents (for a useful summary of cases in England and Wales, see Smith, 2013). However, the courts do not have the discretion to recognise multiple legal parents. Therefore, judges adopt a less-than-satisfactory approach of using parental responsibility as discussed below (see also Harris and George, 2010), which falls short of legal parenthood.

This article is based on two empirical research projects focused on gay and lesbian families that were conducted separately by one author in New Zealand and the other author in the UK. We draw on these projects, which are described later in the article, to argue for a more inclusive approach to the recognition of legal parenthood in these jurisdictions. Rather than attempting to channel families into a particular model of parenthood, we advocate for a legal framework that adequately recognises and values family diversity. By discussing the stories of two collaborative co-parenting families (one in the UK and one in New Zealand) we highlight how family laws in both jurisdictions fail adequately to accommodate the needs of collaborative co-parenting families. Building on this, we suggest that in order for the law to properly protect the welfare and rights of children in these families, it needs to engage with the interests and intentions of the adults involved.

## Allocating legal parenthood: Heteronormative assumptions about parenting

The way in which the law in New Zealand and the UK<sup>1</sup> allocates legal parenthood in collaborative co-parenting families bears the hallmarks of heteronormative assumptions about parenting and is wedded to the notion of dyadic gendered parenting (for more on this see Boyd, 2007; Brown, 2019; McCandless and Sheldon, 2010). The starting point in

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<sup>1</sup> Although the legal analysis in this article relevant to the UK primarily focuses on England and Wales, the Human Fertilisation and Embryology Act 2008 [HFEA 2008] extends to Scotland and Northern Ireland.

both New Zealand and the UK, as with many other jurisdictions, is that the woman who gives birth to a child is that child's legal parent. The birth mother may be the sole legal parent of the child in cases of assisted reproduction using donor sperm. The child may have one other legal parent, who is either male or female, but no more than two legal parents. We refer to this approach to legal parenthood as the 'two-parent model'. The two-parent model is rooted in a traditional conception of the family and, therefore, does not reflect the lived experiences of a number of collaborative co-parenting families. This is illustrated by the legal position in both New Zealand and the UK, which this section of the article considers.

### Regulating legal parenthood: Birth mothers and second legal parents

The Human Assisted Reproductive Technology Act 2004 [HARTA 2004] governs the provision of assisted reproduction treatment in New Zealand. The Act establishes a system of prior authorisation of assisted reproduction treatment by the Ethics Committee on Assisted Reproductive Technology (ECART), which involves taking the health and wellbeing of any children born as a result of the treatment into account (s 4(a)). However, HARTA 2004 does not regulate legal parenthood following the use of assisted reproductive technologies. In New Zealand the legal parenthood of children is governed by the Status of Children Act 1969 [1969 Act]. The 1969 Act was amended by the Status of Children Amendment Act 2004 to cover conception through these technologies. As mentioned above, the law in New Zealand adopts the same starting point as that in the UK, namely that the woman who gives birth to the child is the child's legal parent (s 17). New Zealand law again proceeds on a similar basis to the UK in that it determines the status of the father or second female parent based on his or her relationship with the mother. However, in the UK, the law will only automatically consider the father or second female parent a legal parent where they are married to or in a civil partnership with the birth mother. New Zealand law by contrast includes de facto partners (s 14). In both jurisdictions donors are not considered legal parents (1969 Act ss 19 – 22 as amended by the Status of Children Amendment Act 2004, Part 2; Human Fertilisation and Embryology Act 2008 s 41).

In the UK, both the use of assisted reproductive technologies and the consequences of this for legal parenthood are regulated by the Human Fertilisation and Embryology Act 2008 [HFEA 2008]. There is an inherent distinction in the HFEA 2008 to be drawn between single women and female couples, on the one hand, and single men and male couples, on the other. In some circumstances, it is possible for a single woman or a female couple to be a child's sole legal parent(s) from birth. However, as in New Zealand, although it may be possible for a single man to be one of the child's legal parents at birth, both partners in a male couple will never be considered to be the child's legal parents from birth. This distinction in terms of legal parenthood for men and women derives from the common law principle that parturition identifies a child's mother (Amphill Peerage Case [1977] AC 547, 577) and is contained in the HFEA 2008 (s 33(1)). Therefore, upon birth, one of the child's, and perhaps his or her only, legal parent(s) will be his or her birth mother (for a comparison with the position in France, where there is the possibility of having motherless children because women have the right to conceive anonymously, see Lefaucheur, 2004).

HFEA 2008 makes it clear that, as in New Zealand, a child can only have one other legal parent in addition to the birth mother (ss 36 and 42). However, who this second parent will be depends on the circumstances of conception. If the child is conceived through sexual intercourse then the common law presumption of *pater est quem nuptiae demonstrant* will operate, which is rebuttable by DNA evidence (Family Law Reform Act 1969 s 26). The effect of this is that, on birth, the legal father of a child born through sexual intercourse will be the biological father or, if no DNA tests have been conducted, the mother's husband if she has one. Although conception through sexual intercourse could conceivably feature in collaborative co-parenting arrangements for a variety of reasons, the evidence from the case law and empirical studies is that some form of assisted reproduction is more common (see also Kelly, 2007). Even if conception occurs through assisted reproduction, the law distinguishes between situations where single women and female couples not in a civil partnership/marriage conceive at home, on the one hand, as compared to single women and female couples who conceive at a licensed fertility clinic or female couples in a civil partnership/marriage who conceive at home, on the other. In the former situation, the common law rules apply, whereas female civil partners/married couples are both treated as the child's parents from birth, regardless of whether assisted conception occurs at a clinic or elsewhere, provided no absence of consent can be shown (HFEA 2008 s 42). In addition to this, where the appropriate consent forms have been signed, female couples who are not in a civil partnership/marriage can be the legal parents on birth provided they are treated at a licensed fertility clinic (HFEA 2008 ss 43 and 44) (for an example of where the appropriate consent forms had not been signed see *AB v CD* [2013] EWHC 1418 (Fam)). In each of these cases, the biological father would not be considered one of the child's legal parents (HFEA 2008 s 45(1)). New Zealand law, by contrast, does not require unmarried female couples to conceive in a clinic in order to benefit from automatic legal parenthood but rather applies to all assisted reproduction procedures "regardless of where, or how (for example, with whose help) the procedure is carried out" (1969 Act, s 15(1) as amended by the Status of Children Amendment Act 2004, Part 2).

The position in relation to male parents who conceive through assisted reproduction is different. In both New Zealand and the UK, because the birth mother is always initially one of the child's two legal parents, a male couple cannot be considered the child's legal parents from birth. However, section 54 of the HFEA 2008 allows a male couple, who are either civil partners or living in an "enduring family relationship" and one of whom is the child's biological father, to apply for a parental order, between six weeks and six months after birth, making them and not the gestational mother (provided she consents) the legal parents. This option was not previously available to single men (or women) (see *Re Z (A Child) (2)* [2016] EWHC 1191 (Fam)). However, the Government has now introduced a remedial order to address this disparity which came into force in January 2019 (Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018). In New Zealand, there is no mechanism equivalent to the parental order for gay couples. What is more, in both jurisdictions the restriction to two parents limits the possibilities open for the legal recognition of collaborative co-parenting arrangements involving more than two parents.

Arguably, the intention behind the legislative provisions addressed in this section of the article is to put same-sex parenting on a similar footing to different-sex parenting. As Mr Justice Baker observed in the UK context, “[there] is an acknowledgement that alternative family forms without fathers are sufficient to meet a child’s need” (Re G ( A Minor ); Re Z ( A Minor ) [2013] EWHC 134: [113]). While this is a welcome development there is concern that legal progress could be easily jeopardised (Harding, 2015), particularly given the legal system continues to appear tempted to force father figures on families that women design and lead (Boyd, 2007). Although Smith (2013: 378) acknowledges this point, she also stresses that “excluding known donors from legal recognition through a system which recognizes only two parents validates and protects lesbian families but also reinforces the dyadic parenting norm based on heterosexual reproduction.” This approach may benefit parents who wish to form a (homo)nuclear family but excludes others who seek to engage in collaborative co-parenting (Surtées, 2011). As Leckey (2015: 1) highlights, “redrawing the lines of legal ‘family’ might also further marginalize non-normative caring and kinship networks.” In summarising the problem, Brown (2019) notes that while legal parenthood has broadened in scope to include the possibility of two female parents, this has occurred without adjusting the two-parent model of the conventional, heterosexual nuclear family on which the provisions are based. It is this very model that this article seeks to challenge.

### Acquiring parental responsibility or guardianship

The legislative provisions relating to legal parenthood described above need to be considered in light of the separate legal concept of parental responsibility in the UK (in particular in England and Wales) and guardianship in New Zealand; currently, both may be of more utility in terms of collaborative co-parenting. In England and Wales, parental responsibility is defined in section 3 of the Children Act 1989 as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.” In New Zealand, guardianship, which is governed by the Care of Children Act 2004, similarly emphasises rights, duties, powers and responsibilities. As well as automatically becoming a legal parent in both jurisdictions, a birth mother also acquires parental responsibility for her child upon birth in England and Wales, or guardianship in New Zealand.

Thinking particularly about collaborative co-parenting situations involving a female couple in the UK, the mother’s female partner would acquire parental responsibility on birth if the mother’s partner was the child’s legal parent under HFEA 2008 and was either in a civil partnership with the mother at any time between conception and birth (Family Law Reform Act 1987 s 1(3)(bb)), was registered as the child’s second parent on the birth certificate or had entered into a parental responsibility agreement with the mother (Children Act 1989 s 4ZA). Similarly, in New Zealand, the female partner would acquire guardianship under the care of Children Act 2004 as the second legal parent, whereas the biological father/known donor would need to apply to the Family Court for additional guardianship.

Unlike legal parenthood, in the UK, it is possible for the court to make a child arrangements order in favour of more than two adults, including people who are not the child’s legal parents. Various adults are entitled to apply for a child arrangements order

as a matter of right. These include the child's parent, guardian or step-parent with parental responsibility (Children Act 1989 s 10(4)); a spouse or civil partner where the child is treated as a child of the family; and someone with whom the child has lived for at least three years (Children Act 1989 s 10(5)). Other people such as a mother's female partner where conception occurred at home and who is not in a civil partnership with the mother must apply to the court for leave to apply for a child arrangements order, which can confer parental responsibility but not legal parenthood. The biological father may also be in this position if he is not considered to be a legal parent (for an example of this see *Re G (A Minor)*; *Re Z (A Minor)* [2013] EWHC 134).

Similarly, in New Zealand, other people can apply for additional guardianship, including, as already mentioned, a biological father/known donor. A second way known donors can mitigate the insecurity of their position is through developing a formal written agreement with the legal parents of a child about involvement prior to seeking a court order that reflects some or all of the conditions of the agreement under the Care of Children Act 2004.

## Research overview and approaches

As indicated earlier, this article draws together findings from two separate research projects conducted by the authors. The first study, conducted by Bremner, investigated the ways in which the legal frameworks in the UK and Canada accommodate the procreative autonomy of lesbians and gay men engaging in or considering collaborative co-parenting. In order to compare the relevant laws across these jurisdictions, the study combined a doctrinal approach with a contextually sensitive socio-legal approach that could account for the social contexts within which the legal rules operate (Cotterrell, 2002; Thomas, 1997). The intention in doing this was to avoid the tendency of a purely doctrinal approach to view law as a self-contained system governed by distinctively legal concerns (Moran, 2012). To generate insight into the personal impact of legal rules on (in this case) family life, the study also included an empirical component.

The second study, which Surtees undertook, similarly investigated the procreative autonomy of lesbians and gay men, but from the New Zealand perspective. While collaborative co-parenting was of interest, the overarching aim of the study was to explore the negotiation of the kin status and place of known gay and heterosexual sperm donors, and that of their partners, in the family lives of the children they expected to or had helped to conceive. Because Surtees sought to elicit stories about such negotiation, she adopted a narrative inquiry methodology underpinned by anthropological and sociological theorising about kinship and relatedness. Unlike Bremner's study, the personal impact of legal rules was not a specific focus of inquiry, however these laws contextualised the study and had a bearing on the kinds of stories shared.

Qualitative research methodologies informed both studies. This form of inquiry enables the researcher to generate extensive, richly descriptive, context-specific data for in-depth interpretive study of particular phenomena and the meanings people attach to these (Gray, 2018; Taylor et al., 2016). As such, this approach was well suited to capturing and understanding the close-up reality of lesbian and gay men's collaborative

co-parenting and the impact legal regulation has on this, the specific focus of this article. Notwithstanding the studies' shared approach, there were a number of methodological differences between them, as detailed below.

The remainder of this section addresses the identification and selection of participants for the empirical aspects of the two studies and their methods of data collection and data analysis. Ethics approval and ethical considerations are also addressed.

### Identifying and selecting participants

Lesbians and gay men constitute a hard-to-reach population because they belong to a socially stigmatised group. Developing a sample for this population is challenging, because there is no existing sampling frame to recruit from and much remains unknown about the population, including size and demographics (Matthews and Cramer, 2008; Weeks et al., 2001). Because random sampling was not an option, both studies were promoted through country-specific lesbian and gay media, lesbian and gay-targeted organisations, social groups and online mailing lists. Those wanting to know more about either study were typically part of interconnected networks; these were capitalised on through snowball sampling. Used to identify and select people who are part of such networks, snowball sampling is a particularly useful strategy for accessing hard-to-reach populations, as once the researcher has identified potential participants they can act as informants to recommend others (Fraenkel et al., 2015; Patton, 2015).

These recruitment strategies were largely successful. Six prospective and current collaborative co-parents across four families in the UK and another six such co-parents across three families in Canada participated in Bremner's study. Participants were purposively selected to ensure a diverse range of collaborative co-parenting arrangements. In addition, the UK sample included five legal professionals and one health professional and the Canadian sample six legal professionals. These professionals, who had worked extensively with collaborative co-parenting families, were included on the basis that they allowed access to the experiences of a wider range of this particular family form.

Sixty adults participated in Surtees' study across 21 lesbian known donor familial configurations at different stages of forming family.<sup>2</sup> Initial recruitment focused on lesbians and gay men who had previously collaborated together in order to conceive children through known donor insemination or who were planning to conceive using this method. As recruitment proceeded, the inclusion criteria broadened to include a focus on heterosexual known donors, because it had become increasingly apparent that such donors' concerns lay with their place, and the place of their partners, in children's family lives, rather than their sexual identities per se. What mattered was the participants'

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<sup>2</sup> These adults had formed a variety of social groups patterned on different combinations of relationships, including intimate couple relationships and reproductive relationships. The term 'lesbian known donor familial configurations' captures the diverse interdependencies of the members of any one familial configuration, however participants understood these.

potential to provide insight into a wide range of social identity possibilities and roles for gay or heterosexual men as known donors for lesbians, and those of their partners, vis-à-vis the family lives of children, given they have no obvious place within kinship systems.

### Collecting data

As Taylor et al. (2016: 102) observe, “qualitative interviewing is flexible and dynamic.” Interview encounters, they continue, are directed towards uncovering participants’ experiences. To gain insight into the experience of collaborative co-parenting and the impact legal regulation has on this, Bremner conducted a total of 25 individual face-to-face or telephone interviews with family members and professionals (12 in the UK and 13 in Canada). The interviews were semi-structured, allowing for in-depth guided conversations (Cole and Knowles, 2001). Each interview was digitally recorded and transcribed shortly after they were held.

Surtees, on the other hand, chose to gather data by interviewing members of familial configurations in groupings of their choice. She conducted 26 face-to-face semi-structured interviews in total (10 group interviews, 11 couple interviews and 5 individual interviews). Her preferred approach to interviewing was the narrative interview, a particularly useful method for collecting stories about participant experiences that can accommodate holistic, chronological and long accounts (Bold, 2012; Elliott, 2005; Riessman, 2008). Like Bremner, Surtees also digitally recorded and transcribed her interviews.

In both studies, the rich, detailed data generated through interviewing reflected the accepted understanding in qualitative research that the well-managed interview can be a powerful tool (Gray, 2018).

### Analysing data

Frequently considered messy, qualitative analysis merges intuition, insight and intimate knowledge of the data (Taylor et al., 2016). Both Bremner and Surtees conducted a thematic analysis of their respective data sets generating codes drawn from their interview transcripts using Nvivo (QSR NUD\*IST Vivo [nVivo], 2008), a qualitative data analysis software package. Relationships between the codes were subsequently established before being collated into broader themes.

Despite the methodological differences between the studies, the methodologically compatible data Bremner and Surtees obtained, and the similar codes and themes they identified, allowed for a coherent analysis and conclusion to emerge. Bringing the two studies together in this article allowed the authors to make comparisons between the lived experiences of collaborative co-parenting families across New Zealand and the UK, while simultaneously highlighting the points of similarity and difference in the allocation and regulation of legal parenthood and the mechanisms for acquiring parental responsibility and guardianship in their respective jurisdictions.

### Ethical considerations

Both studies were granted ethics approval from the relevant university ethics committees prior to the collection of data.<sup>3</sup> During the recruitment phase of the studies, participants received information sheets and were asked to sign consent forms. The information sheets reflected accepted ethical principles necessary for the protection of all parties in research involving humans. For example, the purpose, aims and nature of the research were outlined allowing participants to make informed decisions about whether to consent to participate or not. Participation was voluntary; this was also specified, as was the right of withdrawal. In addition, the conditions of confidentiality and anonymity were set out. Participants were promised that their identities and the information they provided would be kept confidential. They were assured that their real names or other identifying information would not be used in the studies or related publications and presentations and that all data would be securely stored.

Because the studies explored sensitive topics, the risks associated with these needed to be considered in advance as part of the ethics approval processes. Participants were provided with information about appropriate support services in the event that they wanted support as a result of their involvement. This did not prove necessary in either study.

## Findings

Two collaborative co-parenting families inclusive of a lesbian couple and a gay man in the early stages of forming their families through donor insemination are introduced in this section of the article, using pseudonyms. Attention is drawn to the ways in which the law hinders the families' preferred formation in both the UK and New Zealand context. The complex statutory arrangements within which parenting is negotiated means legal parenthood is automatically available as a resource for birth mothers and a second family member, but not a third. In their collective efforts to safeguard each person's position, the families make use of available legal resources, consciously choosing to engage with the law to the extent that they can despite the obstacles it presents.

## The Families

For Betty and Eliza, a British couple, and Polly and Esther, who lived in New Zealand, future motherhood was important. Polly quipped their 'how we met' story was "the typical lesbian cliché"; "by date two, we said we wanted to have a family!" Both couples planned to conceive using sperm from known donors and subsequently recruited donors prepared to participate in collaborative co-parenting families as involved fathers and third parents to their future children. At the time of interviewing, the couples' plans were progressing apace. Insemination attempts were underway for Betty and Eliza, facilitated by Lenny, the single gay man they had recruited.<sup>4</sup> Meanwhile, Polly and Esther had a

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<sup>3</sup> The University of Exeter College of Social Science and International Studies Ethics Committee approved Bremner's study (11.07.11-xxii). Additionally, approval was gained from the University of British Columbia Behavioural Research Ethics Board for the Canadian fieldwork (H1300073). The University of Canterbury Human Ethics Committee approved Surtees' study (HEC 2009/158).

<sup>4</sup> Betty, Eliza and Lenny were interviewed separately.

pregnancy well established in conjunction with Keane, who they met at a social event.<sup>5</sup> Like Lenny, Keane was a single gay man.

Collaborative co-parenting families like those formed by these couples and the men with whom they teamed up are not common. The scarcity of studies focused on such family models suggests they also lack recognition. Power et al. (2010) longitudinal study, which investigated family life for same-sex parents in New Zealand and Australia, concluded that contributing factors for this may be dominant social, cultural and institutional traditions that assume a child will have two (and only two) parents and a possible reluctance to engage with the practical, logistical and legal aspects that result when more than two parents are contributing to a child's upbringing. However, these couples, along with the men, were willing to navigate the logistical and legal dimensions inherent in these models in a context where assumptions that a child will have only two parents continue to prevail.

Conversant with the legislation governing assisted reproductive procedures and parenthood in their respective countries, the adults across the two families were mindful that the law would not take as its starting point their family forms, within which collaborative co-parenting was considered key. For Betty, "the idea of co-parenting" meant "all of us being equal, all of us being equally involved, all of us being a family." Polly thought co-parenting required particular skills:

I think a lot of it is the ability to manage the complexities and ambiguities of different relationships. To step outside the traditional stereotypes: that parenting does not necessarily need to imply sexual intimacy, that the parenting alliance can look completely different.

Returning to earlier points, parenthood law is marked by heteronormative assumptions; these retain and reiterate particular norms with parturition identifying a child's mother and conception through heterosexual sex the usual means for identification of a second legal parent. As such, the law is ill equipped to handle the kinds of relational complexities and ambiguities Polly alludes to in her comment. Accordingly, it impedes these families' preferred form by imposing a two-parent model on them—a model that disregards the realities of their arrangements. Nevertheless, unlike some of the families across the two studies, these families expected to utilise the law to the degree possible in an effort to protect the adults' respective positions within them.

Both families had concluded that a written agreement outlining their intentions would be prudent and had entered such agreements prior to insemination attempts. Betty, Eliza and Lenny's written agreement confirmed that while Betty and Lenny would be the biological parents of any child they conceived, Betty and Eliza would be the legal parents of that child. They acknowledged the written agreement was very protective of the women's role in terms of taking responsibility for the child and the ability to make decisions on his or her behalf. Despite this, Lenny trusted that things would work out for

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<sup>5</sup> Polly was five months pregnant when interviewed. She and Esther were interviewed together. Keane was not interviewed, because he was unavailable during the period interviews were conducted.

them all, although he acknowledged that some flexibility would be necessary. As he put it, “we are trying to create a family, really, and [we need] to be a bit flexible about it”.

Esther described her family’s written agreement as an “insurance policy.” Negotiated through their lawyers, it confirmed that the women intended to be the child’s legal parents and that Keane would be a third parent to him or her. It also confirmed that Keane would contribute to all aspects of his or her upbringing. Resonating with Luce’s (2010) notion of contracting kinship, these kinds of written agreements are not enforceable in New Zealand, although parties to them can seek formalisation of key aspects through a court order, as mentioned earlier.

Esther felt her position as the intending non-birth mother was not particularly secure and this made her anxious. While Eliza did not specifically articulate a similar feeling, presumably she may have experienced something comparable. Either way, legal parenthood was a significant resource available to both these women and one that Esther, at any rate, hoped would help assuage her nervousness. The mechanism through which this would be achieved for them differed, however.

For Eliza, legal parenthood would automatically flow from her civil partnership with Betty (unless a lack of consent was demonstrated), consistent with the provisions in UK law already outlined. Lenny would not therefore have the option of being recognised as the second legal parent. Esther’s legal parenthood, on the other hand, would not be reliant on formalising her couple relationship with Polly—although they had the option to enter a civil union following the passage of the Civil Union Act 2004 in New Zealand,<sup>6</sup> this was not something they had to do. Whether or not she should obtain legal parenthood in place of Keane was initially a subject of debate:

Esther: The one bit of drama with—

Polly: Keane’s lawyer.

Esther: Was his lawyer decided ... that it would be better for the child to have Keane on the birth certificate. She wanted to use us as a new legal precedent and try and get three of us on the birth certificate. I said to Keane: “Is it that important, for you?” He said: “No.” I said: “Well, then, I must be honest. It is that important for me to be on it because I don’t have any other right to the child and it just makes me very nervous and the second thing is, it’s going to cost us a fortune of legal fees to be this precedence [sic].” I personally didn’t want to be involved in that.

Polly: We decided on the balance of things as well, and this is also Keane’s position, is that—Keane is the child’s biological father. You can’t take that away.

Esther: You can’t dispute that.

Polly: No matter whether he has a piece of paper or not, he still has that.

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<sup>6</sup> Marriage became possible for same-sex couples in New Zealand within the decade, following the passing of the Marriage (Definition of Marriage) Amendment Act 2013.

Esther: Whereas I've got nothing. Nothing.

Polly: That was a sticky conversation.

Esther: It was hard. The thing was, Keane was okay with it.... He doesn't actually feel that strongly about it.... So he put it out there, but as soon as I told him: "Look, I'm not really comfortable about it" he said: "Let's drop it."

Esther was relieved this option was dropped. As Polly's partner, and in line with the deeming rules under Part 2 of the Status of Children Amendment Act 2004, she expected to name herself as a parent, alongside Polly as the birth mother, when they registered the child's birth. This option would enable her to formalise her social relationship to the child. Similar provisions for lesbian couples to secure joint legal parenthood in other countries have also been made (see for example Hayman et al., 2013; NeJaime, 2016; Swennen and Croce, 2015).

Eliza and Esther's ability to achieve legal parenthood status can be understood as a strategy that will rectify a perceived 'imbalance' between their positions as intending non-birth mothers and those of their partners. Lesbian non-birth mothers can feel uneasy about their status (Gabb, 2005); many are acutely aware they are not recognised as genuine parents in the public sphere or well supported (Brown and Perlesz, 2008; Hayman et al., 2013; Wojnar and Katzenmeyer, 2014). Achieving this status will also rectify a perceived 'imbalance' between their positions as intending non-birth mothers who will have no biological connection to their children and Keane and Lenny's status as people who will have this connection. This is not insignificant in the face of assumptions that the men could be considered to be more important than them on the basis of biology (Nordqvist and Smart, 2014).

In any event, neither Keane nor Lenny will be a legal parent to their children. The deeming rules of the Status of Children Amendment Act 2004, Part 2 will prevent Keane from becoming a legal parent (there are some exceptions to this rule, but they do not apply in his case),<sup>7</sup> unless he can persuade Polly and Esther to allow him to be named a parent on the birth certificate in place of Esther. This was not a satisfactory option from Esther's perspective. Likewise, Lenny will not be considered a parent for any purpose Under Part 2 of the HFEA 2008 by virtue of the fact that Eliza will automatically be recognised as the second legal parent.

Polly and Esther expected to provide day-to-day care of the child in their home following his or her birth, as well as being his or her legal parents and guardians. Keane was to enact non-residential fathering/parenting in ways prescribed through their written agreement. This was to be strengthened through his appointment as an additional guardian—a step intended to reinforce his position as a third parent by securing his legal authority over decision-making and day-to-day care of their child. Similarly, Betty, Eliza

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<sup>7</sup> Exceptions include if the mother was single at the time of conception and later embarks on an intimate relationship with or marries the donor or if the donor successfully gains adoption of the child (which would then extinguish the rights of the other parent/s). These exceptions provide further evidence of the significant obstacles the law can present to families like theirs.

and Lenny expected Lenny would seek to obtain parental responsibility for their child. They also intended to have him named on a shared residence order.<sup>8</sup> This was reassuring for him. As he said, “that was kind of the compromise that if I’m not going to be the legal parent, I am taking that court order which sort of gives me that parental status.”

There was a strong sense from the interviews that each of the six adults within these two families understood their arrangements as an attempt to create a family that included all of them. For example, Betty pointed out Lenny “is very much part of our family now.” And, in a similar vein Polly said, “we’re very clear that we will be mums and dad.” Despite this, legal recognition played an interesting role in their respective family dynamics. Although each of the adults professed the ideal of creating a family, for the women this was very much predicated on the idea of firm pre-conception intentions. Lenny alone expressed a willingness to take things on faith and see how things developed, trusting that they would be able to navigate the future together in a mutually acceptable way. This tension between prior family planning and organic development as a family indicates the different ways these families can form and the different expectations that can exist.

Although the level of agreement that existed between the adults in both families was very high, it is possible that their intentions could change, particularly when considering that Betty, Eliza and Lenny were yet to conceive a child and Polly, Esther and Keane’s child was yet to be born. A number of studies draw attention to disparities between the expectations of lesbian couples and gay donors in relation to donor-child relationships and roles, despite agreements between all parties on this matter prior to the conception and birth of children (see for example Dempsey, 2004; Dempsey, 2005; Dempsey, 2012; Riggs, 2008a; Riggs, 2008b; Scholz and Riggs, 2013).<sup>9</sup> Lenny and Keane will be in the more vulnerable position if intentions change or disparities in expectations were to arise, because only the women will be the legal parents of their children and only they will appear on the birth certificates. Without legal parenthood or parental responsibility or guardianship, the men will have no rights, responsibilities or liabilities in respect of their children and the children will lose those that would otherwise stem from them. The interests of heterosexual couples utilising donated gametes predominantly shape the protection of the donor from rights, responsibilities or liabilities. This is particularly significant for Lenny and Keane because their loss of rights, responsibilities or liabilities will be the case irrespective of their families’ plans to be jointly acknowledged as parents. As Polly said, “the law doesn’t protect the third parent—whichever is decided is the third parent.”

In Dempsey’s (2010) study, a non-cohabiting single lesbian and a single gay man who decide to have a child together typify the kinds of collaborative co-parenting arrangements possible in friendship contexts. According to Dempsey (2010: 1154), in such arrangements “the conventional assumption is that biological motherhood and fatherhood are grounds for parental rights and responsibilities.” Although Betty, Eliza

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<sup>8</sup> This would now be a child arrangements order.

<sup>9</sup> While these families were not in dispute about expected roles, comparisons can be made with the reported experiences of disputing families from the case law.

and Lenny, and Polly, Esther and Keane view themselves as setting up collaborative co-parenting arrangements, this is not done on the basis of a co-parenting agreement like the one Dempsey (2010) describes. The written agreements these families have protect the legal rights and responsibilities of the female couples while leaving the biological fathers legally vulnerable. While the intention is to remedy this to the extent possible following the birth of their children through additional guardianship for Keane and court orders for parental responsibility and shared residence for Lenny, the power very much remains in the hands of the female couples; the men are largely reliant on the willingness of the women to honour pre-conception plans. Despite the skewed nature of their written agreements in terms of legal rights and responsibilities, which makes them seem more like Dempsey's (2010) social solidarity agreements, the actual parenting envisaged in them appears to fit more with an understanding of collaborative co-parenting. As their stories highlight, the current legal context in New Zealand and the UK is complex in its recognition of the partners of birth mothers in same-sex relationships as legal parents while persisting with the assumption that there can only be two legal parents. Despite the progressive nature of the law in both jurisdictions with respect to relationship and parenting recognition, rules determining parental status clearly fall short in these (and other) kinds of lesbian and gay collaborative co-parenting models of family. Potentially the rules will also fall short for the increasing number of heterosexuals who are turning to such models (for more on this see Jadvá et al., 2015; Ravelingien et al., 2016).

## Concluding discussion

Following Hare and Skinner (2008), an existing adult bias in law that a child should not have more than two legal parents is a significant obstacle for the collaborative co-parenting arrangements of the two families introduced in this article, despite the efforts made to ameliorate their respective situations to the extent the law enables. This bias serves to dismiss what will become their children's reality following birth; the children will have three parents but will be denied a legally recognised parental relationship with their fathers, who expect to parent alongside the mothers, as per the agreed conditions of sperm donation. Situations such as this highlight the need for legislative change if the reality of these kinds of arrangements for parents and children are to be formally supported.

The findings of the studies suggest that there are benefits to collaborative co-parenting models of family for parents and children (see also Herbrand, 2017). In New Zealand and the UK, the kinds of complex situations emerging from such models could be resolved if legal provisions were made for more than two parents to be identified in law subject to the wishes of the parties concerned. Similar recommendations have been made elsewhere but to date have not been adopted widely (see for example Dietz and Wallbank, 2015; Gunn and Surtees, 2009; Law Commission, 2005; Polikoff, 1990; Ryan-Flood, 2009; Swennen and Croce, 2015; Surtees, 2011). Importantly, such legal provisions would readdress the problems parents without legal status can face, as well as disadvantages to children, including the loss of rights that would otherwise flow from these parents, such as citizenship and inheritance. Significantly, access to these parents could not be denied to children as can sometimes occur when conflict between parents with and without this status occurs, despite previously agreed plans for the ongoing active

involvement of all parents. Currently, the situation in both jurisdictions remains unsettled and unsatisfactory.

Historically, 'family' has been a problematic notion for gay and lesbian individuals, particularly in relation to raising children. Since the gay and lesbian rights movement in the 1970s and 1980s, gay men and lesbians have had to position themselves in relation to a heterosexually dominated conception of the family and raising children, from which they had largely been excluded. As Kelly (2007) suggests, law has a significant contribution to make within marginalised communities both for its ability to confer concrete rights on the members of these communities, but also because of the symbolic power afforded through this process. Therefore, it is understandable that 'the power of law' takes on a special significance for same-sex parents.

However, it is important to recognise that law reform is not necessarily a complete solution. Nor does it always lead to the desired social change. For example, Kelly (2011) aptly observes that broad social transformation does not necessarily follow from legal acknowledgement of lesbian motherhood. Her observation could equally apply to collaborative co-parenting: the fact that the legal system might in the future recognise collaborative co-parenting does not mean this will lead to greater social recognition of these parenting arrangements. Nevertheless, legal advocacy and activism can be a key motivator for social change. As Brickey and Comack (1987) point out, law is a significant avenue for generating such change. Certainly, law can play an important, although not necessarily determinative role, in deciding who qualifies as a parent.

In recognising law's role in this regard, and as a reaction to historic exclusion, lesbian, gay, bisexual, trans, queer and other (LGBTQ+) activists have long argued for legal recognition on the basis of equality between same-sex and different-sex families. Considerable progress has been made towards achieving at least formal legal equality in New Zealand and the UK. However, equal treatment in the statute books does not always result in a practical outcome that is consistent with substantive equality. Furthermore, those seeking formal legal equality may see this as the sole desired outcome without challenging the institution, in this case legal parenthood, in which they wish to be included. As Leckey (2015: 1) comments:

Groups seeking equality sometimes take a legal victory as the end of the line. Once judgment is granted, or a law is passed, coalitions disband, and life goes on in a new state of equality. For their part, policymakers may assume a troublesome file is now closed.

Despite this, early contributions to the same-sex marriage debate demonstrated different approaches within the gay and lesbian communities in terms of advocacy and resistance. Alongside mainstream voices arguing for same-sex marriage on the basis of equality, other more radical voices came to the fore. For example, Polikoff (2000) argued that an equal rights politics focused on the right of lesbians and gay men to marry on the same terms as those available to heterosexuals, in combination with invoking their right to marry as a 'choice', falls short of visualising a much more transformative model of family relevant to everyone (for other radical commentators see Boyd and Young, 2003; Butler, 2002). This idea of the potential of gay and lesbian relationships to transform the

marriage model has been built on both in relation to same-sex and different-sex marriage, to argue for greater recognition of a diverse range of adult relationships.

Some scholars, although still relatively few, have also echoed these arguments in relation to same-sex parenting. In particular, Kelly (2011: 5) claims:

While an equivalency approach, typically grounded in formal equality, may be adopted because of the strategic advantages it presents in the courtroom, the risk is that it will underplay the differences between lesbian and heterosexual parenting relationships and thus limit reform to that which can be understood within the existing normative framework.

These concerns are engaged by the reforms instituted by the Status of Children Amendment Act 2004 in New Zealand and the HFEA 2008 in the UK. It is commendable that female parents can be automatically recognised as a child's legal parents from birth in these jurisdictions. However, it is not necessarily the case that in each of the families across the two studies the intention is for the biological father to be a legal stranger to his child. This is premised on a heteronormative approach to parenthood, to which some same-sex couples do conform. However, in taking this as the basis for including same-sex parents rather than asking whether the existing approach is suitable for their needs, the law limits the possibilities for recognising the range of same-sex families.

As an alternative to a legal model of parenthood premised on formal equality and the inclusion of same-sex parents within a heteronormative conception of legal parenthood, McClain (2013), writing in the US context, advocates a 'diversity model' of parenthood. As she explains, this model recognises and values diversity; it can encompass a range of possible pathways to parenthood and locates varying parenthood positions on a continuum. Moreover, it fits with family law developments that safeguard particular pathways and positions. Kelly's (2011: 46) earlier substantive equality approach, which "is much more likely to produce laws that cater to families of difference, whether they include three parents, non-conjugal co-parents or involved known donors", is not dissimilar.

This article began by demonstrating how prescriptive New Zealand and UK law is in terms of which parent-child relationships are legally recognised. However, the studies that this article discusses illustrate that lesbians and gay men seek to form families that do not conform to traditional notions of the family that continue to be reflected in the law. The findings of these studies show that the gay men and lesbians engaged in collaborative co-parenting understand themselves to be creating families that reflect the interests and honour the intentions of those involved. Lamentably this is not something the law in these jurisdictions currently encourages or facilitates.

As mentioned, other jurisdictions have acknowledged the need to recognise multiple parents in the context of collaborative co-parenting. Given this, it is not clear that there is any justification for a lack of legal recognition. What is more, this lack of legal recognition creates difficulties for collaborative co-parenting families and a sense of disillusionment with law's relevance to their family. On this basis, we advocate for a more flexible and inclusive notion of legal parenthood that can adequately accommodate

the interests of those involved in gay and lesbian collaborative co-parenting families. Such an approach would be beneficial not only for LGBTQ+ parents but also for the increasing number of heterosexual individuals who seek to parent outside the paradigm of the conjugal couple relationship.

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