

## Chapter 9 supplementary material

These are linked to the main text as follows:

- 9.3.2 Establishing paternity

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#### *The debate about compulsory joint registration*

As we set out in the main text, a small minority of births continue to be registered only on the name of the mother, meaning that there is no prima facie evidence as to the child's paternity, and no automatic parental responsibility for that small percentage of fathers. In response to this perceived problem, reforms were considered in the late 2000s. Tentative proposals were first put forward by the government in its 2006 White Paper on child support.<sup>1</sup> The issue was then detached from the child support reforms and a separate Green Paper published in 2007,<sup>2</sup> followed by a White Paper in June 2008.<sup>3</sup> Although originating from the problems surrounding child support, the proposals were quickly situated within the 1997-2010 Labour government's wider policy agenda on securing good, responsible parenting and promoting and supporting active and engaged fathering in particular. A number of potential benefits from joint registration were identified, including improving child outcomes by facilitating active and involved fathering; securing an enhanced legal status and parental responsibility for the father; securing improved levels of contact; improving compliance with child support obligations; and changing cultural expectations about fathers' responsibilities. Although couched in the language of child welfare and children's rights, the importance of securing 'equality' as between the parents was a strong theme running throughout the White Paper.

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**DCSF and DWP, *Joint Birth Registration: Recording Responsibility*, Cm 7293. (London: HMSO, 2008).**

6. At the heart of our reforms is a desire to promote child welfare and the right of every child to know who his or her parents are. In most cases, a child's right to be acknowledged and cared for by his or her father should not be dependent on the relationship between the parents. To support this right we will ensure that fathers who want to take responsibility for their children do not have to overcome unnecessary obstacles. . . .

20. The roles of both father and mother are important to a child's development. We want parents to realise that, even when they do not have a close relationship with each other, they should both play an active, supportive role in their children's lives. Joint birth registration alone cannot achieve this, but it gives parents the opportunity to demonstrate their commitment to their children . . .

25. . . . The Government considers that it is now time to take steps towards bringing the responsibilities and rights of unmarried fathers more into line with those of unmarried mothers.

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<sup>1</sup> DWP (2006a).

<sup>2</sup> DWP (2007a).

<sup>3</sup> DCSF and DWP (2008).

Subsequently, the Welfare Reform Act 2009 (WRA 2009) was passed, which was intended to amend the Births and Deaths Registration Act 1953 (BDRA 1953). These amendments would have imposed a duty on the child's mother to provide the registrar with certain prescribed information about the child's father.<sup>4</sup> The registrar would then have contacted the alleged father requiring him to state whether or not he acknowledged that he was the father.<sup>5</sup> Where he acknowledged paternity, he would be registered as the child's father.<sup>6</sup> Where he disputed paternity, scientific tests could be carried out, but only if both the mother and the alleged father consented.<sup>7</sup> In order to protect the interests of potentially vulnerable mothers and children, the mother's duty to identify the child's father was to be subject to a number of specific exemptions.

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**Births and Deaths Registration Act 1953, s 2B (not in force)**

- (3) Subsection (1) does not require the mother to provide information relating to the father if she makes in the presence of the registrar a declaration in the prescribed form stating that one or more of the following conditions is met.
- (4) Those conditions are—
- (a) that by virtue of section 41 of the Human Fertilisation and Embryology Act 2008 the child has no father,
  - (b) that the father has died,
  - (c) that the mother does not know the father's identity,
  - (d) that the mother does not know the father's whereabouts,
  - (e) that the father lacks capacity (within the meaning of the Mental Capacity Act 2005) in relation to decisions under this Part,
  - (f) that the mother has reason to fear for her safety or that of the child if the father is contacted in relation to the birth, and
  - (g) any other conditions prescribed by regulations made by the Minister.

The legislation did not state who would be responsible for determining whether one of these exemptions was made out, though the burden would presumably have fallen, at least in the first instance, on the registrar. That said, it was clear that the registrar was not expected to embark upon an investigation into the truth of the mother's assertions.<sup>8</sup> A more proactive model in which registrars would be required to conduct detailed interviews with mothers and search out absent fathers was explicitly rejected as unduly interventionist and impractical.<sup>9</sup> It would presumably therefore have been relatively easy for a mother to avoid joint registration by simply claiming that she did not know the identity or location of the father. In these circumstances, sole registration would have been permitted. Sanctions could have been imposed against the child's mother and/or the alleged father if one or both of them refused to

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<sup>4</sup> The information to be provided to the registrar is to be prescribed in regulations: BDRA 1953, s 2B. The mother may also provide information about the father after registration, allowing the child's birth to be re-registered where the alleged father acknowledges paternity: BDRA 1953, s 10C.

<sup>5</sup> BDRA 1953, s 2C(2).

<sup>6</sup> *Ibid*, s 2C(2)(c).

<sup>7</sup> *Ibid*, s 2E.

<sup>8</sup> DWP (2007a), 19.

<sup>9</sup> *Ibid*.

cooperate, the penalties available in the case of the mother providing false information being the more severe.<sup>10</sup>

The revised legislation would also have permitted registration of the child's father where he contacted the registrar declaring his paternity and the child's mother confirmed this.<sup>11</sup> Where the putative father contacted the registrar, the mother would be required either to acknowledge or deny the alleged father's paternity.<sup>12</sup> If the mother disputed paternity, scientific tests could again be used to determine parentage, subject to the parties' consent.<sup>13</sup> If the mother refused to cooperate, penalties could be imposed.<sup>14</sup> However, in order to resolve the dispute over paternity the matter would be referred to the court.<sup>15</sup>

Parliament's decision to make joint birth registration mandatory divided academic opinion. Bainham welcomed the reforms as reinforcing the biological/genetic basis of legal fatherhood and helping to address previous inequalities between the parents in the birth registration system. In his view, the rights of the child demand accurate registration of both biological parents on the birth register.

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**A. Bainham, 'What Is the Point of Birth Registration?', (2008b) 20 *Child and Family Law Quarterly* 449, 468–70**

Birth registration is manifestly a right of the child . . . [T]he child's claim to knowledge of the truth is grounded not in welfare, but in the autonomy of the individual, given that at birth we can only be talking about protecting *potential* autonomy. The essential point is that it is for the individual to decide for himself or herself whether or not biological parentage (and the wider kinship links deriving from it) are important or not. But this autonomy is violated where the individual has no means of discovering whether or not these biological connections exist in the first place.

The wider significance of the initial right of birth registration for the child cannot be overstated. From this first right flows the protection of the child's identity, the establishment of wider kinship links and the legal connection of the child to the State, especially through citizenship.

Bainham would therefore have gone further than the 2009 reforms in one important respect. He is particularly critical of the mother's previous 'dominant' and 'controlling' position over whether the father is registered on the birth certificate.<sup>16</sup> In his view, the mother's rights and interests have been unduly prioritized over those of the child (and the father) and she should be under a stricter obligation to reveal the identity of the father where known.<sup>17</sup> He was thus critical of the welfare-based exemptions for joint registration, arguing that such concerns about vulnerable women and children have no place in the birth registration system.

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<sup>10</sup> Perjury Act 1911, s 4(1A) and Births and Deaths Registration Act 1953, s 36.

<sup>11</sup> BDRA 1953, ss 2D(1) and 10B(1) (not in force).

<sup>12</sup> *Ibid.*, ss 2D(2) and 10B(3) (not in force).

<sup>13</sup> *Ibid.*, s 2E (not in force).

<sup>14</sup> *Ibid.*, s 36.

<sup>15</sup> DCSF and DWP (2008), [29].

<sup>16</sup> Bainham (2008b), 456.

<sup>17</sup> *Ibid.*, 460.

**A. Bainham, ‘What Is the Point of Birth Registration?’**, (2008b) 20 *Child and Family Law Quarterly* 449, 460

The fundamental point, surely, is that the Registration Service is not a welfare agency or social service and ought not to be cast as such. Given that there is an apparent commitment in the White Paper to ascertaining and recording the child’s biological parentage as soon as possible after birth, and that the child is seen as having a right to be aware of his or her biological parentage, there is a gross imbalance in the Paper between its emphasis on the vulnerability of mothers and its total failure to mention their essential duty to tell the truth about paternity. The fact is that the mother is in a uniquely advantaged position in terms of identifying the biological father, except in a small minority of cases in which she will be in genuine doubt about who the father is . . . [I]t is not the function of the birth registration system to concern itself *at all* with the welfare of any of the parties concerned. Its function is to record accurately the central event of the birth and to identify wherever possible, and record as accurately as possible, the details of the child’s two birth parents. If this is right, there would need to be a very strong justification for exempting *any* parent, whether mother or father, from the requirement to co-operate in providing this information . . . Given the new requirement to record the name of the father, the mother’s existing duty to tell the truth should effectively become a duty to tell the *whole* truth.

Conversely, there were equally strong criticisms of the government’s unquestioning acceptance of the perceived welfare gains from promoting and supporting genetic fatherhood, despite the weak evidential base for suggesting joint birth registration would have had any impact on encouraging greater levels of father involvement or ameliorating the socio-economic disadvantages of lone parenthood.

**J. Wallbank, “Bodies in the Shadows”: Joint Birth Registration, Parental Responsibility and Social Class’**, (2009) 21 *Child and Family Law Quarterly* 267, 272–3, 275

In thinking about this issue it is useful to look to the characteristics of the mothers who sole register the birth . . . They are likely to be ‘younger, have lower incomes, have lower levels of educational attainment and have health issues . . .’ [T]hey are among the more socially and economically vulnerable members of society . . .

[T]he putative fathers are likely to be located within the same vulnerable social group as the mothers . . . These fathers are the ‘bodies in the shadows’ casting a long silhouette back to the past incarnation of the ‘feckless’ father. By encouraging mothers to register the recalcitrant father without his consent, the state is attempting to ensure that they are traceable so that they may be held accountable for child support. It is highly questionable whether any other form of meaningful parental responsibility will necessarily ensue as a result. . . .

By making joint registration the default position, the government attempts to forestall future problems by embedding the values of responsibility at the earliest possible date . . . Assumptions are, therefore, made about what fathers will provide for children in respect of advancing their welfare. However, . . . many of the fathers targeted by the reforms are amongst the most vulnerable groups in society and they may lack effective social and economic support systems. As Val Gillies has argued, it is not possible for parenting to transcend socio-economic reality . . . Joint registration is unlikely to make any practical contribution to improving the lives of vulnerable mothers, fathers and children. However, the government sees joint registration as an early intervention to get fathers to take responsibility for their children. The government’s ‘almost evangelical faith in the power of parenting to compensate for social disadvantage’ is quite staggering.

The reforms were particularly strongly criticized for the way in which the government's preoccupation with addressing the 'problem' of potentially absent, disengaged fathers has been dogmatically pursued, regardless of the impact such policies might have on socially vulnerable mothers. In a robust response to Bainham, Wallbank argued that it is wrong to valorize such a highly abstract, formal notion of parental equality that rendered irrelevant the father's demonstrable commitment to meeting his parental responsibilities and marginalized the legitimate welfare concerns of mothers.<sup>18</sup>

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**J. Wallbank, '“Bodies in the Shadows”: Joint Birth Registration, Parental Responsibility and Social Class’, (2009) 21 *Child and Family Law Quarterly* 267, 277–8, 281–2**

The concerns that women have about joint registration have more to do with women's concerns about the level of responsibility that the father will assume in respect of the child . . . Where social policy and law is increasingly shaped by aspirational views of fatherhood, mothers base their approach to joint registration on concrete practical contributions . . .

[T]he reforms may do very little, if anything at all, to ensure actual parental responsibility. Neither will they address the socio-economic needs of vulnerable mothers and children. Rather, already vulnerable mothers will find themselves subject to intrusive questioning about their intimate relationships and their reasons for objecting to joint registration. However, some would say that mothers should not have the power to veto joint registration and that it is formal legal rights that should be given priority.

Such an approach ignores the responsibility side of the rights and responsibility that mothers flag up, despite the fact that the reform proposals would have us believe that from the child's and the father's right paternal care for the child will seamlessly flow . . .

Bainham's approach to joint registration relies heavily on a formal rights-based approach and focuses on the unevenness of rights ascription in respect of mothers and fathers. He also sees the right of the child to know her biological origins as a trump card. However, although there have been legal developments which institute the importance of genetic origins they do not and should not outweigh other significant interests which may need taking account of . . . [A]lthough birth registration may provide evidence of some tie to the child, that is completely meaningless and even perhaps pernicious in respect of a father who is present in paper but remains the body in the shadows, a spectral figure in the child's life, a mere hologram that the child's imagination will need to fill in . . .

Of course, those who seek formal equality between mothers and fathers will welcome this shift in gendered power relations whereby fathers can insist on being registered against the mother's wishes. Bainham has argued that welfare considerations have no place in birth registration but I would argue that welfare considerations do have a place, especially when we are dealing with the most vulnerable groups in society.

It now seems all but certain that these reforms will not be brought into force, but they remain on the statute books, and illustrate an interesting and unresolved debate about these issues.

## References:

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<sup>18</sup> See also Fortin (2009a), 353–4.

Bainham (2008b). 'What is the Point of Birth Registration?'. *Child and Family Law Quarterly*, 20: 449

DCSF and DWP (2008). *Joint Birth Registration: Recording Responsibility*, Cm 7293 (London: HMSO). <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243115/7293.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243115/7293.pdf)>.

DWP (2006a). *A Fresh Start: Child Support Redesign—the Government's Response to Sir David Henshaw*, Cm 6895. London: TSO.

DWP (2007). *Report on the Child Maintenance White Paper: Reply by the Government*, Cm 7062. <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243430/7062.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243430/7062.pdf)>.

Fortin (2009a). 'Children's Right to Know Their Origins—Too Far, Too Fast?'. *Child and Family Law Quarterly*, 21: 336.