'The current system of assigning parenthood under English law fails to reflect the reality of modern families.' Discuss

Assignment of parenthood under English law is founded on increasingly outdated social norms. The law no longer rests entirely on presumptions of parenthood, but still favours the socially acceptable, rather than the reality. The law propounds the 'ideal' family, prioritising genetic and gestational ties, on the assumption that such relationships are the most valuable. Whilst it is sensible to have guiding principles to avoid uncertainty, this cannot be achieved by applying unfounded assumptions under the guise of serving the child's welfare, as this compromises crucial flexibility and fairness. The law *should* pursue the welfare of the child, but following the general principle that intentional and social parenthood is most beneficial, to bring the law in line with reality.

There is a moral agenda at work, prioritising conventional family ties, often at the expense of welfare. Traditionally, this was in the form of the 'presumption of legitimacy', justified by the need to avoid stigmatisation of illegitimate children. This pressure has diminished[1], a reality which the law has begun to reflect: the standard of proof has progressed from a strong presumption to a civil standard of proof[2], where the courts are more willing to disturb the presumption based on birth registration or evidence of genetic parentage. The focus on genetic parentage might be thought to better reflect reality. However, this denotes biological parentage as the only 'truth', when, in fact, this emphasis is simply another, arguably unfounded, presumption as to the best conception of parentage. The modern approach stresses that genetic and gestational parenthood is superior to any other tie. Day Sclater et al[3] suggest in the wake of scientific advances in DNA testing, 'biology now provides the main basis upon which claims to parental status rest'. This is seen in judgments such as that of Baroness Hale in *Re G[4];* whilst many welcomed her recognition of social parentage, she emphasises the unique importance of gestational motherhood, stating that acknowledging the gestational mother recognises a 'deeper truth' of a special relationship. Diduck[5] criticises this prioritisation of the gestational tie at the expense of others who might have a more active parenting role. Yet, preferential treatment of genetics is palpable in several areas, including ordering DNA testing. *Re T*[6] demonstrates the courts' view that the 'crucial importance of the rights and best interests of the child' in knowing their genetic father is the most important interest at stake, regardless of other rights involved. Moreover, prioritisation of gestational motherhood has led to a particularly biology-focused approach to surrogacy; surrogacy agreements are not binding[7], meaning the gestational mother is *prima facie* the legal parent, notwithstanding the parties' intentions. The rationale is that genetic parentage constitutes 'the truth', an argument bolstered by Bainham[8]. The fundamental error here is that, as recognised by Johnson[9], there are *multiple* components to parenthood, of which genetic parenthood is just one. The legal framework, by favouring genetics even where neither the gestational

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[1] Office for National Statistics, 2013: 47% of children in England and Wales are born out of wedlock
[2] *W v K (Proof of Paternity) [1988]* 1 FLR 86
[3] Bainham, Day Sclater and Richards, *What is a Parent? A Socio-Legal Analysis,* Hart Publishing, 1999
[4] *Re G (Children) (Residence: Same-Sex Partner) [2006]* UKHL 43
[5] Diduck, "*If Only We Can Find the Appropriate Terms to Use the Issue Will Be Solved": Law, Identity and Parenthood,* Child and Family Law Quarterly, 2007
[6] *Re T (A Child) (Paternity: Ordering Blood Tests) [2001]* 2 FLR 1190
[7] Human Fertilisation and Embryology Act 2008, s.33
[8] Bainham, *Arguments About Parentage,* Cambridge Law Journal, 2008
[9] Johnson, *A Biomedical Perspective on Parenthood,* Hart Publishing, 1999

mother nor the genetic father may have a parental role, undermines the stability of the families which exist in reality.

The legal law fails to capture the reality of modern families by refusing to recognise certain family forms, regardless of the true situation, or whether their exclusion is justified. The HFEA made significant progress by introducing a mechanism for assigning parentage with assisted reproduction, but deficiencies remain. Language such as 'second female parent' demonstrates unwillingness to recognise more than one mother, even where more than one person performs the mothering role. The situation is more problematic with multiple fathers; there is no equivalent provision for men embodied in the HFEA, most obviously as the law urges recognition of the gestational mother. Furthermore, the uncertain legal nature of surrogacy leaves many male couples with the only possibility of potentially complicated and lengthy adoption. Even the basic foundations of family law, in particular that one may only have two parents, reveals the exclusionary nature of the legal system. This rests on devotion to pursuing the biological norm – yet, both science, and society, have progressed from this model. Many children no longer live with one mother and one father, with family arrangements becoming increasingly complex, given the rise of assisted reproduction, as well as polyamorous relationships. Cases like *Re D*[10] illustrate the existence of three-parent families, where the mothers envisaged the sperm donor having the (albeit limited) role of a 'real father'. Hedley J remarks[11] on the inadequacy of language to deal with such cases, a shortcoming in our legal system. Ousting families from recognition not only places the law out of kilter with reality, but invalidates the role of those who consider themselves parents, potentially discouraging pursuance of family forms, regardless of any benefits they may have. If greater recognition is not offered, Horsey[12] comments that the law shall continue to perpetuate a hierarchy of family forms, an unacceptable position given the modern range and complexity of family life.

A disconcerting falsity in the law is lack of transparency, applying assumptions for the apparent benefit of the child's welfare. With ordering DNA testing, for instance, the courts maintain that 'welfare does not dominate the decision'[13], but the judgments are largely devoted to the child's best interests, emphasising the child's right to know the truth about their genetic parentage. This welfare approach has been heightened since the introduction of the Human Rights Act[14], leading *Re T*[15] to declare that the child's rights and interests are the focus of the concern. This rests on the idea that children have a fundamental right to know the truth about their parentage, a 'right' which might be found in the UNCRC[16] which states the child shall have, as far as possible, the right to know and be cared for by their parents. Bainham argues this means the genetic, rather than social, parent, particularly as the Article was introduced to address the threat of removal of children from their birth parents. This interpretation was favoured by Butler-Sloss LJ[17]who stated that the child 'has a right … to know the truth'. However, if we are to accept this interpretation, we must have some normative justification. As shown by Baroness Hale, many believe that bonding occurs between mother and child during gestation, yet there is very little evidence of this[18]; such 'bonding' is arguably much more a reflection of social construction than of biology[19]. Thus,

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[10] *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father) (No 2) [2006]* EWHC 2 (Fam)

[11] *Re MA and RS (Contact: Parenting Roles) [2011]* EWHC 2455 (Fam)

[12] Horsey, *Challenging Presumptions: Legal Parenthood and Surrogacy Agreements,* Child and Family Law Quarterly, 2010

[13] *S v McC & M; W v W [1972]* AC 24

[14] Human Rights Act 1998

[15] *Re T (A Child) (Paternity: Ordering Blood Tests) [2001]* 2 FLR 1190

[16] United Nations Convention on the Rights of the Child 1989, Article 7

[17] *Re R (A Minor) (Contact: Biological Father) [1993]* 2 FLR 762

[18] The Warnock Committee, *Report into Human Fertilisation and Embryology,* 1984

[19] suggested by Levitt, *Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation,* Columbia Journal of Law and Social Problems, *1992*

emphasis on the benefit of genetic relations is undermined by circularity, as children might not feel so attached to genetic relations, and vice versa, without the law's narrow stance. Many cultures do not ascribe such importance to the genetic relationship, including tribes in the Amazon who pursue 'partible paternity' – importance of genetic tie may simply be our social construction. Furthermore, it is particularly difficult to see how we can retain the welfare analysis on assessment of the case law. *Re D*[20], for example, ordered DNA testing supposedly for the child's welfare, despite the child's vehement opposition. Emphasis on genetic truth is rigidly pursued, even where the facts point against this as undermining stability and security in the child's current relationships. The law's paternalism here is unfounded, raising concern from Fortin[21] that *Re D* 'provokes a feeling of unease', as the child should also have a right *not* to know their genetic parentage. So, the law rests on assumptions about what is *best* for the child, without properly determining whether that is the case, and certainly without sufficient flexibility where it is *not* the case. Instead, to better accord with reality, Horsey[22] advocates recognition of intentional parenthood, particularly in surrogacy cases, as those who invest time, finances, and emotion, and initiate the reproductive process are best-placed to look after the child. Jackson[23] believes ignoring the certainty of intention, instead ascribing *prima facie* parenthood to a couple that never intended to keep the child (as is the current surrogacy law), may not promote the child's welfare. Rather than commitment to a dogmatic assertion that the child's best interests require knowledge of genetic parentage, the law should accommodate for the flexibility of true family life, accepting that the welfare of the child requires respect of the family that *actually* cares for them, irrespective of a genetic tie. This can best be achieved by giving greater recognition to intentional and social parentage.

Parenthood is a vital legal concept, offering legitimacy and stability to families. However, the law has undermined such stability by favouring genetics and excluding recognition of some family forms, on the basis that such an approach is necessary for the child's welfare. However, by failing to acknowledge the reality of many families which do not fit these norms, the law fails to offer crucial validation to some families. In perpetuating the idea that genetic parentage is supreme, the situation is worsened or children who are not connected with their genetic parents. We must acknowledge that society has moved on from the nuclear biological model, and recognise that if we are to offer stability and treat families equally, the law must follow.

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[20] *Re D (Paternity) [2006]* EWHC 3545 (Fam)
[21] Fortin, *Children's Rights and the Developing Law,* Cambridge University Press, 2009
[22] Horsey, *Challenging Presumptions: Legal Parenthood and Surrogacy Agreements,* Child and Family Law Quarterly, 2010
[23] Jackson, *Regulating Reproduction: Law, Technology and Autonomy,* Hart Publishing, 2001