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**LEGAL PARENTAGE “BY DESIGN”: REIMAGINING
BIRTH CERTIFICATES IN AOTEAROA NEW ZEALAND**

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Abstract

This thesis highlights two significant flaws in birth certification and legal parentage regimes in Aotearoa New Zealand that negatively impact children conceived and raised in an array of diverse family structures. First, birth certificates currently reflect a child's legal parentage, excluding any reference to a child's genetic or gestational origins. This thesis draws on social constructionist conceptions of the self and narrative identity theory, alongside Māori understandings of aspects of whakapapa, to demonstrate that birth certificates should incorporate more information about a child's origins, and that a failure to do so can have negative consequences for a child's identity development. To rectify these informational deficits, this thesis argues for the reform of birth certification in Aotearoa New Zealand. It demonstrates the nature and potential of these reforms through the creation of a prototype birth certificate for all children that incorporates their genetic, gestational, and legal parentage.

Second, this thesis claims that the current model of legal parentage, which permits a child to have a maximum of two legally recognised parents at any given time, does not reflect the lives of children who are intentionally brought into the world and raised by more than two individuals. Rather, it embodies historic understandings of legal parentage that privilege traditional heterosexual western forms of reproduction, and fails to account for the realities of assisted human reproduction and modern-day family formation. Expanding the operation of legal parentage to incorporate all of a child's parental figures (and including them on the child's birth certificate from the outset) would provide greater legal protection for children born into multi-parent families, in line with that currently enjoyed by children with one or two legal parents. Therefore, this thesis develops an intentional model of legal parentage accommodating more than two legal parents where a child is conceived by assisted human reproduction in specified circumstances.

Reimagining birth certificates and legal parentage as proposed in this thesis would better reflect the social and narrative realities of identity formation, especially for children, whereby who they become is greatly shaped by the individuals in their lives and their experiences in the world. It would also better meet our obligations under the United Nations Convention of the Rights of the Child, as well as possibly affording greater respect to Māori conceptions of identity, which is of fundamental importance given the classification of whakapapa as a taonga guaranteed protection under Te Tiriti o Waitangi. The expansion of legal parentage beyond the two-parent paradigm would also provide greater legal protection to children in Aotearoa New Zealand, arguably making this area of family law consistent with a legal framework that is otherwise well attuned to recognising the diversity and complexity of family relationships.

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To the incredible family that inspired it all; this is for you Johnny and Sam.
I know your love for each other and your family will eventually change the world (or, at the very least, birth certificates and parentage laws) for the better.

*Glossary of Māori Terms*¹

Hapū	Sub-tribe
Iwi	Tribe
Mātua	Parents
Mātua whāngai	Foster parents
Mihimihi	Greetings
Pākehā	Non-Māori, European
Takatāpui	Intimate same-sex companion
Tamariki	Children
Taonga	Treasure
Te Ao Māori	The Māori world
Te Tiriti o Waitangi	The Treaty of Waitangi
Tikanga	Custom
Tūpuna	Ancestors, grandparents
Urupā	Cemetery
Whakahīhi	Arrogant, smug
Whakapapa	Genealogy, cultural identity
Whānau	Family, extended family
Whanaungatanga	Relationship, kinship
Whāngai	Nourish, care for, adopt child

¹ All definitions from PM Ryan *The Raupō Dictionary of Modern Māori* (4th ed, Penguin, Auckland, 2012).

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CHAPTER ONE

Setting the Scene

Birth certificates benefit the individual, both practically and psychologically. From a practical perspective, birth certificates provide an individual with a means of establishing their identity.²

I Birth Certification and Parentage: The Need for Reform

Birth certificates are profoundly important documents in Aotearoa New Zealand, providing significant legal, social, and practical benefits to children and their families. A birth certificate, as a child's first legal identity document, provides "the most visible evidence of respect for every child's unique identity".³ However, in their current form, birth certificates embody inconsistent theoretical understandings of identity and legal parentage. This thesis argues that there are two significant flaws in birth certification and parentage regimes in Aotearoa New Zealand that negatively impact children conceived and raised in an array of diverse family structures.

First, birth certificates currently reflect a child's legal parentage, excluding any reference to their genetic or gestational origins. This thesis draws on social constructionist conceptions of the self and narrative identity theory, alongside Māori understandings of aspects of whakapapa, to demonstrate that birth certificates should incorporate more information about a child's origins. This is premised on the centrality of whakapapa within parts of Māori society,⁴ alongside the broader empirical evidence that suggests disregarding genetic aspects of parentage can be harmful for children.⁵ Concealing this

² Paula Gerber and Phoebe Irving Lindner "Modern Families: Should Children be Able to Have More Than Two Parents Recorded on Their Birth Certificates?" (2015) 5(1) Victoria University Law and Justice Journal 34 at 35.

³ Liz Brooker and Martin Woodhead (eds) *Early Childhood in Focus: Developing Positive Identities - Diversity and Young Children* (Open University, Milton Keynes, 2008) at 2.

⁴ As detailed in Chapter Four, Māori concepts of whakapapa evoke broader conceptions of connectedness that encompass, not just human genealogy, but also the spiritual world, as well as non-human animals and objects. Definitions of whakapapa may vary between Māori individuals and across iwi, hapū, and whānau groups because Māori are not a "homogenous group". See Arohia Durie "Te Aka Matua: Keeping a Māori Identity" in Pania Te Whāiti, Marie McCarthy, and Arohia Durie (eds) *Mai i Rangiatea: Māori Wellbeing and Development* (Auckland University Press, Auckland, 1997) 142 at 154.

⁵ Adoption research strongly suggests that it is important for children to know their genetic origins. See generally Jane Fortin *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press, Cambridge, 2009) at 468-475; HJ Sants "Genealogical Bewilderment in Children with Substitute Parents" (1964) 37(2) British Journal of Medical Psychology 133; John Triseliotis *In Search of Origins: The Experiences of Adopted People* (Routledge, London, 1973); and George Stewart "Interpreting the Child's Right to Identity in the UN Convention on the Rights of the Child" (1992) 26(3) Family Law Quarterly 221 at 227.

information behind the physical text of a birth certificate hinders the rights of children “not to be deceived about [their] true origins”.⁶ This is a significant issue, as a child’s right to know their parents and to preserve their identities is enshrined in the United Nations Convention on the Rights of the Child (UNCROC).⁷ An obligation also exists under Te Tiriti o Waitangi to protect Māori taonga such as whakapapa.⁸ To rectify these deficiencies, this thesis argues for the reform of birth certification in Aotearoa New Zealand. It demonstrates the nature and potential of these reforms through the creation of a prototype birth certificate that incorporates information on children’s genetic, gestational, and legal parentage.⁹

Second, this thesis posits that the current model of legal parentage, which permits a child to have a maximum of two legally recognised parents at any given time, does not reflect the lives of children who are brought into the world and raised by more than two individuals.¹⁰ In continuing to embody historical, western heteronormative ideals around parentage, our current legal model fails to accommodate the increasing diversity of family structures in Aotearoa New Zealand. For example, one multi-parent family structure

⁶ Michael Freeman “The New Birth Right? Identity and the Child of the Reproduction Revolution” (1996) 4(3) *The International Journal of Children’s Rights* 273 at 291. See also Eric Blyth and others “The Role of Birth Certificates in Relation to Access to Biographical and Genetic History in Donor Conception” (2009) 17(2) *The International Journal of Human Rights* 207. If children are conceived via assisted human reproduction (AHR) using gamete or embryo donation at a fertility clinic, this information is recorded on the Human Assisted Reproductive Technology Register (HART Register). Under s 50 of the Human Assisted Reproductive Technology Act 2004 (HART Act), such children can request this information once they turn 18. However, individuals only know to seek this information if their parents inform them of the reality of their conception.

⁷ United Nations Convention on the Rights of the Child (UNCROC) 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 7-8. This was the first international Convention to recognise a right to identity. See Freeman, above n 6, at 283. There is debate as to whether article 7(1) pertains to a child’s right to know their genetic, gestational, social, or legal parentage. See Andrew Bainham and Stephen Gilmore *Children: The Modern Law* (Jordan Publishing, Bristol, 2013) at 150-153. This debate is examined in Chapter Five.

⁸ See Aroha Te Pareake Mead “Human Genetic Research and Whakapapa” in Pania Te Whāiti, Mārie McCarthy, and Arohia Durie (eds) *Mai i Rangīātea: Māori Wellbeing and Development* (Auckland University Press, Auckland, 1997) 126 at 128.

⁹ These are not the only aspects of birth certificates in exigent need of reform. The changes proposed by the Births, Deaths, Marriages, and Relationships Registration Bill 2017 (296-2), especially those recommending modification to the process for changing an individual’s registered sex on their birth certificate, are urgently required to alleviate some of the legal and social difficulties experienced by these individuals. This Bill is examined in Chapter Two.

¹⁰ Martin Johnson “A Biomedical Perspective on Parenthood” in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds) *What is a Parent? A Socio-Legal Analysis* (Hart, Oxford, 1999) 47 at 48. See also Emily Jackson “What is a Parent” in Alison Diduck and Katherine O’Donovan (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish, Abingdon (United Kingdom), 2006) 59 at 60. Some scholars even suggest that three parents might be better than two. See Daniela Cutas “On Triparenting: Is Having Three Committed Parents Better Than Having Only Two?” (2011) 37(12) *Journal of Medical Ethics* 735 at 737.

especially common within the LGBTQI* community,¹¹ involves two same-sex couples choosing to have children together, and sharing their day-to-day care.¹² Children born into this kind of family structure are often actively raised by all four individuals.¹³ Unfortunately, the message that our current parentage models send to these children is that some of their parents do not legally count, regardless of their role in a child's ongoing welfare and sense of identity.

Expanding the operation of legal parentage to incorporate all of a child's parental figures (and including them on the child's birth certificate from the outset) would provide greater legal protection for children born into multi-parent families, in line with that currently enjoyed by children with one or two legal parents. Consequently, this thesis develops an intentional model of legal parentage, which incorporates more than two individuals in specific circumstances, who can be included on a child's birth certificate without requiring judicial intervention. This would be limited to situations where the child was conceived as a result of AHR and the individuals had completed an "intentional multi-parent agreement" prior to the birth of the child (as detailed in Chapter Seven).¹⁴ This challenges the usual classification under the Status of Children Act of sperm and ovum donors as non-parents in some circumstances. Adequately recognising multi-parent families in this way would provide greater legal protection to both parents and children in Aotearoa New Zealand, and would bring this area of family law into line with a legal framework otherwise well attuned to recognising the variety and complexity of family relationships.

The changes recommended in this thesis centre upon the child's right to know their parents and to preserve their identity, and the accommodation of more diverse families by ensuring that all children's parents are legally recognised. Such modernisation of Aotearoa New Zealand's birth certificate regime (applied to whatever future physical or digital composition birth certificates may take) would better align with the notion of birth

¹¹ LGBTQI* is an umbrella term that recognises the "diversity of sexual orientations and gender/sex identities". It is used in an inclusive way here to encompass individuals who identify as "Lesbian, Gay, Bisexual, Transgender, Transsexual, Intersex, [Takatāpui], Whakawahine, Vakasalewalewa, Fakaleiti, Tangata Ira Tane, Tongzhi, Mahu, Palopa, Fa'afafine, [Akava'ine], Fakafifine, Queer, Questioning, Asexual, Genderqueer, Pansexual, and Genderfluid". See Ministry of Youth Development "Supporting LGBTI Young People in New Zealand" (14 November 2015) <www.myd.govt.nz> at 1.

¹² Anthony Hayden and others *Children and Same Sex Families: A Legal Handbook* (Jordan, Bristol, 2012) at 2.

¹³ At 2-4.

¹⁴ Chapter Seven makes provision for retrospective agreements. It also details a judicial process for dispute resolution (about the agreements themselves or any other parenting matter) as well as situations where more than four individuals wish to be recognised as legal parents.

certificates being “a living organism that matures and evolves” over time to keep pace with changing societal values and technological possibilities.¹⁵

II Limitations of Proposed Reforms

The reforms suggested in this thesis are specifically designed to fit within the current legislative framework (with some minor alterations) and demonstrate realistic achievable changes that would drastically improve the lives of many children. This would result in the closer alignment of our birth certification system with current theories of identity and selfhood, aspects of whakapapa, and our international obligations under UNCROC. The principles that underpin these reforms could also be used to expand our models of legal parentage further to better incorporate the significant role played by other non-parent caregivers such as mātua whāngai,¹⁶ grandparents, step-parents, and foster parents. However, given the constraints of this thesis, such relationships are not included within the model.

Likewise, the intentional parentage model proposed here could be adopted as part of a wider overhaul of parentage and surrogacy laws in Aotearoa New Zealand. The “intentional multi-parent agreement” could arguably be used by individuals intentionally conceiving children via sexual intercourse (including those in polyamorous relationships).¹⁷ Furthermore, applied to surrogacy, the proposed model would essentially make surrogacy agreements enforceable, and would remove the need for adoption to transfer the child’s legal parentage to the intended parents. This would, however, alter the central tenet of our legal parentage laws, which always bestow legal parentage upon the individual who carries the child.¹⁸ More in-depth research is thus required before the intentional parentage model suggested in this thesis is extended to the above situations, especially in relation to surrogacy, where debate remains about the ethical ramifications

¹⁵ HL Brumberg, D Dozor, and SG Golombek “History of the Birth Certificate: From Inception to the Future of Electronic Data” (2012) 32(6) *Journal of Perinatology* 407 at 410.

¹⁶ Whāngai refers to the Māori custom of extended family members raising children instead of the children’s genetic parents. The individuals raising the child are known as mātua whāngai (or whāngai parents). Within parts of Māori society, grandparents traditionally raised their firstborn grandchildren instead of the children’s parents. Mātua whāngai now include extended family members who raise Māori children in wide-ranging circumstances, including where the genetic parents are unable to raise the child. See Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991) at 80-81. For more detailed information about the concept of whāngai see Joan Metge *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) at 210-257. Disputes about a child’s day-to-day care can sometimes arise between genetic parents and mātua whāngai. See *Nikau v Nikau* [2018] NZCA 566, [2018] NZFLR 826.

¹⁷ It would, however, be broadly more difficult to ensure that children conceived via sexual intercourse were conceived intentionally.

¹⁸ Status of Children Act, s 17.

of making these agreements enforceable.¹⁹ For these reasons, the reforms proposed here expressly excludes non-parent caregivers, individuals who conceive children via sexual intercourse, and those who have children via surrogacy. The discussion is thus limited to scenarios in which more than two individuals use AHR to intentionally have children together without the involvement of a gestational surrogate.

III Key Terminology

This section briefly sets out the terminology employed within this thesis. It focuses on the specific meanings given to: genetic, gestational, social, and legal parentage, assisted human reproduction (AHR), multi-parent families, and the intentional use of non-gendered language.

The terms “parents”, “parentage”, and “guardianship” can be confusing, because they encompass several different types of relationships and signify different things to different people. To avoid such confusion, this thesis refers to four specific categories of parentage – genetic, gestational, social, and legal – as distinct from guardianship. These categories are not mutually exclusive and one individual could simultaneously fit within more than one of the following categories:

- *Genetic parentage* (or a child’s *genetic parents*) denotes the individuals whose gametes contribute to the conception of the unborn child and whose genes the child shares.
- *Gestational parentage* (or a child’s *gestational parent*) refers to the individual who gestates the unborn child.
- *Social parentage* (or a child’s *social parents*) represents the individual or individuals who raise and care for the child, regardless of their legal relationship to the child. This usually includes all parents who actively raise their children, as well as other caregivers such as *mātua whāngai*, grandparents, step-parents, and foster parents. Such caregivers (aside from some *mātua whāngai*) often become involved in a child’s life as the result of changing circumstances, where, for example, a child’s legal parents separate or are unable to care for the child. This thesis focuses on a particular subset of social parentage that occurs in families where more than two people intentionally decide to have a child together via AHR and jointly raise the resulting child. For the purposes of this

¹⁹ See Ruth Cabeza “The Case for Surrogacy Law Reform” in Ruth Cabeza and others (eds) *Surrogacy: Law, Practice and Policy in England and Wales* (LexisNexis, Bristol, 2018) 161 at 162-183; and Mark Henaghan, Ruth Ballantyne, and Devon Helm “Genes Versus Gestation: Protecting the Interests of Surrogate Mothers” in Mark Henaghan and Jesse Wall (eds) *Law, Ethics, and Medicine – Essays in Honour of Peter Skegg* (Thomson Reuters, Wellington, 2016) 266 at 277-288.

thesis, *social parentage* refers solely to these individuals. This meaning expressly excludes one or two parent families, individuals who conceive children via sexual intercourse, as well as *mātua whāngai*, grandparents, step-parents, and foster parents.

- *Legal parentage* (or a child’s *legal parents*) signifies the individual or individuals who are deemed to be the child’s legal parents (based on current parentage rules) and are listed on the child’s birth certificate. Under our current model of legal parentage, a child can have no more than two legal parents at any given time.
- *Guardianship* embodies the rights and responsibilities traditionally associated with raising a child.²⁰ Guardianship and legal parentage differ, in that guardianship confers the power to “act” as a parent, whereas legal parentage bestows the status of “being” a parent. This allows additional social parents to obtain guardianship rights and responsibilities in relation to raising children (in some circumstances), even if they are excluded from legal parentage status (given the two-parent maximum).²¹ However, this thesis argues that guardianship is not enough, and that additional social parents need legal parentage status to best protect the child-parent relationships involved in multi-parent families (as defined below). This is because the operation of guardianship and legal parentage are not functionally equivalent. Guardianship expires when children grow up and can also be removed by the court, whereas legal parentage is for life.²² Guardianship also fails to secure the same financial benefits for children as legal parentage does, especially in relation to child support and inheritance matters. For this reason, this thesis primarily focuses on legal parentage, rather than guardianship (although the complex interplay between these concepts is detailed in Chapter Six).

This thesis deliberately avoids the use of gendered terms like “woman”, “man”, “mother”, and “father” where possible, because such language excludes individuals who do not identify by these gender binaries.²³ It also deliberately employs more functional terminology, such as “gestational carrier” and “gestational surrogate”, to avoid emotionally loaded terms like “mother” and “surrogate mother”. To this end, a gestational

²⁰ Care of Children Act, s 15-16.

²¹ Sections 21-25 and 27.

²² Sections 28-29A.

²³ See Sally McConnell-Ginet “‘What’s in a Name?’ Social Labeling and Gender Practices” in Janet Holmes and Miriam Meyerhoff (eds) *The Handbook of Language and Gender* (Blackwell Publishing, Malden (United States), 2003) 69.

carrier (who may also be a genetic parent) is an individual who gestates a child with the intention of becoming the child's social and legal parent. A gestational surrogate (who may also be a genetic parent) is an individual who intentionally and by mutual agreement gestates a child on behalf of someone else. This gender-neutral language also acknowledges that not everyone who gives birth is a woman.²⁴

This thesis employs an inclusive definition of AHR that covers formal AHR procedures that take place in fertility clinics, including all forms of in vitro fertilisation (IVF), alongside more informal AHR, where children are intentionally conceived via "DIY methods" that do not involve sexual intercourse. Such a definition would usually incorporate all types of surrogacy. However, for the purposes of this thesis, surrogacy is expressly excluded. The intentional model of parentage proposed here does not alter the operation of s 17 of the Status of Children Act 1969, whereby an individual who becomes pregnant via AHR (regardless of their status as a gestational carrier or a gestational surrogate) is always a legal parent.²⁵ This exclusion is examined in more detail in Chapter Seven.

The term "multi-parent family" is used to signify a family group consisting of more than two active social parents (as defined above) jointly raising one or more children together, where the children were intentionally conceived via AHR and gestated by one of the social parents. The relationships between the social parents will vary and the family group may live in one household or across several different households.

IV Structure of Thesis

The thesis is divided into nine chapters. *Chapter One* introduces the topic and outlines the legal and personal significance of birth certificates. This demonstrates two core problems with our current birth certification regime: a failure to accurately reflect children's genetic and gestational origins and a failure to recognise multi-parent families. This chapter also clarifies the terminology that will be employed throughout the rest of this thesis and explains the limited scope of the proposed reforms.

Chapter Two provides an historic analysis of the ever-changing nature and purposes of birth registration and birth certificates, from their ancient international beginnings, to the present day in Aotearoa New Zealand. This chapter also contains information about our

²⁴ See Alexis Hoffkling, Juno Obedin-Maliver, and Jae Sevelius "From Erasure to Opportunity: A Qualitative Study of the Experiences of Transgender Men Around Pregnancy and Recommendations for Providers" (2017) 17(2) BMC Pregnancy and Childbirth 7.

²⁵ Status of Children Act 1969, s 17.

current birth registration and certification regimes and a brief overview of future reforms currently in progress.

Chapter Three analyses the legal and personal significance of birth certificates in Aotearoa New Zealand, which provides the rationale for the reforms proposed in this thesis.

Chapter Four examines theoretical frameworks of identity, with a particular focus on the ways children develop their identities and sense of self, and provides the rationale for the adoption of social constructionist and narrative conceptions of identity. The chapter includes an analysis of the importance of aspects of whakapapa for the development of Māori identity and demonstrates connections between Māori concepts of whakapapa and wider theoretical ideas.

Chapter Five focuses on the importance of identity from a legal perspective. This includes a detailed examination of our obligations under UNCROC and an analysis of identity within our domestic family law legislation and case law. Both discussions illuminate the importance of identity and support the idea that genetic and gestational parentage can, and should, be included on children's birth certificates, alongside all of their legal parents.

Chapter Six critiques the current inconsistent model of legal parentage and the two-parent paradigm, which permits a child to have a maximum of two legal parents at any given time. The chapter also explains the interplay between legal parentage and guardianship. Finally, it explains the importance of all of a child's intending social parents being included on their birth certificate and considers the arguments against recognising more than two legal parents.

Chapter Seven begins with a comparative analysis of the recognition of multi-parent families in California and British Columbia, before detailing the inner workings of the proposed intentional multi-parent model. It provides details about the "intentional multi-parent agreement" alongside mechanisms for limiting numbers of legal parents, obtaining retrospective legal recognition, and resolving conflict between parents.

Chapter Eight reimagines birth certificates as identity-enhancing documents that reflect genetic, gestational, and legal parentage and includes multi-parent families where more than two individuals intentionally raise a child. The chapter provides a proposed prototype demonstrating how these changes would work and addresses privacy concerns associated with the inclusion of more personal information on birth certificates.

Chapter Nine summarises the findings in this thesis and reiterates the importance of birth certificates reflecting the reality of children's lives in Aotearoa New Zealand.

V Summary of Chapter One

This chapter outlined the core concerns of the thesis, which focused on how Aotearoa New Zealand's birth certification and parentage regimes can best be reformed in light of a child's right to identity and the different ways children are conceived, born, and live. It provided a detailed analysis of the role of birth certificates generally, as well as a brief exploration of the theoretical, philosophical and legal conceptions of identity and aspects of whakapapa upon which the suggested reforms are based. It also provided definitions of key terms used throughout the thesis, and an outline of the content of subsequent chapters.

CHAPTER TWO

The History of Birth Registration and Certification

... the format and content of birth certificates are not frozen in time ...
This foundational legal document must have the flexibility to record the
many forms that families take in contemporary society.²⁶

I Introduction to Chapter Two

This chapter outlines the historical origins and purposes of birth registration and certification, and examines the changes that have occurred within these schemes in Aotearoa New Zealand since they were first introduced in 1847. It demonstrates that birth registration systems have changed significantly over time, both in terms of form and purpose. This establishes the transformative potential of such schemes, whereby adjustments are made in line with the changing needs of society, as well as broader notions of law as “an instrument of change”, or “as a ‘culture shifting’ tool”.²⁷ The chapter concludes with a brief overview of our current birth registration and certification regimes and possible future changes heralded by the Births, Deaths, Marriages, and Relationships Registration Bill 2017.²⁸

II The Historic Origins of Birth Registration and Certification: An International Perspective

This section provides an overview of the historic development of birth registration and certification systems, from ancient beginnings in China (in 2100-1600 BCE) and the Roman Empire (in 4-9 CE), to the two-stage progression from ecclesiastical to civil birth registration in the United Kingdom (in the 1500s and 1830s respectively), which provided the genesis for Aotearoa New Zealand’s own regime.

A China

²⁶ Paula Gerber and Phoebe Irving Lindner “Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?” (2015) 18(2) *New York University Journal of Legislation and Public Policy* 225 at 232 and 276.

²⁷ Thomas B Stoddard “Bleeding Heart: Reflections on Using the Law to Make Social Change” (1997) 72(5) *New York University Law Review* 967 at 973. As Stoddard points out (at 991), “change through the legislature is more likely to engender ‘culture-shifting’ than change through a court or an administrative agency”; therefore, legislative change is “preferable to other forms of change” in that it “is deeper and lasts longer”. See also Adiva Sifris “Lesbian Parenting in Australia: Demosprudence and Legal Change” (2010) 28(1) *Law in Context* 8 at 9-15 and 22-23.

²⁸ Births, Deaths, Marriages, and Relationships Registration Bill (296-2).

The first known system of birth registration was China’s family register (or “hukou”) in the Xia Dynasty (2100-1600 BCE), which ultimately became a tool for “taxation, conscription, and social control”.²⁹ Other nations such as Egypt, Persia, and Greece instituted such systems prior to the Common Era primarily for “taxation and [the] determination of available military manpower”.³⁰ It is difficult to ascertain exactly what form these ancient birth registration systems took and whether or not any form of birth certificate documentation accompanied them.

B The Roman Empire

The Romans developed a birth registration system complete with birth certificates in 4-9 CE under Augustus (the first Emperor of the Roman Empire) for “legitimate children in possession of ... Roman citizenship”.³¹ As Schulz notes, “The purpose of the registration was to facilitate the proof of a child’s birth and status ... The birth certificates had a similar value.”³² There was no prescribed form for Roman birth certificates during this time, which were most likely written by public scribes (similar to a modern-day notary public),³³ but the documents could be used as proof of Roman citizenship.³⁴ As Gerber and Lindner explain, “Roman birth certificates could be used as *prima facie* proof of Roman citizenship, and as evidence of citizenship before courts of law”, which “enabled courts to establish jurisdiction over Roman citizens”.³⁵

C The United Kingdom

The first birth registration system in the United Kingdom was localised to individual communities, whereby local clergy recorded “in elementary form” the date each child in the parish was baptised in the church’s baptismal register.³⁶ This early registration system

²⁹ Jijiao Zhang “The Hukou System as China’s Main Regulatory Framework for Temporary Rural-Urban Migration and its Recent Changes” (2012) 143(3) *Die Erde – Journal of the Geographical Society of Berlin* 233 at 244.

³⁰ Brumberg, Dozor, and Golombek, above n 15, at 407.

³¹ Fritz Schulz “Roman Registers of Births and Birth Certificates: Part I” (1942) 32 *Journal of Roman Studies* 78 at 80–81.

³² At 63.

³³ See Gerber and Lindner, above n 26, at 229-230.

³⁴ Fritz Schulz “Roman Registers of Births and Birth Certificates: Part II” (1943) 33 *Journal of Roman Studies* 55 at 64. See also Gerber and Lindner, above n 26, at 229–230.

³⁵ Gerber and Lindner, above n 26, at 229.

³⁶ Brumberg, Dozor, and Golombek, above n 15, at 407.

was introduced in 1538 by Thomas Cromwell. The express purpose, according to Cromwell, was:³⁷

...for the avoiding of sundry strifes, processes and contentions rising upon age, lineal descents, title of inheritance, legitimation of bastardy, and for knowledge, whether any person is our subject or no.

Such registers recorded the date of baptism, rather than a child's date of birth. However, most children would have been baptized within several weeks of their birth.³⁸ Such records generally included the names of the child's parent or parents, but otherwise provided variable amounts of information.³⁹

As a result of widespread dissatisfaction with the ad hoc nature of parish baptismal records and growing religious dissent, a formal civil birth registration system was developed in the United Kingdom in the 1830s "along with civil registration of marriages and deaths ... as part of wide-scale constitutional reforms".⁴⁰ Civil registration formally commenced in 1837, after the passing of the Births and Deaths Registration Act 1836 (UK), and was "crucial in protecting property rights by providing evidence of succession for inheritance purposes",⁴¹ and focused on "the accurate recording of lines of descent".⁴² As Higgs notes:⁴³

In an increasingly complex capitalist economy, and one in which property descended by entail, primogeniture or wills, there was a need to protect title to property by recording who was related to whom, who was the first born, and who was legitimate.

Hence, birth registration and the resulting certification was "perceived as documenting one's genetic heritage".⁴⁴ However, birth certificates also came to have a more practical use in terms of providing proof of a child's age. This was of particular importance given

³⁷ See GR Elton *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge University Press, Cambridge, 1972) at 259-260 and Edward Higgs *The Information State in England* (Palgrave Macmillan, Basingstoke, 2004) at 39.

³⁸ Rebecca Probert "Recording Births: From the Reformation to the Welfare Reform Act" in Fatemeh Ebtehaj and others (eds) *Birth Rites and Rights* (Hart Publishing, Oxford, 2011) 171 at 173.

³⁹ At 173-174.

⁴⁰ Blyth and others, above n 6, at 218.

⁴¹ At 218-219.

⁴² Higgs, above n 37, at 78.

⁴³ At 78.

⁴⁴ Blyth and others, above n 6, at 218.

the passing of the Factory and Workshop Act 1878 (UK), which prevented children under the age of ten from working in factories,⁴⁵ and expressly relied on birth certificates as substantive proof of age.⁴⁶

D Aotearoa New Zealand

In Aotearoa New Zealand, birth registration and certification took much the same form as the civil birth registration system introduced in the United Kingdom in the 1830s. Initially, Aotearoa New Zealand's scheme was established in 1847 by way of an Ordinance for Registering Births Deaths and Marriage in the Colony of New Zealand (the Ordinance).⁴⁷ The Ordinance was thought "expedient to provide the means for a register of the births deaths and marriages of Her Majesty's subjects in the Colony of New Zealand",⁴⁸ and came into force on 1 January 1848.⁴⁹ From this time, parents, or an occupier of a house where a child was born had a duty to notify the Registrar of the child's birth with 42 days.⁵⁰ This information included the name of the child, their date of birth, the child's sex, the names of the child's parents, and the father's "Rank or Profession".⁵¹ A child's birth had to be registered within six months,⁵² and individuals who knowingly registered a child after six months could be fined up to £50 (a not unsubstantial sum in 1848).⁵³

Between 1858 and 1 September 1995 (when the current Act came into force),⁵⁴ substantial changes were made to birth registration and certification requirements by five consecutive pieces of legislation.⁵⁵ The Registration Act 1858, which replaced the 1847 Ordinance, increased the timeframe for notifying the Registrar of a child's birth from 42

⁴⁵ Factory and Workshop Act 1878 (UK), s 20.

⁴⁶ Section 27. See also Higgs, above n 37, at 74-75. Prior to this time, medical professionals (known as "certifying surgeons") were responsible for ascertaining the age of children for the purposes of factory work. See Alexander Redgrave *The Factory and Workshop Act 1878: With Introduction, Copious Notes, and an Elaborate Index* (3rd ed, Shaw and Sons, London, 1885) at 75-76.

⁴⁷ An Ordinance for Registering Births Deaths and Marriage in the Colony of New Zealand 1847 11 Vict 9.

⁴⁸ Preamble.

⁴⁹ Clause 38.

⁵⁰ Clause 11.

⁵¹ Schedule A.

⁵² Clause 15.

⁵³ Clause 16.

⁵⁴ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 1. Prior to 2009, this Act was known as the Births, Deaths, and Marriages Registration Act 1995.

⁵⁵ See generally the Registration Act 1858; the Registration of Births and Deaths Act 1875; the Births and Deaths Registration Act 1908; the Births and Deaths Registration Act 1924; and the Births and Deaths Registration Act 1951.

days to 62 days,⁵⁶ and required the inclusion of a child's place of birth for the first time.⁵⁷ This Act was superseded by the Registration of Births and Deaths Act 1875, which further increased the information requirements, this time in relation to the mother and father's ages and places of birth, as well as the date and place of their marriage.⁵⁸

The subsequent Births and Deaths Registration Act 1908 imposed strict requirements on occupiers of houses in urban centres where children were born to provide written notice of birth within 72 hours or within 21 days in non-urban areas.⁵⁹ The 72 hour time period for occupiers in urban centres was reduced to 48 hours by the Births and Deaths Registration Act 1924.⁶⁰ This Act also required the inclusion of additional birth registration information pertaining to previous children (both living and dead) of the parents' marriage.⁶¹ This Act was replaced by the Births and Deaths Registration Act 1951, which changed the 21 day notification period for non-urban occupiers to seven days.⁶² The 1951 Act remained the principal Act, albeit with a significant number of amendments,⁶³ until the current Births, Deaths, Marriages, and Relationships Registration Act came into force on 1 September 1995.⁶⁴

III Modern-Day Aotearoa New Zealand

This section provides a brief overview of the birth registration and certification process in Aotearoa New Zealand under the current Act.

A Birth Registration

⁵⁶ Registration Act 1858, s 12.

⁵⁷ Section 9 and Schedule A.

⁵⁸ Registration of Births and Deaths Act 1875, Schedule A. Several minor amendments were made to the 1875 Act (notably in 1882 and 1892), before it was entirely replaced by the Births and Deaths Registration Act 1908.

⁵⁹ Births and Deaths Registration Act 1908, ss 15(1) and 15(2). Minor amendments were made to the 1908 Act in 1912, 1915, and 1920 before it was superseded by the Births and Deaths Registration Act 1924.

⁶⁰ Births and Deaths Registration Act 1924, s 16(2).

⁶¹ Schedule 1. Several minor amendments were made to the 1924 Act in 1930 and 1947 before it was replaced by the Births and Deaths Registration Act 1951.

⁶² Births and Deaths Registration Act 1951, s 10(2).

⁶³ The 1951 Act was substantially amended in 1953, 1955, 1959, 1961, 1963, 1964, 1969, 1970, 1972, 1976, 1982, 1991, and 1993.

⁶⁴ Births, Deaths, Marriages, and Relationships Registration Act, s 1.

Registration of a child's birth is required for all children born in Aotearoa New Zealand,⁶⁵ and this must occur "as soon as is reasonably practicable after the birth".⁶⁶ Generally, both parents must jointly notify a Registrar of their child's birth by completing and signing a birth registration form, either in hardcopy or through an online portal. A birth can be registered by just one parent (resulting in a birth certificate containing only one parent's name) where the Registrar is satisfied that the child only has one parent "at law",⁶⁷ or where the other parent is "unavailable".⁶⁸

According to the current Act, a child has one parent "at law" where a single woman has used a sperm donor to become pregnant.⁶⁹ A parent is "unavailable" by virtue of being "dead, unknown, missing, of unsound mind, or unable to act by virtue of a medical condition".⁷⁰ A child may also be registered as having only one parent where "it is not reasonably practicable to obtain the other parent's signature" because the other parent is overseas and "cannot be contacted within a period of time that is reasonable in the circumstances".⁷¹ Finally, the Registrar may also accept a birth registration form signed by one parent where "requiring the other parent to sign the form would cause unwarranted distress to either of the parents".⁷²

B Obtaining a Birth Certificate

Once a child's birth has been registered, they can be issued with a New Zealand birth certificate, which contains: the full name of the child; the child's registered sex; date and place of birth; New Zealand citizenship status; and their legal parents' names and dates of birth. Birth certificates are extremely easy to obtain in Aotearoa New Zealand and can be ordered in person (in Auckland, Manukau, Wellington, or Christchurch), or via post, phone, or an online portal.⁷³ Individuals can request a copy of their own birth certificate, or their child's birth certificate, or anyone else's birth certificate, provided they know that individual's full name and date of birth.⁷⁴

⁶⁵ Section 5.

⁶⁶ Section 9(1). This is usually within two months of the child's birth. See New Zealand Government "Registering a New Baby and Getting a Birth Certificate" (27 July 2017) <www.govt.nz>.

⁶⁷ Births, Deaths, Marriages, and Relationships Registration Act, s 9(2)(a).

⁶⁸ Section 9(2)(b).

⁶⁹ Sections 9(2)(a) and 9(4)(a).

⁷⁰ Sections 2 and 9(2)(b).

⁷¹ Section 9(2)(ba).

⁷² Section 9(2)(c).

⁷³ See New Zealand Government "Order a Birth Certificate" (11 July 2018) <www.govt.nz>.

⁷⁴ See New Zealand Government "Order a Birth Certificate", above n 73.

Notably, birth certificates do not contain all of the information recorded when a child's birth is registered. As the Law Commission explains:⁷⁵

Birth certificates themselves only record *some* of the information retained on the Births, Deaths and Marriages register ... when registering a birth, parents are asked to provide information about their marital status, any other children of the relationship, the addresses of the parents, whether the parents are of Māori descent, and the ethnicity of the child and the parents. This information is recorded on the birth register, but does not appear on the birth certificate.

The difference between the information compiled when a child's birth is registered, and what is actually contained on the child's birth certificate warrants further examination. However, this thesis focuses solely on the information recorded on individuals' birth certificates.

IV Future Changes to Birth Certificates

A government Bill proposing a raft of changes to the current Act and to the operation of birth certificates in Aotearoa New Zealand is currently in progress.⁷⁶ The Births, Deaths, Marriages, and Relationships Registration Bill 2017 (the 2017 Bill), was introduced on 10 August 2017, but was recently deferred (prior to reaching the second reading stage) pending additional public consultation.⁷⁷ The changes proposed by the 2017 Bill include altering birth notification provisions, as well as the process for changing an individual's registered sex on their birth record.⁷⁸ Other changes relate to death notification provisions within Aotearoa New Zealand, the receipt of information about death or dissolution that occurs overseas, name change applications, and simplifying access to information.⁷⁹

Most of the proposed changes are not directly relevant to this thesis; however, allowing parents to choose their "classification" is a key element of the reforms suggested in this thesis. Clause 12(2A) of the 2017 Bill would modify s 9 of the current Act to formally allow parents to choose whether they are referred to as a "mother", or "father", or "parent" when registering the birth of their child, and this choice will then be reflected on the

⁷⁵ Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at 117.

⁷⁶ Births, Deaths, Marriages, and Relationships Registration Bill (296-2).

⁷⁷ See Tracey Martin "Births, Deaths, Marriages and Relationships Registration Bill to be Deferred" (press release, 25 February 2019).

⁷⁸ Births, Deaths, Marriages, and Relationships Registration Bill (296-2) (select committee report) at 1-4.

⁷⁹ At 4-7.

child's resulting birth certificate.⁸⁰ Such an approach to parental terminology is in line with progressive practices adopted elsewhere.⁸¹ The Department of Internal Affairs has allowed female same-sex couples to make this choice during birth registration since May 2018, following a complaint by a female same-sex couple to the Human Rights Commission about the discriminatory terminology used on birth certificates.⁸² However, such couples are not afforded total choice. For example, a gestational carrier is unable to specify their preferred terminology on birth registration forms, and the female partner of the gestational carrier can only choose between "mother" or "parent".⁸³ Male same-sex couples (where neither of the partners are able to gestate the child) are entirely excluded because they are unable to jointly register the birth of a child and can only be granted joint legal parentage via adoption. It is hoped that cl 12(2A) of the 2017 Bill represents a growing awareness of the need for choice in relation to parental terminology, and will ultimately lead to all legal parents having this choice. This is discussed in more detail in Chapter Eight.

The proposed modification to the required process for changing an individual's registered sex, recommended by the Governance and Administration Committee, would help to alleviate some of the legal and social difficulties faced by those seeking to change their sex as registered on their birth certificates.⁸⁴ The process under the 2017 Bill would be based on self-identification, and would allow an individual to legally make the change by way of a statutory declaration, instead of requiring costly and potentially undignified judicial intervention.⁸⁵ This proposed reform is not directly relevant to the proposals in this thesis. However, the changes are complementary in the sense that many of the same theoretical and legal identity arguments employed in Chapters Four and Five of this thesis could also underpin this proposed reform.

V Summary of Chapter Two

⁸⁰ Births, Deaths, Marriages, and Relationships Registration Bill (296-2), cl 12(2A).

⁸¹ Gerber and Lindner, above n 2, at 47.

⁸² See New Zealand Government "Registering a New Baby", above n 66. See also New Zealand Government "Notification of Birth for Registration of Child Born in New Zealand Form" (14 May 2018) <www.govt.nz>; and Hannah Bartlett "First NZ Couple to Both be Called 'Mother' on their Baby's Birth Certificate Say Language Matters" *The Nelson Mail* (online ed, Nelson, 4 May 2018).

⁸³ See New Zealand Government "Notification of Birth Form", above n 82.

⁸⁴ The fact these modifications were made at the select committee stage, after the close of public submissions, has created legal difficulties, resulting in the deferral of the 2017 Bill to allow suitable public consultation to occur. See Martin, above n 77.

⁸⁵ Martin, above n 77. See also Births, Deaths, Marriages, and Relationships Registration Bill (296-2) (select committee report) at 2-4.

This chapter demonstrated the changing nature of birth certificates over time and foreshadowed reforms that may occur in the near future. The fact such regimes change over time to meet particular societal needs provides a precedent for the reforms proposed in this thesis, based on increased family diversity and greater recognition of the need for children to know their genetic and gestational parentage. The following chapter examines the legal and personal significance of birth certificates in more detail and the benefits birth certificates provide.

CHAPTER THREE

The Importance of Birth Certificates

A birth certificate is the most visible evidence of respect for every child's unique identity.⁸⁶

I Introduction to Chapter Three

This chapter highlights the fundamental importance of birth certificates, which fulfil a number of practical legal functions, and, for some, are imbued with considerable personal meaning. This chapter considers the role of birth certificates in establishing a child's sense of self and legal identity, which echoes the examination of theoretical and cultural conceptions of the self and legal identity in Chapters Four and Five. It also considers the part birth certificates play in determining children's legal parentage and acknowledges the personal significance of birth certificates for some individuals.

II The Legal Significance of Birth Certificates

The importance of birth certificates can be easily overlooked when they are viewed as little more than formal records of an individual's birth registration. However, when their legal functions are properly considered, they suggest birth certificates, and the information contained within them, are of vital significance. This section considers the legal functions of birth certificates, focusing primarily on the discrete but interconnected categories of legal identity and legal parentage.

A Birth Certificates and Legal Identity

Birth certificates are irrevocably intertwined with the concept of identity. As the Law Commission notes, “[t]he information on a birth certificate goes to the core of an individual's identity”.⁸⁷ Practically speaking, birth certificates are vital for many stages of an individual's life and can be used to prove a myriad of different aspects of an individual's legal identity including their name, date of birth, age, registered sex, and citizenship status. This is in accordance with the express purposes of the Births, Deaths, Marriages, and Relationships Registration Act, which is to provide “an official record of births ... and name changes that can be used as evidence of those events and of age, identity, descent, whakapapa, and New Zealand citizenship”.⁸⁸ As Gerber and Lindner note, “[b]irth certificates afford an individual with legal proof of identity, which is

⁸⁶ Brooker and Woodhead, above n 3, at 2.

⁸⁷ Law Commission *New Issues in Legal Parenthood*, above n 75, at 119.

⁸⁸ Births, Deaths, Marriages, and Relationships Registration Act, s 1A(a)(ii).

essential for many day-to-day activities.”⁸⁹ For example, a birth certificate is required to enrol at primary and secondary school, as well as university. As the Law Commission explains:⁹⁰

Birth certificates are relied upon by schools and universities on enrolment, by authorities when issuing a passport or driving licence, and to verify information for tax purposes. They may also be required by banks, before marriage, and by agencies abroad. All these institutions need to be able to rely on the accuracy of the information being presented to them.

The birth registration process, resulting in the creation of a birth certificate, is also hugely significant in terms of an individual’s citizenship status. According to the birth registration form provided by the Department of Internal Affairs, birth registration “is the first official step that confirms whether your child is a New Zealand citizen”.⁹¹ In this way, birth certificates enable individuals to prove their “identity in order to access services and claim rights”.⁹² As Dow notes, “A birth certificate is a ticket to citizenship. Without one, an individual does not officially exist and therefore lacks legal access to the privileges and protections of a nation.”⁹³

As well as being official identity documents in their own right, birth certificates also provide a gateway for individuals to obtain other vital identification documents such as a passport and a driver licence. In other countries, birth certificates provide access to other important instruments of identity such as a social security number (in the United States) and a government identity card (in Germany). As Apland and others explain, “birth certificates may themselves be used as a form of legal identity proof” or they “may be used to facilitate an individual’s access to other identity documents”.⁹⁴ Therefore, birth certificates are of vital importance, providing significant practical and legal benefits.

B Birth Certificates and Legal Parentage

⁸⁹ Gerber and Lindner, above n 26, at 235.

⁹⁰ Law Commission *New Issues in Legal Parenthood*, above n 75.

⁹¹ The form can be downloaded here: New Zealand Government “Registering a New Baby”, above n 66.

⁹² Kara Apland and others *Birth Registration and Children’s Rights: A Complex Story – Executive Summary* (Plan International, Surrey, 2014) at 2.

⁹³ Unity Dow “Birth Registration: The ‘First’ Right” in Catharine Way (ed) *The Progress of Nations 1998* (UNICEF Division of Communications, New York, 1998) 5 at 5.

⁹⁴ Kara Apland and others *Birth Registration and Children’s Rights: A Complex Story – Full Report* (Plan International, Surrey, 2014) at 32.

A birth certificate is often incorrectly said to provide a legal repository of a child's genetic parentage, or to "offer an official record of lineage".⁹⁵ In Aotearoa New Zealand, "Births, Deaths and Marriages consider the birth certificate to be a snap shot of the circumstances as they were at the time of the child's birth".⁹⁶ However, birth certificates have never been entirely accurate records of genetic lineage. Through mistake or intentional deception, the genetic parentage of many children has been incorrectly represented on their birth certificate since such records began. As McCandless explains, "birth registration was never really an infallible record of genetic parenthood".⁹⁷ Adoption, the greatest of all legal fictions, provides an obvious example of the failure of birth certificates to generate an accurate record of an individual's genetic parentage, whereby in line with current practice, after the adoption has occurred, only the adoptive parents names are recorded on the child's birth certificate.⁹⁸

The increase in AHR technology and the current exclusion of gamete donors from donor-conceived individuals' birth certificates further complicates matters and often intentionally obscures an individual's genetic parentage. This is because birth certificates only establish legal parentage, as opposed to genetic parentage. As the Law Commission notes, "It is important that people understand that the birth certificate reflects the legal rather than genetic parentage of the child, though usually the two coincide."⁹⁹

Birth certificates also are imbued with significant power, in that they can essentially turn a legal stranger, with no genetic or gestational connection to a child, into a legal parent. According to s 8 of the Status of Children Act, being named on a child's birth certificate is "prima facie evidence" of legal parentage.¹⁰⁰ This gives such individuals the exact same status as any other legal parent. As detailed in Chapter Six, legal parentage status is for life and cannot normally be terminated by the court. It also comes with significant financial obligations. While guardianship is not a primary focus of this thesis (as mentioned in Chapter One and discussed in more detail in Chapter Six), birth certificates have a corresponding power to turn legal strangers (as well as legal parents) into guardians with all the rights and responsibilities encompassed in caring for a child.¹⁰¹

⁹⁵ Gerber and Lindner, above n 26, at 235.

⁹⁶ Law Commission *New Issues in Legal Parenthood*, above n 75, at 116.

⁹⁷ Julie McCandless "The Changing Form of Birth Registration?" in Fatemeh Ebtehaj and others (eds) *Birth Rites and Rights* (Hart Publishing, Oxford, 2011) 187 at 192.

⁹⁸ An adopted individual is unable to access their pre-adoptive birth certificate containing the names of their genetic parents until they reach 20 years of age. See ss 4 and 2 of the Adult Adoption Information Act 1985.

⁹⁹ Law Commission *New Issues in Legal Parenthood*, above n 75, at 117.

¹⁰⁰ Status of Children Act, s 8. See also Births, Deaths, Marriages, and Relationships Registration Act, s 71.

¹⁰¹ Care of Children Act, s 18.

This means that who is recorded on a child's birth certificate is of utmost importance because it can be used to establish a child's legal parentage, and can also provide a pathway for obtaining guardianship rights and responsibilities.

III The Personal Significance of Birth Certificates

Aside from their legal functions, birth certificates are also inherently personal documents imbued with particular significance for different individuals.¹⁰² For some, "having a birth certificate may strengthen [their] sense of self-worth and entitlement".¹⁰³ For others, birth certificates can provide a feeling of interconnectedness between their conception of self and their sense of family. This is particularly important for many Māori children, where knowing their whakapapa and their connection to their whānau, hapū and iwi based on their ancestral heritage can be of vital importance (as examined in Chapter Four).¹⁰⁴

For some individuals (such as those who have been adopted, or who have been raised by more than two parents, or whose registered sex does not match their gender identity),¹⁰⁵ birth certificates serve only to obfuscate their individual sense of self and fail to adequately reflect their lived reality. This means that some children (whose families are not encompassed by their birth certificates) have less legal protection than others in terms of both their legal identity and legal parentage. As Gerber and Lindner note, "children's birth certificates should reflect how they see themselves and their families, rather than contradicting their realities".¹⁰⁶ Otherwise, such documents can be confusing for children and may have a negative "practical and psychological impact" on their wellbeing.¹⁰⁷ This is particularly problematic given our explicit obligations under UNCROC to uphold the best interests of children. As article 3(1) affirms, "[i]n all actions concerning children ... the best interests of the child shall be a primary consideration".¹⁰⁸ The failure to accommodate diverse family structures can also have substantive "emotional implications" for children, and result in inequality and discrimination between different types of families.¹⁰⁹ As Sifris explains, if a child's "functional family is not recognised at

¹⁰² Gerber and Lindner, above n 26, at 235.

¹⁰³ Apland and others *Full Report*, above n 94, at 32.

¹⁰⁴ See Durie, above n 4, at 142-153.

¹⁰⁵ As discussed in Chapter Two, the Births, Deaths, Marriages, and Relationships Registration Bill would make it easier for an individual to change their registered sex on their birth certificate. Progress on the 2017 Bill is currently deferred awaiting further public consultation. See Martin, above n 77.

¹⁰⁶ Gerber and Lindner, above n 26, at 238.

¹⁰⁷ Gerber and Lindner, above n 2, at 42.

¹⁰⁸ UNCROC, above n 7, art 3(1).

¹⁰⁹ Gerber and Lindner, above n 26, at 240.

law then they are directly discriminated against”.¹¹⁰ Such discrimination can only be overcome by legislative reform in this area.

IV Summary of Chapter Three

This chapter highlighted the significance of birth certificates from both legal and personal perspectives. It demonstrated that deficiencies within the current birth certificate regime can negatively affect children. This may result in children raised in diverse families feeling marginalised and as though their families or parents do not count from a legal perspective. This suggests that our current birth certification regime is insufficiently child-focused. The forthcoming chapter provides a detailed theoretical and cultural analysis of identity development, paying particular attention to children’s conceptions of the self.

¹¹⁰ Adiva Sifris “The Legal Recognition of Lesbian-Led Families: Justifications for Change” (2009) 21(2) *Child and Family Law Quarterly* 197 at 219.

CHAPTER FOUR

Theoretical Conceptions of Identity

Identity is a complex, oppositional, non-linear construct that operates on psychological, political, personal, and social levels and takes shape by contemplating difference and sameness ... identity is part of human cognitive and emotional development through which a person begins to understand him or herself as separate from but related to others.¹¹¹

I Introduction to Chapter Four

This chapter provides a critical analysis of identity from a child-focused perspective, concentrating on the broader theoretical and cultural conceptions of the self that underpin this thesis and the proposed birth certificate reforms set out in Chapter Eight. It forms the central theoretical pillar of this thesis and is to be read in conjunction with the following chapter, which explores child-focused conceptions of identity within an international and domestic family law context.

The chapter draws primarily on philosophical conceptions of identity and how these principles relate to children and young people. Given the vast subject area, this chapter does not attempt to address all possible manifestations of identity theory; rather, it provides an introduction to transcendental, social constructionist, and narrative conceptions of the self, from which the subject of identity can be explored. The chapter also examines Māori concepts of identity formation, with a particular focus on some key human aspects of whakapapa. This is of fundamental importance, given the centrality of whakapapa to many aspects of Māori life and the classification of whakapapa as a taonga guaranteed protection under Te Tiriti o Waitangi.¹¹² This analysis also explores the connections between aspects of whakapapa, social constructionist concepts of the self, and narrative identity theory. This underpins the rationale, from an identity formation perspective, of a child's birth certificate reflecting their genetic and gestational heritage.

II The Significance of Identity

Most philosophers agree that the self is a fundamental component of human life. The ability to contemplate one's personal identity is an essential characteristic of what it

¹¹¹ Annette R Appell "The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption" (2008) 22(2) *BYU Journal of Public Law* 289 at 292.

¹¹² See Aroha Mead, above n 8, at 128.

means to be human or as “uniquely defining of human selfhood”.¹¹³ Questioning one’s sense of identity is perceived as a normal endeavour,¹¹⁴ whereby all human beings appear to question who they are at some juncture. As Burkitt states, “It seems that at key points in our lives we all address this question in one way or another.”¹¹⁵ This makes the question of self, at the heart of identity theory, “one of the most frequently asked questions in the modern Western world”.¹¹⁶ This is not to say that all individuals continuously think about who they are as people in an abstract sense. As Schechtman clarifies:¹¹⁷

Although persons are often self-reflective, and sometimes make a self-conscious effort to understand where they have come from, where they are going, and how the parts of their lives fit together, most often they simply live.

Nevertheless, this does not inhibit the development of an individual’s identity, which is often an unconscious process. This is consistent with aspects of Freudian theory, whereby “the vast part of the self is unknown to us”.¹¹⁸ As Burkitt explains, “the conscious ‘I’ is like the tip of an iceberg with only the small peak visible above the water and the major part of it concealed beneath the surface”.¹¹⁹

Despite generalised agreement about the significance of identity, how best to conceptualise personal identity or the self remains one of the most debated philosophical questions of our time.¹²⁰ A myriad of differing theories have captivated philosophers since the emergence of what is now recognised as Western philosophy. The pre-Socratic philosopher Thales was the first of many to grapple with the difficulty of knowing and conceptualising “thyself”.¹²¹ Since this time, many theorists have attempted to determine

¹¹³ Kim Atkins *Narrative Identity and Moral Identity: A Practical Perspective* (Routledge, New York, 2008) at 1.

¹¹⁴ See M Brewster Smith “Perspectives on Selfhood” (1978) 33(12) *American Psychologist* 1053 at 1053.

¹¹⁵ Ian Burkitt *Social Selves: Theories of Self and Society* (2nd ed, Sage Publications, London, 2008) at 1.

¹¹⁶ At 1.

¹¹⁷ Marya Schechtman *The Constitution of Selves* (Cornell University Press, Ithaca, 1996) at 105.

¹¹⁸ Burkitt, above n 115, at 23.

¹¹⁹ At 23.

¹²⁰ Erikson notes the clear connection between concepts of personal identity and the self. As Erikson states, “Identity in its vaguest sense suggests, of course, much of what has been called the self”. See Erik H Erikson *Identity: Youth and Crisis* (Faber & Faber, London, 1968) at 208. For the purposes of this thesis, the expressions personal identity, identity, and the self are used interchangeably.

¹²¹ When asked, “what is the most difficult of all things?” Thales is said to have replied “to know thyself”. See SH Rosen “Thales: The Beginning of Philosophy” (1962) 1(3) *Arion: A Journal of*

the meaning of identity. The remainder of this chapter analyses three prominent theoretical conceptions of identity from a child-focused perspective, examining how such theories intersect with aspects of Māori identity formation and elements of whakapapa.

III Transcendental Conceptions of the Self

This section outlines the notion of the disembodied inner self that underpins the transcendental conception of the self, focusing primarily on the work of Descartes, Locke, and Kant, three well-known Enlightenment thinkers. This section provides the rationale for a move away from the transcendental self, towards theories of identity more grounded in the daily realities of human life, especially in relation to sociocultural conceptions of childhood and child development. The section also suggests that privileging individualistic conceptions of the self directly contravenes Māori conceptions of identity, especially in relation to the importance of whakapapa, as detailed in a later section.

A The Transcendental Self

Early Western philosophical views of identity focus on notions of the transcendental self, which is seen as a “separate and logically distinct self”,¹²² which transcends “ordinary social life”.¹²³ The use of the term ‘transcendental’, signifies “something given in the infinite, rather than created out of the finite experience of embodied individuals”.¹²⁴ This sense of identity is based on the distinctively human trait of self-reflexivity, whereby “humans identify our existence through mental reflection on our own selves, and this is what makes us unique”.¹²⁵

Descartes is one of the most well-known proponents of the transcendental self, defining the self as a thinking being, entirely separate from the body. This results in ontological substance dualism (or Cartesian dualism), whereby the mental (the mind) and the physical (the body) are separate substances that exist independently from each other. According to Descartes, the self is a:¹²⁶

Humanities and the Classics 48 at 56. A similar account can be found here: Diogenes Laërtius *The Lives and Opinions of Eminent Philosophers* (CD Yonge (translator), Henry G Bohn, London, 1853) at 19. Thales is frequently referred to as the “father” of Western philosophy. See Maria Michela Sassi *The Beginnings of Philosophy in Greece* (Michele Asuni (translator), Princeton University Press, Princeton, 2018) at 3.

¹²² James A Holstein and Jaber F Gubrium *The Self We Live By: Narrative Identity in a Postmodern World* (Oxford University Press, Oxford, 2000) at 19.

¹²³ At 18.

¹²⁴ Burkitt, above n 115, at 7.

¹²⁵ At 6.

¹²⁶ René Descartes *A Discourse on the Method of Correctly Conducting One’s Reason and Seeking Truth in the Sciences* (Ian MacLean (translator), Oxford University Press, Oxford, 2006) at 29.

... *substance* whose whole *essence* or nature resides only in thinking, and which, in order to exist, has need of no place and is not dependent on any material thing. Accordingly, this 'I' ... is entirely distinct from the body.

Thinking is at the heart of Descartes' theory; the archetypal expression of which is encapsulated by his famous maxim, "I think, therefore I am".¹²⁷ This squarely locates the self *within* the mind or "inner nature" of the individual, as opposed to being part of the physical body.¹²⁸

Other proponents of the transcendental self have adopted these ideas to differing degrees. For example, Locke also subscribes to a version of substance dualism, whereby the self and the body remain separate. This ensures that individuals persist beyond death in order to be "held responsible for their thoughts and actions before God".¹²⁹ This reflects Locke's complex interpretation of the self, which is based on "the practical problem of how a person remains the same over time", and is primarily driven by religious and moral concerns.¹³⁰ However, Locke attenuates Descartes' account of substance dualism by entertaining the possibility that, in reality, individuals may actually only be a single substance consisting of "mental and corporeal" characteristics.¹³¹

Kant posits a strictly transcendental conception of the self. He excoriates Descartes' definition of the ordinary thinking self as being overly empirical (or based on one's lived experiences), describing 'empirical cognition' as "a composite of that which we receive through impressions and that which our own cognitive faculty ... provides out of itself".¹³² Kant instead develops his own approach based on reason-based thinking (known as 'a priori' or 'pure cognition') that occurs "prior to the experience of any given embodied individual".¹³³ As Kant explains, pure "*a priori* cognitions" are "with which nothing empirical is intermixed",¹³⁴ or as "cognition independent of all experience and even of all

¹²⁷ Holstein and Gubrium, above n 122, at 18. See also Burkitt, above n 115, at 6. Alternative translations of Descartes' famous maxim read "I am thinking therefore I exist". See René Descartes, above n 126, at 28-29.

¹²⁸ Burkitt, above n 115, at 10.

¹²⁹ Atkins, above n 113, at 14.

¹³⁰ At 13. See also Burkitt, above n 115, at 2.

¹³¹ Douglas Odegard "Locke and Mind-Body Dualism" (1970) 45(172) *Philosophy* 87 at 95. Locke also tempers Descartes' conception of a constantly thinking being or self, by drawing attention to lapses in human consciousness, such as during sleep. See Atkins, above n 113, at 16-17.

¹³² Immanuel Kant *Critique of Pure Reason* (Paul Guyer and Allen W Wood (translators and eds) Cambridge University Press, Cambridge, 1998) at 136.

¹³³ Burkitt, above n 115, at 9. See also Kant, above n 132, at 136-137.

¹³⁴ Kant, above n 132, at 137.

impressions of the senses”.¹³⁵ This results in a conception of the transcendental self that remains entirely disembodied from society.

B Criticisms of the Transcendental Self

Significant criticism has been levelled at transcendental conceptions of identity and substance dualism (premised on the separation of the self and the body). Two primary avenues of concern are: the failure of transcendental conceptions of the self to reflect the day-to-day lives of individuals, and the privileging of overly individualistic conceptions of identity that run counter to non-Western comprehensions of the self, such as within Māori culture, where identity is viewed more collectively.

1 Abstracted from human reality

As discussed above, the universal significance of identity cannot be overstated. Personal identity is “a fundamental feature of persons” with “deeply significant practical implications” that “play an absolutely basic role in our day-to-day lives”.¹³⁶ Indeed, personal identity is located “at the core of our ordinary practice” and lays “the foundations for our day-to-day interactions.”¹³⁷ Therefore, one would expect discussions about the construction of identity to reflect the everyday reality of the human condition. However, despite such ubiquitous acknowledgement of the importance of identity, philosophical notions of the transcendental self, situated outside the material world (such as those outlined above), do not sufficiently reflect what it means to be a human being on a daily basis. Schechtman agrees and states:¹³⁸

Philosophical discussion has yielded some extremely sophisticated theories of personal identity, but they do not seem to be about persons as we know them, nor do they capture the real-world implications of personal identity.

Indeed, Schechtman is unequivocally critical of overly complex philosophical conceptions of the self, noting that, despite the fact that theoretical accounts of identity “should ... be compelling, accessible, and of general appeal”, to date “treatments of this topic in contemporary analytic philosophy have been highly abstract, technical, and specialized”.¹³⁹

¹³⁵ At 136.

¹³⁶ Schechtman, above n 117, at 14.

¹³⁷ At 1.

¹³⁸ At 1.

¹³⁹ At 1.

From a child-focused perspective, transcendental conceptions of identity also fail to account for the daily lives of children in any real way. Childhood is viewed merely as a transformation process to adulthood and selfhood; children are not seen as individuals in their own right. For example, Kant views children as “potential moral agents ... not fully developed yet”.¹⁴⁰ This evokes contemporary debates regarding the source of children’s rights, and whether they are grounded in positive fundamental rights (also referred to as moral, natural, or human rights), or within “a wider account of fundamental obligations”.¹⁴¹ O’Neill argues for the latter position, and notes that children are not permanently excluded from obtaining positive fundamental rights, stating that, “their main remedy is to grow up”.¹⁴² However, this thesis argues that legal conceptions of identity, especially those that impact upon children, should accommodate them as individuals in their own right, not merely as future adults. This chapter also argues, based on principles drawn from social constructionist and narrative theories of identity, that, like aspects of children’s identities, adults’ identities also change and develop over time.

2 *Overly individualistic*

Transcendental conceptions of the self within modern Western liberal democracies overly privilege “possessive individualism”.¹⁴³ As Macpherson explains, “its possessive quality is found in its conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them”.¹⁴⁴ Under this approach, an individual is not considered to be “part of a larger social whole, but as an owner of [her or] himself”.¹⁴⁵ For the purposes of this thesis, there are two interrelated problems with this conception of identity.

Firstly, it does not accord with the reality that much of who we are and what we achieve is dependent on the people around us and the things we receive and learn from those individuals.¹⁴⁶ Social relations themselves are also not a neutral factor; they are coloured

¹⁴⁰ Kate A Moran “Can Kant Have an Account of Moral Education?” (2009) 43(4) *Journal of Philosophy of Education* 471 at 477.

¹⁴¹ Onora O’Neill “Children’s Rights and Children’s Lives” in Philip Alston, Stephen Parker, and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) 24 at 24-25. See also Lucinda Ferguson “Not Merely Rights for Children But Children’s Rights: The Theory Gap and the Assumption of the Importance of Children’s Rights” in Michael Freeman (ed) *The Future of Children’s Rights* (Brill Nijhoff, Leiden, 2014) 50.

¹⁴² Onora O’Neill, above n 141, at 39.

¹⁴³ See generally CB Macpherson *The Political Theory of Possessive Individualism: Hobbes to Locke* (Wynford (ed), Oxford University Press, Don Mills (Canada), 2011).

¹⁴⁴ At 3. See also Burkitt, above n 115, at 2.

¹⁴⁵ Macpherson, above n 143, at 3.

¹⁴⁶ For a striking visual representation of the way familial and societal interactions shape an individual’s identity and achievements (alongside socially constructed power structures resulting in inequalities

by invisible power structures grounded in socially constructed inequalities as a result of differences in ethnicity, gender, sexuality, culture, and one's socio-economic position in society.¹⁴⁷ Thus, (as is discussed in more detail in the 'social self' section below), one's social status and place in the world has a significant impact on an individual's personal identity. Burkitt agrees, noting that an individualistic view of one's own achievements "distorts human nature, because each one of us develops our capacities in society".¹⁴⁸

To provide a simple child-focused example, young children who are exposed to literature and the act of reading within their home and social environments, and who internalise an interest in literature, are more likely than other children to obtain higher levels of educational achievement.¹⁴⁹ Such children also exhibit superior fine motor skills, language abilities, and are more socially and emotionally mature.¹⁵⁰ Broader power structures also have a role to play in relation to children's reading and educational abilities, whereby children who live in lower socio-economic communities have fewer books in their homes and are less likely to be read to by their parents, compared to children from more affluent parts of society, which can create significant differences in children's learning outcomes.¹⁵¹ As Aikens and Barbarin explain, "[t]hrough their resources, experiences, and interactions, families, schools, and neighborhoods create auspicious or risky environments for children's reading development."¹⁵² This demonstrates that we cannot isolate who we are from where we have come from, and that our abilities are not acquired in a vacuum devoid of external influence.

The second problem is that overly individualistic concepts of identity, presented in a value-neutral or universal way, fail to recognise the way cultures define identity differently. In some cultures, identity is more collective in nature, whereby an individual knows their place in the world based on the people that have come before them.¹⁵³ The

based on ethnicity, gender identity, sexuality, and socioeconomic status) see Toby Morris "The Pencilword: On a Plate" (cartoon, 22 May 2015) Radio New Zealand <www.radionz.co.nz>.

¹⁴⁷ Burkitt, above n 115, at 3.

¹⁴⁸ At 3.

¹⁴⁹ See generally Lesley Mandel Morrow "Home and School Correlates of Early Interest in Literature" (1983) 76(4) *Journal of Educational Research* 221 at 226.

¹⁵⁰ At 226.

¹⁵¹ Nikki L Aikens and Oscar Barbarin "Socioeconomic Differences in Reading Trajectories: The Contribution of Family, Neighborhood, and School Contexts" (2008) 100(2) *Journal of Educational Psychology* 235 at 235-236. See also Stacey Storch Bracken and Janet E Fischel "Family Reading Behavior and Early Literacy Skills in Preschool Children from Low-Income Backgrounds" (2008) 19(1) *Early Education and Development* 45.

¹⁵² Aikens and Barbarin, above n 151, at 235.

¹⁵³ See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 31. See also Maria Haenga-Collins "Belonging and Whakapapa: The Closed Stranger Adoption of Māori Children into Pākehā Families" (MSW Thesis, Massey University, 2011) at 89 and Erica Newman

conception of “an individual with an identity amongst others”¹⁵⁴ recognises that “we are born into a world of social relations that have been made by previous generations”.¹⁵⁵ This closely aligns with Māori understandings of identity formation (as considered in greater detail below), which often places significant emphasis on tribal relationships and knowing one’s whakapapa or ancestors.¹⁵⁶ As Durie explains, “[c]lassical Māori identity formation posits self-concept as deriving from membership in the kin-group, with the group being the significant societal unit.”¹⁵⁷ She notes that this approach contradicts “Western theoretical perspectives where the primary emphasis is on the characteristics of individuality and a portable identity”.¹⁵⁸ Consequently, individualistic definitions of identity are incompatible with conceptions of the self within parts of Māori society. McCarthy agrees, stating “[i]deologically, the promotion of the individual is in conflict with one of the most central Māori principles: the collective”.¹⁵⁹ While these aspects of Māori understandings of identity are examined in more depth below, this overview demonstrates that individualist definitions of identity are but one of the many ways identity can be conceptualised.

Transcendental notions of the self do not reflect the daily lives of individuals, especially those of children; such an approach also privileges Western individualist conceptions of identity, at the expense of culturally diverse understandings of the self. This is a missed opportunity to obtain a richer understanding of how different people view themselves and the world in which they live, and results in the creation of law that fails to accommodate such differences. This thesis argues that our legal conceptions of identity can and should accommodate more diverse understandings of the self, drawing on principles from social constructionism, narrative identity theory, and Māori understandings of identity. These principles are examined in the remainder of this chapter, and are applied to legal principles of identity in the following chapter.

IV Social Constructionist Conceptions of the Self

“A Right to be Māori? Identity Formation of Māori Adoptees” (MA Thesis, University of Otago, 2011) at 16.

¹⁵⁴ Burkitt, above n 115, at 16.

¹⁵⁵ At 187.

¹⁵⁶ It is also important to acknowledge that Māori understandings of identity encompass unique human and tribal connections with the natural and spiritual worlds, not merely connections between humans. See Durie, above n 4, at 142-150.

¹⁵⁷ At 149.

¹⁵⁸ At 149.

¹⁵⁹ Mārie McCarthy “Raising a Māori Child Under a New Right State” in Pania Te Whāiti, Mārie McCarthy, and Arohia Durie (eds) *Mai i Rangiatea: Māori Wellbeing and Development* (Auckland University Press, Auckland, 1997) 25 at 27.

The main tenets of social constructionist conceptions of the self, as depicted by theorists such as Marx, Mead, and Erikson, emphasise the social context within which human beings develop and live. This highlights the vital connection, from an identity formation perspective, between children, their families, and the wider social world. It demonstrates that a child's identity is greatly influenced by the individuals who raise them, which highlights the importance of including all of a child's social parents (as specifically defined in Chapter One) within our models of legal parentage (as detailed in Chapter Seven). It also reveals the ways in which the physical and psychological health of gestational carriers, as well as some of the choices they make, can affect the future identities of the children they carry. This underpins the justification for including details about gestational carriers on children's birth certificates.

A The Social Self

Some philosophers entirely reject the concept of the transcendental self that is separate from the world, choosing instead to emphasise the connection between personal identity and society. Most notably, Marx contends that individuals cannot be severed from their social worlds, and proclaims “[a person] is not an abstract being, squatting outside the world. [A person] is *the human world*, the state, society”.¹⁶⁰ Marx and fellow founding sociologists, Durkheim and Weber, view identity from a collective, rather than individualist perspective, based on the notion that “[w]e are elements of our culture, time and place, and can never be abstracted from the social world.”¹⁶¹ This ideology highlights the way society permeates all aspects of identity and ‘being’. As Marx makes plain, “[m]y *own existence* is a social activity ... [the] individual *is the social being*”.¹⁶²

Theorists within the American pragmatism movement also view the self as firmly embedded within the experiences of social interaction and daily life.¹⁶³ James recognises a multiplicity of social selves,¹⁶⁴ and posits an understanding of the self as an “empirical aggregate of things objectively known”.¹⁶⁵ Mead too, emphasises this experiential view, stating that the self is “essentially a social structure, and it arises in social experience”.¹⁶⁶ As a result, he focuses on the importance of interactions between individuals, whereby

¹⁶⁰ Karl Marx *Early Writings* (TB Bottomore (translator), CA Watts, London, 1963) at 43.

¹⁶¹ Burkitt, above n 115, at 16.

¹⁶² Karl Marx, above n 160, at 158.

¹⁶³ Holstein and Gubrium, above n 122, at 17. See also Burkitt, above n 115, at 1. Pragmatism originated in the United States in the 1870s and views the world “as inseparable from agency within it”. See Stanford Encyclopedia of Philosophy “Pragmatism” (29 January 2019) <<https://plato.stanford.edu>>.

¹⁶⁴ William James *Psychology: Briefer Course* (MacMillan, London, 1892) at 179.

¹⁶⁵ At 215.

¹⁶⁶ George H Mead *Mind, Self, and Society* (University of Chicago Press, Chicago, 1934) at 140.

“We are what we are through our relationship to others”.¹⁶⁷ Mead directly links human rationality with the social space within which individuals operate, stating that a human “is a rational being” because she or he “is a social being”.¹⁶⁸ This is not to say that individuals become a single homogenised self. Rather, as a result of being born into diverse social worlds and having different life experiences, individuals are shaped by society in distinct ways and retain their own “peculiar individuality”.¹⁶⁹ In this way, the quintessential self is a social self, or “an individual with an identity amongst others”.¹⁷⁰

This concept of identity is associated with the ability to see one’s self from the perspective of others, which is entirely dependent on social interaction between individuals.¹⁷¹ In this way, society truly “gives us a mirror to ourselves”.¹⁷² This societal mirroring was later endorsed by developmental psychology. According to Erikson, identity formation “employs a process of simultaneous reflection and observation” whereby individuals judge themselves based on their perception of how others would judge them.¹⁷³ This underscores the proposition that identity “is not something hidden that we have to *find*, but something that has to be *made*”.¹⁷⁴ This directly relates to narrative identity theory, as examined in detail below, and demonstrates the strong connections between the social self and the narrative self that underpin the reforms proposed in this thesis.

More recent conceptions of the self continue to accentuate the social component of human identity, which does not develop “in a vacuum, but rather always through dialogue and sometimes struggles with significant others”.¹⁷⁵ From Schechtman’s perspective, personhood “is an intrinsically social concept” that is “inherently connected to the capacity to take one’s place in a certain web of social institutions and interactions”.¹⁷⁶ Atkin agrees, noting that “a person’s identity is not that of an independent individual in splendid isolation”, but rather, “is inextricably linked to our relationships with others”.¹⁷⁷

¹⁶⁷ At 379.

¹⁶⁸ At 379.

¹⁶⁹ At 201.

¹⁷⁰ Burkitt, above n 115, at 16.

¹⁷¹ At 45.

¹⁷² At 10.

¹⁷³ Erikson *Identity: Youth and Crisis*, above n 120, at 22.

¹⁷⁴ Burkitt, above n 115, at 4.

¹⁷⁵ Ya’ir Ronen “Redefining the Child’s Right to Identity” (2004) 18(2) *International Journal of Law, Policy and the Family* 147 at 149-150. Schechtman also acknowledges “that persons do not exist in a vacuum”. See Schechtman, above n 117, at 95.

¹⁷⁶ At 95.

¹⁷⁷ Bill Atkin “Law and Identity in New Zealand – Le droit à l’identité en Nouvelle-Zélande” (paper presented at the Right to Identity Colloquium, New Caledonia, November 2016) at 12.

Even those who intentionally stand apart from the conventional social world cannot circumvent the inescapable influence of society. As Arendt explains:¹⁷⁸

No human life, not even the life of the hermit in nature's wilderness, is possible without a world which directly or indirectly testifies to the presence of other human beings.

This notion is also reflected in Lyotard's conception of identity whereby each self "exists in a fabric of relations", the composition of which has a significant impact on the self each individual becomes.¹⁷⁹ To that end, questions of identity are about "becoming" as opposed to "being".¹⁸⁰

B Children and the Social Self

Nowhere is becoming, in contrast to being, more apparent than in relation to childhood, given the significant evolution of the self that occurs during this vital stage of human development.¹⁸¹ As Smith explains, "[b]abies are not born as persons or selves; they achieve selfhood ... From the very beginning, babies learn about their worlds by interacting with them".¹⁸² In this context, social conceptions of identity are particularly pertinent; especially in relation to infants who exhibit socialised behaviour before they obtain an acute sense of self-awareness.¹⁸³ As Atkins eloquently explains:¹⁸⁴

We are born into communities – however tiny and remote – with historically constituted systems of norms that regulate our desires, responses, and bodily activities in culturally acceptable ways long

¹⁷⁸ Hannah Arendt *The Human Condition* (2nd ed, University of Chicago Press, Chicago, 1998) at 22.

¹⁷⁹ Jean-François Lyotard *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi (translators), University of Minnesota Press, Minneapolis, 1984) at 15.

¹⁸⁰ Burkitt, above n 115, at 4. For a well-known philosophical examination of the meaning of existence, as well as being and becoming, see generally Martin Heidegger *Being and Time* (Joan Stambaugh (translator), State University of New York Press, Albany, 1996).

¹⁸¹ For detailed information about child development and the influence of social and cultural environments see LS Vygotsky *Mind in Society: The Development of Higher Psychological Processes* (Michael Cole and others (eds), Harvard University Press, Cambridge, 1978). See also Erik H Erikson *Childhood and Society* (2nd ed, Penguin Books, Harmondsworth (England), 1963) at 239-266; Erikson *Identity: Youth and Crisis*, above n 120, at 96-141; and Nicola J Taylor "Care of Children: Families, Dispute Resolution and the Family Court" (PhD Thesis, University of Otago, 2005) at 187.

¹⁸² M Smith, above n 114, at 1058.

¹⁸³ Although Erikson argues that infants start their journey to self-awareness at an early stage, he acknowledges that identity development is a lifelong process. See Erik Homburger Erikson "The Problem of Ego Identity" (1956) 4(1) *Journal of the American Psychoanalytic Association* 56 at 69.

¹⁸⁴ Atkins, above n 113, at 4.

before we acquire reflective self-consciousness. In this sense, we are always already socialised subjects.

The pre-existing social worlds infants are born into reflect their families (whether that be their genetic, gestational, social, and/or legal families), as well as the other important human beings who are involved in the infant's life. Given young children's first social interactions occur within, and are mediated via, such individuals, these relationships truly are "starting points in life".¹⁸⁵ As Ronen explains, "From within a family and a community a child naturally begins to create meaningful ties and develop an identity that evolves over time".¹⁸⁶ This reflects a sociocultural conception of childhood, which "views development as occurring through children's activities within their social contexts, especially their relationships and interactions with other people".¹⁸⁷ This echoes Mead's assertion that the "self is something which has a development; it is not initially there, at birth, but arises in the process of social experience and activity".¹⁸⁸

Over time, children's worlds expand and other social groupings such as those created within community and educational institutions become more important.¹⁸⁹ This is especially true during the transition from adolescence to adulthood, which has long been recognised as a vital time in relation to identity development.¹⁹⁰ However, it is important to note that the "search for identity" is not completed during this transition; rather it is ongoing quest, whereby one's identity continues to be developed and shaped throughout one's life.¹⁹¹ As Erikson explains, "identity *formation* neither begins nor ends with adolescence: it is a lifelong development largely unconscious to the individual and to [their] society".¹⁹² This does not diminish the importance of the identity development processes that take place during childhood and adolescence; rather it highlights that some aspects of identity remain in a constant state of flux through one's life.

¹⁸⁵ Ronen, above n 175, at 154.

¹⁸⁶ At 154. See also Burkitt, above n 115, at 191.

¹⁸⁷ Taylor, above n 181, at 187.

¹⁸⁸ George Mead, above n 166, at 135. See also Atkins, above n 113, at 4.

¹⁸⁹ Judith Sligo and Karen Nairn "Children's Understandings of Success" in Nancy Higgins and Claire Freeman (eds) *Childhoods: Growing up in Aotearoa New Zealand* (Otago University Press, Dunedin, 2013) 235 at 237.

¹⁹⁰ See generally Rolf E Muuss *Theories of Adolescence* (4th ed, Random House, New York, 1982) and Erikson *Identity: Youth and Crisis*, above n 120.

¹⁹¹ Some theorists consider that the primary stage of identity formation terminates in adolescence. To this end, Muuss argues that "To *complete* the search for an identity the adolescent must find an answer to the question 'Who am I?' ... The adolescent who fails the search ... will experience self-doubt, role diffusion, and role confusion" (emphasis added). See Muuss, above n 190, at 71-72. However, this is inconsistent with social constructionist conceptions of identity.

¹⁹² Erikson "The Problem of Ego Identity", above n 183, at 69.

The social worlds inhabited by children and adolescents also embody broader ongoing “social relations that bear the imprint of a power structure”, especially in relation to socially constructed inequalities based on ethnicity, gender identity, sexuality, and socioeconomic status.¹⁹³ These often invisible factors play a significant role in who we become. As Burkitt asserts, “we are all born into social relations that we didn’t make, and much of who and what we are is formed in that context”.¹⁹⁴

Most proponents of social constructionist identity theory contend that the dynamic component of a child’s identity development begins upon the birth of the child. For example, Erikson argues that the “roots” of identity go back to the “baby’s earliest exchange of smiles”.¹⁹⁵ However, for some, the social foundation of identity is actually revealed by childbirth itself. As Atkins explains, “Human beings come into existence quite literally through the bodies of other human beings, and our early survival depends upon the most intimate human interactions.”¹⁹⁶ This echoes Marx’s observation that, “even in a physical sense [humankind] owes [its] existence to [humankind]”.¹⁹⁷

This thesis expands this proposition, and argues that some events that occur during gestation can impact upon the physical and psychological development of children, thereby contributing to a child’s future identity, both in terms of static and dynamic components of self. The fact that gestational carriers may leave a legacy on the lives of the children they bear, is most apparent in research regarding the effects of maternal states on offspring. For example, children born to gestational carriers suffering from gestational diabetes are more likely to exhibit poorer neurological functions than other children. Ornoy and others found that children “born to mothers with gestational diabetes, had a higher rate of attention deficit, lower cognitive scores, and lower gross and fine motor achievements than matched control children”.¹⁹⁸ Such children also physically weigh more than other children, which may have an impact on their future health outcomes.¹⁹⁹ Likewise, stress experienced by gestational carriers can affect the head circumference and neurodevelopment of resulting children.²⁰⁰ Studies found “an association between

¹⁹³ Burkitt, above n 115, at 3.

¹⁹⁴ At 3.

¹⁹⁵ Erikson “The Problem of Ego Identity”, above n 183, at 69.

¹⁹⁶ Atkins, above n 113, at 1.

¹⁹⁷ Marx, above n 160, at 165.

¹⁹⁸ A Ornoy and others “Neurodevelopmental Outcome at Early School Age of Children Born to Mothers with Gestational Diabetes” (1999) 81(1) Archives of Disease in Childhood: Fetal and Neonatal Edition F10 at F13.

¹⁹⁹ At F13-F14.

²⁰⁰ Marysia J Lazinski, Alison K Shea, and Meir Steiner “Effects of Maternal Prenatal Stress on Offspring Development” (2008) 11(5) Archives of Women’s Mental Health 363 at 364-365. See also Nicole M Talge and others “Antenatal Maternal Stress and Long-Term Effects on Child

maternal prenatal stress and delayed motor and mental development, as well as poorer language abilities” in children born to them.²⁰¹ Such children may also display higher levels of anxiety and negative behavioural problems.²⁰² In addition, a child born to a gestational carrier who has consumed alcohol during their pregnancy may develop fetal alcohol spectrum disorder, which can result in negative physical and psychological outcomes such as low birth weight and heart defects, as well as behavioural problems and intellectual disabilities.²⁰³ Clearly, many gestational carriers are also responsible for providing a fetal environment that enables children to be born healthy and well.

This fundamental connection between a gestational carrier and a resulting child, which can affect the child’s health and well-being, and consequently impact their future identity, coupled with a child’s right to preserve their identity under article 8(1) of UNCROC (examined in detail in the following chapter), supports including the names of gestational carriers on children’s birth certificates. This would acknowledge not just that childbirth literally brings human beings into existence, but rather, as demonstrated above, the ways in which the gestation process itself can significantly influence the resulting child.²⁰⁴ It would also more appropriately respect the significance of creation stories in terms of identity formation within Māori culture (as discussed below). The importance of this proposed reform is discussed in more detail in Chapter Eight. The next section examines narrative identity theory and the way this intersects with notions of social constructionism.

V Narrative Identity Theory

The core principles of narrative identity theory view identity as “an agglomeration or tapestry of different threads of narratives which people use to represent and to reflect on their lives”.²⁰⁵ As developed by French philosopher Ricœur, this theory focuses on the different ways individuals fashion their own identities via the construction of a coherent

Neurodevelopment: How and Why?” (2007) 48 *Journal of Child Psychology and Psychiatry* 245 at 250-251.

²⁰¹ Lazinski, Shea, and Steiner, above n 200, at 365.

²⁰² At 366-367.

²⁰³ See Ministry of Health “Fetal alcohol spectrum disorder (FASD)” (29 August 2018) <www.health.govt.nz>.

²⁰⁴ Maternal cell microchimerism, which suggest that cells from gestational carriers can be transferred to fetuses during gestation, reflects the fundamental connectedness of gestational carriers and the children they bear. Studies into this phenomenon have found the cells of gestational carriers in the umbilical cords of fetuses, from as early as 13 weeks’ gestation. See Bharath Srivatsa and others “Maternal Cell Microchimerism in Newborn Tissues” (2003) 142(1) *Journal of Pediatrics* 31 at 31 and 34.

²⁰⁵ Sarah Wilson “Identity, Genealogy and the Social Family: The Case of Donor Insemination” (1997) 11(2) *International Journal of Law, Policy and the Family* 270 at 281.

life story based on their individual experiences in the world. The following analysis builds on the principles of socially constructed conceptions of identity discussed in the previous section, because the way an individual experiences their social worlds becomes a part of their personal narrative and, consequently, their sense of self.

This section demonstrates that in order to construct a coherent narrative about themselves, children need to know the whole story, which encompasses acquiring knowledge about their genetic and gestational heritage to fit alongside what they experience in terms of their social and legal parentage. This is not to say that genetics (or one's gestational beginnings) tells the whole story in terms of one's identity; rather it is merely one (albeit important) part of a child's ongoing life story to be considered alongside other vital aspects of the child's identity that emanate from their social environment and experiences, and the significant people in their life. This provides further justification for the reforms proposed in this thesis (as detailed in Chapter Eight), especially in relation to the importance of including information about a child's genetic and gestational origins on a child's birth certificate.

A The Narrative Self

Ricœur's concept of narrative identity, which emerged during the 1980s and was adopted by a tranche of contemporary theorists, is based upon the idea that knowledge of one's self is best conceptualised as a personal "interpretation" that "borrows from history as much as fiction".²⁰⁶ This renders one's life story as a kind of "historical fiction" mediated through one's own experiences and perspectives. As Ricœur eloquently explains:²⁰⁷

After all, do not human lives become more readable ... when they are interpreted in function of the stories people tell about themselves? And these 'life stories', are they not rendered more intelligible when they are applied to narrative models?

The key tenet of narrative identity theory is, therefore, the idea that "constituting an identity requires" an individual to understand their life "as having the form and the logic of a story" with a "conventional, linear narrative."²⁰⁸ Arendt agrees, stating that the "chief characteristic" of human life "is that it is itself always full of events which ultimately can be told as a story" or that can "establish a biography".²⁰⁹ Such narratives are created

²⁰⁶ Paul Ricœur "Narrative Identity" (1991) 35(1) *Philosophy Today* 73 at 73.

²⁰⁷ At 73.

²⁰⁸ Schechtman, above n 117, at 96.

²⁰⁹ Arendt, above n 178, at 97. Atkins describes this as "an *activity* of self-constitution and self-understanding articulated narratively". See Atkins, above n 113, at 7.

within the social sphere, highlighting a clear intersection between narrative and social conceptions of the self. Burkitt also emphasises this connectivity, asserting that individuals are “always immersed in the atmosphere of the social world, constantly constructing and reconstructing our selves and the society in which we are embedded”.²¹⁰

Within the narrative structure, an individual constructs their identity, on an ongoing basis, as a result of their subjective interpretation of their “lived experiences”.²¹¹ Thus, the identity construction process is different for every person.²¹² As Giddens explains, “The self is seen as a reflexive project, for which the individual is responsible ... We are, not what we are, but what we make of ourselves”.²¹³ Schechtman agrees, noting that “individuals weave stories of their lives, and it is their doing so which makes them persons”.²¹⁴ She notes that meaning is not created as a result of isolated experiences, but rather is “interpreted as part of the ongoing story that gives them their significance”.²¹⁵

Such an approach is premised on the process of identity development as a lifelong endeavour in a constant state of flux, based on “interpreting and reinterpreting” one’s past, one’s current experiences, and one’s hopes for who they will become in the future.²¹⁶ This is a clear departure “from the classical substantive, essentialist, conception of identity which emphasises static, unchanging elements of identity”.²¹⁷ Rather, theories of narrative identity provide an “organising framework”,²¹⁸ which enhances “a feeling of being at home in one’s body” and the sense of “knowing where one is going”.²¹⁹ As Myftari explains, “Individuals are thought to narrate a meaningful and coherent story about the self, which integrates significant past events to give meaning to present and future conceptions of self.”²²⁰

²¹⁰ Burkitt, above n 115, at 189.

²¹¹ Sandy Farquhar “Wellbeing and Narrative Identity” (2012) 16(1) *Early Childhood Folio: A Collection of Recent Research* 27 at 27.

²¹² Schechtman, above n 117, at 94.

²¹³ Anthony Giddens *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press, Cambridge, 1991) at 75.

²¹⁴ Schechtman, above n 117, at 94.

²¹⁵ At 97. See also Holstein and Gubrium, above n 122, at 103, who explain that “the storying of the self is actively rendered and locally conditioned”.

²¹⁶ Wilson, above n 205, at 281.

²¹⁷ Ronen, above n 175, at 149.

²¹⁸ Freeman, above n 6, at 290.

²¹⁹ Erikson “The Problem of Ego Identity”, above n 183, at 74.

²²⁰ Ella Myftari “Ko taku reo taku ohooho, ko taku reo taku mapihi mauria: Exploring Māori Narrative Identity Development and the Link to Adolescent Well-Being” (PhD Thesis, University of Otago, 2014) at 1. See also Schechtman, above n 117, at 94.

Consequently, one's personal history is an important component of narrative identity theory, because "Our pasts give us our conception of who we are and what life story we are living".²²¹ This is consistent with Dienstag's view of the connection between history and the self. As Dienstag states, "Human beings fight over history because they conceive their pasts to be an essential part of who they are. And they are right."²²² The importance placed on knowing one's past, to make sense of one's present and future, amplifies the importance of individuals knowing their genetic and gestational heritage. This is especially acute given that individuals cannot know this aspect of their past through experience. They must rely on others to convey this information so it can then be incorporated into their life story.²²³ This provides a further point of connection between social and narrative conceptions of the self.²²⁴

Narrative conceptions of the self could be seen as being entirely subjective.²²⁵ However, narrative identity theory does involve a degree of objectivity. As Schechtman explains, "the narrative self-constitution view requires that an identity-constituting self-narrative fundamentally cohere with reality".²²⁶ This means that one's subjective sense of self must correspond, to some degree, to the reality of that individual's life, and must "hang together in a way" that "feels psychologically intelligible".²²⁷

B Children and the Narrative Self

In relation to children, identity is frequently posited as a choice between identity as biological determinism (whereby an individual's identity is fixed at birth as a result of one's genetics) or identity as a social construction (whereby one's identity is entirely the result of one's lived experiences and genetics are wholly irrelevant). Such a division fails to capture the complexity of legally recognised family structures in Aotearoa New Zealand, which incorporate both genetic and social elements. For example, parents with formally adopted children (absent any genetic connection) are legally recognised in the same way as parents with genetic children. This arbitrary division is further deconstructed by families that incorporate both genetic and social connections, where, for example, a cisgender heterosexual couple conceive a child using a sperm donor. In such

²²¹ Schechtman, above n 117, at 112.

²²² Joshua Foa Dienstag *Dancing in Chains: Narrative and Memory in Political Theory* (Stanford University Press, Stanford, 1997) at 206.

²²³ See Wilson, above n 205, at 287.

²²⁴ See Atkins, above n 113, at 3.

²²⁵ This is particularly concerning in relation to legal identity, where certainty and objectivity are prioritised, especially in relation to birth certificates, where the rules as to who is included must be clear and consistent.

²²⁶ Schechtman, above n 117, at 119.

²²⁷ At 97.

circumstances, the female partner (who contributed the ovum and gestated the child) is a genetic parent, the male partner (whose sperm was not able to be used) is a social parent, and both individuals are the child's legal parents.

In response to such complexities, narrative identity theory can be employed to unite these crucial aspects of identity together in a coherent and meaningful way.²²⁸ It essentially provides a theoretical framework that avoids privileging genetic, gestational, social, or legal familial connections by recognising that all components of parentage play a part in the child's identity and their developing sense of self. This is consistent with the idea that "It is through narrative that children come to know who they are", rather than solely as a result of one's arrival in the world, or one's upbringing.²²⁹ Such an approach also incorporates important aspects of social constructionist conceptions of the self, especially in relation to children's identity development processes. As Schechtman explains:²³⁰

Infants do not narrate their lives, but take individual experiences as they come. In becoming socialized the developing child learns to live a certain kind of life, to think of persons – and hence of itself – in a certain way, thus *learning* to integrate experience into a coherent narrative whole.

Consequently, narrative and social aspects of identity can work in tandem to assist children in coming to an understanding of who they are, while acknowledging identity development as a lifelong process.

Such an approach requires children to be informed about their genetic and gestational parentage, where this differs from their social and legal parentage.²³¹ Otherwise children are unable to create a coherent narrative of their lives. For example, if a child is unaware that they were conceived as a result of gamete donation, "this denies the child feedback about half of his or her genetic history".²³² This is not to say that "genetics tell us who we

²²⁸ Atkins, above n 113, at 2.

²²⁹ Farquhar, above n 211, at 27.

²³⁰ Schechtman, above n 117, at 146.

²³¹ This is difficult in a legal sense given parents who conceive a child with the assistance of a gamete donor are under no legal obligation to inform the resulting child of this fact. Where this occurs in a fertility clinic, this information is recorded on the HART Register. However, where conception occurs more informally, this information is unlikely to be recorded. Whether there should be a legal duty placed on parents to disclose this information and questions as to the effectiveness of information keeping regimes are beyond the scope of this thesis, but these issues are recognised as barriers to children obtaining vital information about their genetic and gestational origins, as are situations where genetic parentage is unknown or inaccurately recorded.

²³² An Ravelingien and Guido Pennings "The Right to Know Your Genetic Parents: From Open-Identity Gamete Donation to Routine Paternity Testing" (2013) 13(5) The American Journal of Bioethics 33 at 33-34.

really are”); rather that our genetic heritage contributes to the constructed narrative of our lives based upon the importance we place upon this component of our identity.²³³ As Wilson helpfully elucidates, “Recognizing to some extent, the importance of genetic and genealogical information does not equate to promoting a norm of the genetically-related family.”²³⁴

The subjective nature of narrative identity theory means that individuals will emphasise the importance of their genetic origins to differing degrees, depending on a variety of other components of their identity. This explains why, for example, some individuals who know they are adopted (and who were adopted via a closed process no longer in operation) seek out more information about their genetic heritage, and some do not. As Ravelingien and Pennings explain, some adopted individuals “who are deprived of information about their genetic parents can have problems constructing their own unique and consistent personal narrative”.²³⁵ However, many others “choose not to trace their genetic parents, since the significant parents in their lives are likely to be those who have cared for them and raised them”.²³⁶ This is also true for children conceived or born as a result of AHR using gamete donation or surrogacy, whereby knowledge surrounding the reality of their conception and arrival into the world is valued differently. This is examined in more detail in the following chapter.

The law cannot be expected to anticipate all subjective components of identity that may or may not be important for different individuals, and which may change over time. The state is not in the business of helping individuals construct their subjective life stories. However, the law should ensure that children have access to basic information that could foreseeably impact upon a child’s sense of self. This information should not remain hidden behind the text of a birth certificate that only provides information about one’s legal parentage, as is the current position. One way to achieve this would be to implement the reforms proposed in this thesis (detailed in Chapter Eight), whereby all of a child’s genetic, gestational, social, and legal parentage would be reflected upon their birth certificate, which would also have space for more than two legal parents. What those individuals then choose to do with such information, and how they incorporate it into the personal narratives of their lives, is entirely up to them.

²³³ Donald Evans “Whakapapa, Genealogy, and Genetics” (2012) 26(4) *Bioethics* 182 at 182.

²³⁴ Wilson, above n 205, at 283.

²³⁵ Ravelingien and Pennings, above n 232, at 33-34. See also Erica Haimes and Noel Timms *Adoption, Identity and Social Policy: The Search for Distant Relatives* (Gower Publishing, Aldershot (United Kingdom), 1985) at 81; and Wilson, above n 205, at 286-287.

²³⁶ Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, UNICEF, Geneva, 2007) at 107.

Incorporating these aspects of narrative (and social) identity theory within legal conceptions of identity in Aotearoa New Zealand would more respectfully incorporate the fundamental role whakapapa plays within parts of Māori society. Narrative structures themselves are also particularly relevant, given the centrality of “storytelling and narration” within many parts of Māori society and other indigenous cultures.²³⁷ Employing narrative conceptions of the self would also better uphold our obligations under UNCROC to ensure children know their parents and are able to preserve their identity (as examined in the following chapter).

VI Aspects of Māori Identity Theory: The Importance of Whakapapa

The concept of whakapapa lies at the very centre of many parts of Māori society,²³⁸ and its importance “within Māori culture cannot be overstated”.²³⁹ Consequently, having knowledge of one’s whakapapa is a vitally important component of identity formation for many Māori individuals.²⁴⁰ This is especially true of children. However, in some instances birth certificates currently fail to accurately represent a key aspect of a child’s whakapapa, that of their genetic parentage. This is a significant problem given that the stated purpose of the Births, Deaths, Marriages, and Relationships Registration Act is to provide:²⁴¹

²³⁷ Myftari, above n 220, at 155. See also Lyotard, above n 179, at 19.

²³⁸ The author respectfully acknowledges that “Māori people are not a homogenous group”; therefore, identity development factors and definitions of whakapapa will differ across iwi, hapū, and whānau groups, and even between Māori individuals. See Durie, above n 4, at 154. As a result, this thesis presents one of several possible conceptions of whakapapa and Māori identity development based on the perspectives of individual Māori and non-Māori commentators with significant expertise in this field. The author does not claim expert knowledge regarding Māori conceptions of whakapapa and identity development, or Māori world views, and acknowledges her own outsider status as a non-Māori family law researcher. Therefore, this thesis does not claim to provide a comprehensive account of these subjects; rather the purpose of their inclusion in this thesis is to suggest a more respectful consideration of these important elements within the birth certificate regime. The author acknowledges the need for the creation of space in future research to enable Māori to engage in this discussion.

²³⁹ Laurie Anne Whitt and others “Indigenous Perspectives” in Dale Jamieson (ed) *A Companion to Environmental Philosophy* (Blackwell Publishers, Malden (United States), 2001) 3 at 5. See also Lesley Rameka “Whakapapa: Culturally Valid Assessment in Early Childhood” (2012) 16(2) *Early Childhood Folio* 33 at 35 who notes that “the importance of whakapapa within Māori culture cannot be overestimated”; and Linda Tuhiwai Te Rina Smith “Kaupapa Māori Research” in Marie Battiste (ed) *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, Vancouver, 2000) 225 at 234 who states that whakapapa “is inscribed in virtually every aspect of our worldview”.

²⁴⁰ See Joseph Selwyn Te Rito “Whakapapa: A Framework for Understanding Identity” (2007) 2 *MAI Review* 1 at 4; Mohi Rua, Darrin Hodgetts, and Otilie Stolte “Māori Men: An Indigenous Psychological Perspective on the Interconnected Self” (2017) 46(3) *New Zealand Journal of Psychology* 55 at 57; Maria Haenga-Collins and Anita Gibbs “‘Walking Between Worlds’: The Experiences of New Zealand Māori Cross-Cultural Adoptees” (2015) 39(1) *Adoption & Fostering* 62 at 72.

²⁴¹ Births, Deaths, Marriages, and Relationships Registration Act, s 1A.

... an official record of births, deaths, marriages, civil unions, and name changes that can be used as evidence of those events and of age, identity, descent, whakapapa, and New Zealand citizenship.

This section examines the meaning and significance of aspects of whakapapa, from an identity perspective, within parts of Māori culture in Aotearoa New Zealand and demonstrates the need for reform of our birth certification regime to better reflect a child's genetic parentage, which is an important aspect of a child's whakapapa.

A Conceptions of Whakapapa

Māori concepts of whakapapa evoke broader concepts of fundamental connectedness, that encompasses not just human genealogy, but also that of non-human animals and objects, alongside the spiritual world. As a result, the word whakapapa signifies both “biological ancestry” and “the relations between people and other species, places, events, things and to the gods”.²⁴² Whakapapa is often loosely equated to the Pākehā concept of genealogy, which evokes notions of individuals finding out basic information about their forebears, such as their name and date of birth. However, this definition is a substantial “oversimplification”, which fails to recognise the meaning and significance of whakapapa within its cultural context.²⁴³

In highlighting the multifaceted nature of whakapapa, Roberts and others describe “cosmogonical whakapapa” as “the origins of the universe” and note that it fundamentally connects “the spiritual and material worlds” of humans, as well as non-human animals and things.²⁴⁴ Their research highlights the “spiritual qualities” of everything in the universe, including “Insects and humans, fish and ferns, stars and stones”.²⁴⁵ This closely aligns with Barlow's seminal statement:²⁴⁶

Whakapapa is the genealogical descent of all living things from the gods to the present time ... Everything has a whakapapa: birds, fish, animals, trees, and every other living thing; soil, rocks and mountains also have a whakapapa. [Humankind] also has a genealogy. Whakapapa is a basis for the organization of knowledge in respect of the creation and development of all things.

²⁴² At 183.

²⁴³ Evans, above n 233, at 182.

²⁴⁴ Mere Roberts and others “Whakapapa as a Māori Mental Construct: Some Implications for the Debate over Genetic Modification of Organisms” (2004) 16(1) *The Contemporary Pacific* 1 at 3-4.

²⁴⁵ At 4.

²⁴⁶ Barlow, above n 16, at 173.

Broader meanings of whakapapa “permeate the whole of cultural life”,²⁴⁷ and all components of whakapapa “are important in the determination of the identity of Māori persons”.²⁴⁸ However, the examination of whakapapa undertaken here concentrates solely on the human aspects of whakapapa.²⁴⁹

From a human perspective, whakapapa is about the interconnectedness of past, present, and future generations of family members. As Barlow explains, “The meaning of whakapapa is ‘to lay one thing upon another’ as, for example, to lay one generation upon another.”²⁵⁰ Likewise, for Metge, whakapapa means “to place in layers”.²⁵¹ This captures the idea that ancestors form a foundation that successive generations are built upon,²⁵² creating “a link between past generations”, as well as current and future ones.²⁵³ As Roberts and others explain, whakapapa is a “mental construct” that “functions as a genealogical table or family pedigree in which the lineages connect each papa or layer (a metaphorical reference to each generation of a family)”.²⁵⁴ This resonates with Smith’s notion of “placing oneself in a generational sequence and network of other connected selves as forebears and descendants and relatives”.²⁵⁵

The essential connection between aspects of one’s whakapapa (incorporating an individual’s past, present, and future ancestors) and identity is reinforced by former MP Pita Sharples, who states: “Whakapapa helps us to know who we are, from whom we descend, and what our obligations are to those who come after us. It tells us who we are.”²⁵⁶ Likewise, in a study about Māori perspectives of organ donation, one Māori research participant described their personal view of whakapapa thus, “[t]he best way I

²⁴⁷ Robert Webb and Rhonda Shaw “Whānau, Whakapapa and Identity in Experiences of Organ Donation and Transplantation” (2011) 8(1) *Sites: A Journal of Social Anthropology and Cultural Studies* 40 at 43.

²⁴⁸ Evans, above n 233, at 183.

²⁴⁹ For more information about the operation of whakapapa in a non-human context see Mere Roberts “Ways of Seeing: Whakapapa” (2013) 10(1) *Sites: A Journal of Social Anthropology and Cultural Studies* 93.

²⁵⁰ Barlow, above n 16, at 173.

²⁵¹ Metge, above n 16, at 48.

²⁵² Te Rito, above n 240, at 1.

²⁵³ Webb and Shaw, above n 247, at 43.

²⁵⁴ Roberts and others, above n 244, at 1.

²⁵⁵ M Smith, above n 114, at 1053.

²⁵⁶ (17 June 2008) 647 NZPD 16663. This conception of whakapapa is endorsed by s 7 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, which, when it comes into force on 1 July 2019, will insert a definition of whakapapa into s 2(1) of the Oranga Tamariki Act 1989. This definition views human aspects of whakapapa as “multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend”. See Chapter Five.

can put it is that it's a whole whakapapa that sits behind you as a person; that has created you as a person".²⁵⁷ This demonstrates that an individual's identity is directly connected to those who have gone before them and resonates with Durie's explanation that "family to the Māori mind is really part of one's self".²⁵⁸

B The Importance of Whakapapa

In accordance with prominent Māori world views, knowing one's whakapapa is not so much about developing a sense of individual or personal identity as it is about learning and connecting with an individual's social or collective identity and knowing one's place in the world based on the people who have come before them.²⁵⁹ Essentially, whakapapa "exists as a genealogical narrative", whereby "Each generation learns about their ancestors, their achievements and where they came from".²⁶⁰ This is a vital aspect of Māori identity development. According to Durie:²⁶¹

As whakapapa is told and retold, the interconnections between the living and the ancestors, the deities and the land becomes clear ... the shaping of individual and collective Māori identity is set within the context of the personal, the collective and the total environment.

In this way, whakapapa is not about merely possessing information about one's ancestors and origins; whakapapa is about creating connections between people. For example, in a study about Māori perspectives of developing AHR technologies, one male research participant notes that individuals choose which aspects of their whakapapa to emphasise depending on where they are and which connections they wish to make.²⁶² As the research participant explains, it is not about saying "I am statistically descended from da-da-da"; rather it is about "saying that I am this person and I am descended from these people here and they link in with you from these other people here and through this place".²⁶³

Knowledge of one's whakapapa is also of vital significance for functioning within many parts of Māori society, because it underpins all whānau, hapū, and iwi relationships.²⁶⁴

²⁵⁷ Webb and Shaw, above n 247, at 43.

²⁵⁸ Durie, above n 4, at 150.

²⁵⁹ See Law Commission *Māori Custom and Values*, above n 153, at 31. See also Durie, above n 4, at 142-153; and Haenga-Collins, above n 153, at 89 and Newman, above n 153, at 16.

²⁶⁰ Newman, above n 153, at 16.

²⁶¹ Durie, above n 4, at 147.

²⁶² Evans, above n 233, at 185.

²⁶³ At 185.

²⁶⁴ Webb and Shaw, above n 247, at 43-44. As Barlow notes, "It is through genealogy that kinship and economic ties are cemented". See Barlow, above n 16, at 174.

As Mead explains, “The very foundation of membership and acceptance as a Māori is whakapapa. It is the ultimate and indisputable ‘test’ of heritage.”²⁶⁵ Whakapapa is an important determinant of a number of rights and responsibilities; as Durie states, it is “the governing factor in Māori identity claims and in the establishment of rights and obligations which might accrue in respect of that identity”.²⁶⁶ The expansive rights conferred by whakapapa can provide significant practical benefits for Māori individuals. As Mead describes:²⁶⁷

Correct whakapapa is the key to eligibility to interests in tribal lands, to education grants, to attend certain tribal ceremonies, and to be accepted as tangata whenua at the local marae ... Whakapapa is also the key to membership in the hapū of the parents, to one hapū or to several. Whakapapa legitimises participation in hapū affairs and opens doors to the assets of the iwi. It provides a right to be buried in the local urupā (cemetery), a right to succeed to land interests of the parents and a right to claim membership in the hapū.

Thus, knowing one’s whakapapa can be an essential component of Māori identity, both in terms of knowing one’s self, but also in terms of knowing one’s place within one’s whānau, hapū, and iwi. This closely accords with Mead’s poignant assertion: “In short, whakapapa is belonging. Without it an individual is outside looking in.”²⁶⁸

C Children and Whakapapa

According to prominent Māori conceptions of identity development, knowing one’s whakapapa is particularly important for children, because “sustenance is gained from knowing who you are”.²⁶⁹ As Pihama explains, “we must be aware of the need for Māori children to know their whakapapa and for all children to have access to knowledge of who they are”.²⁷⁰ To this end, children are supposed to be given information about their whakapapa. As Barlow states:²⁷¹

²⁶⁵ See Aroha Mead, above n 8, at 128.

²⁶⁶ Durie, above n 4, at 152.

²⁶⁷ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 43.

²⁶⁸ At 43.

²⁶⁹ McCarthy, above n 159, at 29.

²⁷⁰ See Leonie Pihama “Reconstructing Meanings of Family: Lesbian/Gay Whānau and Families in Aotearoa” in Vivienne Adair and Robyn Dixon (eds) *The Family in Aotearoa New Zealand* (Longman, Auckland, 1998) 179 at 200.

²⁷¹ Barlow, above n 16, at 174.

All the people in a community are expected to know who their immediate ancestors are, and to pass this information on to their children so that they too may develop pride and a sense of belonging through understanding the roots of their heritage.

This is one of the reasons why formal legal adoption, whereby the child becomes the child of the adoptive parents (or parent) and their legal connection with their genetic parents (or parent) is entirely severed,²⁷² is particularly repugnant to many Māori individuals.²⁷³ As Metge explains: “Māori deplore this on the grounds that connection by descent is an inalienable part of a child’s inheritance”; it is also “the basis of attachment to whānau, hapū and iwi and a wide network of kinsfolk”.²⁷⁴

The reforms proposed in this thesis do not entirely remedy this problem. However, they may go some way to tempering the effects of adoption, by ensuring children know this layer of their whakapapa. To this end, an original pre-adoptive birth certificate containing the names and details of a child’s genetic parents will no longer be replaced with a new version containing only the names and details of their adoptive parents as currently occurs.²⁷⁵ Rather, the original pre-adoptive birth certificate will be modified and re-printed, reclassifying a child’s genetic parents as their “former legal parents”, and adding the names and details of the adoptive parents as the child’s “current legal parents”.²⁷⁶ The child’s genetic and gestational parentage will also be reflected in the relevant sections of their birth certificate inserted by the proposed reforms. This will ensure that children know their immediate ancestry, regardless of the fact they have been adopted. These reforms are detailed in Chapter Eight, alongside a visual representation of the proposed changes.

²⁷² Adoption Act 1955, s 16.

²⁷³ For a detailed discussion of the aspects of adoption that are inconsistent with Māori understandings of the world, see Jacinta Ruru “Kua tutū te puehu, kia mau: Māori Aspirations and Family Law Policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 72-75.

²⁷⁴ Metge, above n 16, at 251. This demonstrates why the practice of whāngai is accepted within parts of Māori society because it does not legally or practically sever the child’s vital connection with these aspects of their whakapapa. Children raised by mātua whāngai will still generally have a strong connection to their whānau, hapū and iwi, even if they are raised by extended family members. See Metge, above n 16, at 210-257.

²⁷⁵ Currently, under s 4 of the Adult Adoption Information Act, when individuals reach 20 years of age they can apply to obtain a copy of their original birth certificate (generated prior to their adoption) from the Registrar-General. However, individuals adopted prior to the contemporary move towards open adoption, may not know they were adopted, so they will be unaware that such information exists in the first place.

²⁷⁶ This is analogous to where an individual changes their legal name, whereby their birth certificate reflects both their original legal name as well as their current legal name.

The proposed reforms will not change the legal impact of adoption, but they will more respectfully recognise a child's right to know their genetic parents (discussed in more detail in the following chapter), which is vitally important for many Māori people. As Sharples states, from a Māori perspective, "We believe that every child has the right to know who has given them the sacred gift of life."²⁷⁷ This is what these reforms are specifically designed to ensure. Of course, as discussed above, merely knowing one's immediate ancestors' names is not enough to fully know this aspect of one's whakapapa, but these reforms, in conjunction with the current era of open adoption (in stark contrast to a historic emphasis on secrecy),²⁷⁸ should at least ensure that children know this important part of who they are.

This is not to say that whakapapa is the only important aspect of identity for children. Other information, alongside knowledge of their whakapapa, is required for children to develop a secure personal and cultural identity throughout their lives. As McCarthy explains, for Māori children to know themselves requires:²⁷⁹

...a form of understanding which extends beyond knowing your genealogy, to include knowing your history as told by your own people, being skilful in your language, recognising the nuances of your culture that make you different from another, and owning a world view that is distinctly Māori.

However, this thesis primarily focuses on select aspects of whakapapa to provide additional justification for the importance of reforming Aotearoa New Zealand's birth certification regime to incorporate all of a child's genetic parents where possible. While genetic parentage represents merely one (albeit important) layer of the many that form their whakapapa, such reforms would nevertheless be a step in the right direction in terms of more respectfully acknowledging the centrality of whakapapa to Māori understandings of the world. This is not to say that additional layers of whakapapa alongside other important aspects of Māori identity should not be included on children's birth certificates (in whatever digital form they make take) in the future. However, such proposals are beyond the limited scope of this thesis.

D Whakapapa and Theoretical Conceptions of Identity

²⁷⁷ (17 June 2008) 647 NZPD 16665.

²⁷⁸ For a detailed discussion of the history of adoption in Aotearoa New Zealand, see Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at 12-20.

²⁷⁹ McCarthy, above n 159, at 29.

The discussion of aspects of whakapapa evokes aspects of social constructionist and narrative conceptions of identity as examined in the preceding sections. The way whakapapa locates an individual's identity within their past and present family group is a clear example of a social constructionist perspective of the self. This "collective mode of operation as found in the whānau or extended family concept is fundamental to Māori culture", and confirms that identity is not formed in a vacuum, and that much of who we become is a result of our familial upbringing and our social and cultural context.²⁸⁰ Mead agrees, stating "Much of a person's prospects in life depend on the parents and the legacy they pass on: genes, social standing, economic position, education and the like."²⁸¹

According to Durie, broader social influences also have a role to play from a Māori identity formation perspective. As Durie explains, "The family bonds we grow up with, the kinds of friends we have, and even the language through which our fondest thoughts are made known, shape and mould our identity."²⁸² The way Māori children are taught about their ancestor's successes²⁸³ and the acknowledgement that "Talents come with the whakapapa" also resonate with social conceptions of identity, whereby individual achievements are actually viewed as familial achievements.²⁸⁴ Indeed, as Metge explains, for many Māori people, "Talking about one's own achievements is described as 'skiting' and attracts critical comment."²⁸⁵ This is because such behaviour, usually "considered whakahīhī (conceited or arrogant)",²⁸⁶ demonstrates "what Māori consider the wrong sort of pride, pride which focuses on the self separate from the group".²⁸⁷

Māori conceptions of whakapapa also closely align with aspects of narrative identity theory. This is perhaps unsurprising given the significance of oral storytelling and recitation within parts of Māori culture, especially in relation to various Māori creation stories, sometimes referred to as "cosmogonical whakapapa".²⁸⁸ As Roberts and others explain, in societies "with a strong oral tradition, narrative discourse plays a major role in transmitting knowledge".²⁸⁹ Narrative aspects of identity, such as stories told about one's ancestors, give "a sense of belonging and purpose to contemporary Māori" that "is

²⁸⁰ At 27.

²⁸¹ Hirini Moko Mead, above n 267, at 42.

²⁸² Durie, above n 4, at 161.

²⁸³ See Newman, above n 153, at 16.

²⁸⁴ Hirini Moko Mead, above n 267, at 44.

²⁸⁵ Metge, above n 16, at 160.

²⁸⁶ At 160.

²⁸⁷ At 103.

²⁸⁸ Roberts and others, above n 244, at 3-4.

²⁸⁹ At 12.

hugely emphasised in Māori culture”.²⁹⁰ Therefore, this is a vital component of identity development for many Māori individuals.²⁹¹ As Sharples eloquently states, “Whakapapa is the bridge that links us to our ancestors, defines our heritage, and gives us the stories that define our place in the world.”²⁹²

These connections between aspects of whakapapa, social constructionist conceptions of the self, and narrative identity theory, further strengthen the reforms proposed in this thesis, especially in relation to the importance of a child knowing their genetic parentage. Of course, knowing one’s genetic origins or immediate ancestors (one layer of a child’s whakapapa) is not the only relevant aspects of a child’s identity, but it is an important part of that child’s unique story, especially for Māori children, given that “whakapapa is generally agreed to be the lynchpin of Māori identity”.²⁹³

VII Summary of Chapter Four

This chapter examined theoretical and cultural understandings of identity. It found that the familial, social, and political worlds children are born into, and the way they create coherent meaning out of their own life experiences and stories, influences their sense of self on an ongoing basis. The chapter also established the importance of children knowing their genetic heritage. This is especially important for Māori children, for whom knowing their whakapapa can be an essential part of knowing who they are. The following chapter applies this expansive conception of the self to legal conceptions of identity in Aotearoa New Zealand.

²⁹⁰ Myftari, above n 220, at 5. Myftari also links the importance of narrative aspects of identity within Māori culture to formal Māori mihimihi greetings or “self-introductions that establish links to ancestors and whakapapa, and includes other relevant information such as specific geographical features associated with their tribal area”. As Myftari states “[t]he importance of telling one’s story is pertinent for all Māori, as the mihimihi clearly shows.” See Myftari, above n 220, at 21.

²⁹¹ Durie, above n 4, at 148.

²⁹² (17 June 2008) 647 NZPD 16663.

²⁹³ See Tahu Kukutai *The Dynamics of Ethnicity Reporting: Māori in New Zealand* (Te Puni Kōkiri, Wellington, 2003) at 21. This argument could possibly be extended to suggest that mātua whāngai should also be included on a child’s birth certificate based on the significant role they play in the child’s life and the important ways they contribute to a child’s sense of identity. However, such discussions are beyond the scope of this thesis.

CHAPTER FIVE

Legal Conceptions of Identity

One of the main facets of a person's legal identity is their official status within the nation. This has several aspects but a core part of a person's identity is the registration of their birth and the issuing of a birth certificate.²⁹⁴

I Introduction to Chapter Five

This chapter focuses on the intersectionality of law and identity, given that law is “the passage through which identity must be known”.²⁹⁵ It provides an in-depth analysis of children's rights to know their parents and preserve their identities under UNCROC, to demonstrate how the proposed reforms would better satisfy our UNCROC obligations. Furthermore, the chapter considers the emphasis placed on legal identity within domestic family law legislation and cases. It notes that in many instances, lawmakers and judges appear to take an expansive view of identity, arguably in line with conceptions of narrative identity theory and vital connections between aspects of whakapapa and identity development, as outlined in the previous chapter. The chapter thus argues that the reforms proposed in this thesis simply represent the extension of a pre-existing set of principles to birth certification and parentage models.

II UNCROC and the Right to Identity

The starting point of any child-focused analysis of legal identity is UNCROC,²⁹⁶ which guarantees basic civil, economic, political, cultural, and social rights for children and “defines universal principles and standards for the status and treatment of children worldwide”.²⁹⁷ UNCROC was the “first universal and detailed international instrument on children's rights to lay down minimum binding obligations”.²⁹⁸ Aotearoa New Zealand

²⁹⁴ Atkin, above n 177, at 3.

²⁹⁵ Peter Brooks *Enigmas of Identity* (Princeton University Press, Princeton, 2011) at 20.

²⁹⁶ UNCROC, above n 7.

²⁹⁷ Ministry of Social Development “United Nations Convention on the Rights of the Child” <www.msd.govt.nz>. UNCROC has previously been referred to as the “Children's Magna Carta”. See Douglas Hodgson “The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness” (1993) 7(2) *International Journal of Law and the Family* 255 at 255.

²⁹⁸ Hodgson, above n 297, at 255-256.

became a signatory in 1990, followed by formal ratification in 1993.²⁹⁹ Ratifying UNCROC demonstrates a formal commitment to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights” recognised in UNCROC.³⁰⁰ Most importantly, this makes “the best interests of the child ... a primary consideration” in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”.³⁰¹

Despite our UNCROC obligations, neither the Births, Deaths, Marriages, and Relationships Registration Act or the Status of Children Act mentions the best interests of children at all, let alone as a primary consideration. This is particularly surprising given these Acts are responsible for the administration of two of the most vital aspects of establishing an individual’s legal identity, namely the provision of birth certificates and the determination of legal parentage. These are most certainly “actions concerning children” undertaken by “administrative authorities or legislative bodies”.³⁰² Therefore, in line with our obligations under UNCROC, the best interests of children should at least be considered in the applications of these two Acts. Of course, obligations under the treaty are not automatically part of domestic law unless they have been incorporated into legislation.³⁰³ However, UNCROC can be used “to put pressure on the authorities to create the political will to implement the Convention fully and to address the needs of children effectively”.³⁰⁴ This is what this thesis is designed to do.

²⁹⁹ United Nations Human Rights Office of the High Commissioner “Convention on the Rights of the Child” <www.ohchr.org>. In ratifying UNCROC, the New Zealand government has agreed to be bound by the treaty and to uphold the purpose and spirit of UNCROC.

³⁰⁰ UNCROC, above n 7, art 4. This article further explains that, in terms of economic, social, and cultural rights, countries that have ratified UNCROC are obliged to “undertake such measures to the maximum extent of their available resources”.

³⁰¹ Article 3(1).

³⁰² Article 3(1).

³⁰³ See Pauline Tapp “Parenting: A Private Responsibility or a Collaborative Partnership? A Perspective Based on the United Nations Convention on the Rights of the Child” in Vivienne Adair and Robyn Dixon (eds) *The Family in Aotearoa New Zealand* (Longman, Auckland, 1998) 1 at 9. Note that the text of UNCROC is provided in Schedule 2 of the Children’s Commissioner Act 2003. However, this does not incorporate UNCROC into our domestic legislation, because s 36(1) of the Act states that UNCROC is included in Schedule 2 of the Act “for public information and reference purposes only”. This is reiterated in s 36(2) of the Act, which states “For the avoidance of doubt, the inclusion of the text of the Convention in this Act does not affect the legal status of the Convention.” However, UNCROC will be expressly read into the Oranga Tamariki Act when the remainder of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act comes into force on 1 July 2019. This will ensure that during decision-making processes under that Act, a child’s rights under UNCROC will be “respected and upheld”. See s 5(1)(b)(i) of the Oranga Tamariki Act (as will be amended by s 11 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act).

³⁰⁴ Tapp, above n 303, at 9. Some individuals are statutorily obliged to consider the application of the principles of UNCROC in carrying out their duties. For example, under s 3 of the Children’s

Articles 7 and 8 of UNCROC are both focused on the protection of a child's right to identity.³⁰⁵ Children have a right to know their parents under article 7(1), and to preserve their identity under article 8(1).³⁰⁶ However, UNCROC does not define who a parent is, or what constitutes identity. This results in obvious interpretation difficulties. Such uncertainty may undermine the application of UNCROC, rendering it nothing more than rhetoric. However, such uncertainty can also create opportunities to implement definitions better suited to protecting the rights of children than narrowly prescribed definitions. Within this context, articles 7 and 8 of UNCROC are examined in turn below.

A Right to Know One's Parents – Article 7

A child's right to know her or his parents is enshrined in article 7(1) of UNCROC, which states:³⁰⁷

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

For the purposes of this thesis, the wording of the provision raises two primary interpretation difficulties; who counts as a child's parents, and what counts as knowing them. UNCROC does not define either of these concepts, which, within the context of a Convention specifically designed to protect the rights of children, provides an opportunity to adopt child-focused meanings that accommodate the vast array of ways children are actually conceived and raised within different family groupings.

In terms of the meaning of parents under article 7(1) of UNCROC, this thesis proffers a comprehensive definition that encompasses all of a child's genetic, gestational, social,

Commissioner Act, one of the express purposes of the Act is to “confer additional functions and powers on the Commissioner to give better effect in New Zealand” to UNCROC and to “require the Commissioner to have regard to the Convention when carrying out the Commissioner's functions and powers”. Likewise, under s 6C(b) of the Children's Act 2014 (formerly known as the Vulnerable Children Act 2014), the Minister responsible for adopting a strategy for improving children's well-being “must have regard to” the rights of children “derived” from UNCROC. Note that according to s 6A of the Act, the strategy is “intended to help New Zealand meet its international obligations relating to children” including those under UNCROC.

³⁰⁵ See Michelle Giroux and Mariana De Lorenzi “Putting the Child First: A Necessary Step in the Recognition of the Right to Identity” (2011) 27(1) Canadian Journal of Family Law 53 at 70 and 78 and Jaap E Doek “Article 8: The Right to Preservation of Identity and Article 9: The Right Not to Be Separated from His or Her Parents” in André Alen and others (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2006) 1 at 5.

³⁰⁶ UNCROC, above n 7, arts 7-8.

³⁰⁷ Article 7(1).

and legal parents.³⁰⁸ Other commentators have argued for a similarly expansive definition of parentage under article 7(1). Besson, for example, notes that this “right should be interpreted broadly” in order to include “not only one’s social or legal parents, but also one’s biological or genetic parents together with one’s birth parents”.³⁰⁹ The adoption of such an inclusive definition is not to say that all such individuals should be recognised as the child’s legal parents, or that they will all be responsible for raising the child.³¹⁰ Rather, the definition is based on the assertion that the child has a right to know all of the individuals who jointly contributed (as a genetic, gestational, social, and/or legal parent) to bringing the child into being. This is based on the idea that a child’s right to know her or his parents can be “conceived of as a moral entitlement not to be left to one’s own imagination as far as the story surrounding the circumstances at conception and birth”.³¹¹ This argument directly underpins the suggested reforms proposed in Chapter Eight, whereby birth certificates would include information about a child’s genetic and gestational origins, alongside their legal parentage.

Applying such an expansive definition to the meaning of “parents” under article 7(1) does not have universal agreement. For example, the United Kingdom interprets “parents” in article 7(1) as referring solely to a child’s legal parent or parents (who may or may not also be a child’s genetic parents).³¹² However, such a narrow interpretation seems to be in direct conflict with the preamble of UNCROC, which recognises “the inherent dignity” and “the equal and inalienable rights of all members of the human family”, alongside a desire “to promote social progress and better standards of life”.³¹³ Excluding genetic, gestational, or social aspects of a child’s parentage, in favour of a narrow definition of

³⁰⁸ In *Nikau v Nikau* [2018] NZHC 1862, the High Court suggested that in the context of the Care of Children Act, the term “parent” refers solely to a child’s genetic parent. However, the Court of Appeal left this issue open, especially in terms of whether the emphasis on genetic parentage was “correct in light of tikanga” and “the status of whāngai parents in Te Ao Māori”. See *Nikau v Nikau*, above n 16, at [29]. Therefore, it remains open to argue that the term “parent” should be defined broadly in a way that incorporates all aspects of a child’s parentage.

³⁰⁹ Samantha Besson “Enforcing the Child’s Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights” (2007) 21(2) *International Journal of Law, Policy and the Family* 137 at 143. See also Hodgkin and Newell, above n 236, at 105-106.

³¹⁰ See Giroux and De Lorenzi, above n 305, at 62-64.

³¹¹ Richard J Blauwhoff “Tracing Down the Historical Development of the Legal Concept of the Right to Know One’s Origins” (2008) 4(2) *Utrecht Law Review* 99 at 104.

³¹² See Hodgkin and Newell, above n 236, at 105.

³¹³ UNCROC, above n 7, preamble. Looking to the preamble of UNCROC is consistent with article 31(1) of the Vienna Convention on the Law of Treaties (the Vienna Convention), which requires international treaties to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. See article 31(1) of the Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980). Article 31(2) of the Vienna Convention also expressly recognises that a preamble to a treaty is indeed part of the context of said treaty.

legal parentage, generally based on the outdated heteronormative idea of the traditional nuclear family, is contrary to the aspirations of UNCROC. It fails to recognise “all members of the human family” and disregards the promotion of “social progress”.³¹⁴

Most importantly, limiting the definition of parents in article 7(1) to legal parentage alone is not in the best interests of children, which under article 3(1) of UNCROC are supposed to be a “primary consideration”.³¹⁵ This is because there is increasing evidence that, for some children, having knowledge of their genetic origins is “essential in terms of [their] psychological well-being”.³¹⁶ This is particularly true for many Māori children, where, as demonstrated in the previous chapter, knowledge of one’s whakapapa is a vital part of one’s identity formation and is necessary to fully participate within parts of Māori society.³¹⁷ While UNCROC was not drafted with Māori world views in mind, it can be seen as supporting the need for children to know their whakapapa, given that one of its express purposes is to take “due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child”.³¹⁸

Indeed, according to some commentators, children are actually “harmed and severely wronged” if they do not know who their genetic parents are.³¹⁹ The negative consequences that can result from a lack of information about one’s genetic heritage is well documented in relation to adoption.³²⁰ For example, Triseliotis’ historic study of 70 adopted individuals in Scotland (which, at the time, was the largest known study of adoptees) found that 65 per cent of the participants “perceived themselves in what appeared to be negative or fairly negative terms and with a poor self-image”.³²¹ According to Triseliotis, such individuals:³²²

... talked about experiencing a sense of ‘emptiness’, ‘isolation’ or ‘vacuum’; of feeling ‘false’, ‘not being a whole or a real person’,

³¹⁴ UNCROC, above n 7, art 3(1).

³¹⁵ Article 3(1).

³¹⁶ Ravelingien and Pennings, above n 232, at 33. Knowing one’s genetic (and legal) parentage is also important in relation to child support and inheritance rights. See Chapter Six.

³¹⁷ See generally Pihama, above n 270, at 200; Webb and Shaw, above n 247, at 43-44; and Hirini Moko Mead, above n 267, at 43.

³¹⁸ UNCROC, above n 7, preamble.

³¹⁹ Ravelingien and Pennings, above n 232, at 33.

³²⁰ See generally Sants, above n 5; and Stewart, above n 5, at 227.

³²¹ Triseliotis, above n 5, at 82.

³²² At 82.

‘depressed and unhappy’, ‘tense and anxious’, ‘not coping’, ‘unable to get close to people’.

It must be conceded that some participants did not experience such negative consequences, and adoption is not a direct comparator.³²³ However, the fact that many adoptees sought information about their genetic heritage to “fill in gaps about their genealogy, or to complete themselves” is highly pertinent.³²⁴ Triseliotis concluded that adopted children “need to have information about their biological and sociological background to help them complete their self-image”,³²⁵ and that no one should be “cut off from [their] origins”.³²⁶

In one more contemporary study of nearly 500 adoptees, the majority of the study’s participants had questions about their identities as a result of their adoption. As Howe and Feast found, “[f]or a majority of adopted people, questions of identity, genealogical connectedness, and the need to have the full-story appear to be endemic.”³²⁷ These findings are mirrored within other adoption literature, which conclude that adopted individuals “who are deprived of information about their genetic parents can have problems constructing their own unique and consistent personal narrative”,³²⁸ and are “vulnerable simply because they cannot recount with confidence their own full life-history”.³²⁹ This is particularly problematic in terms of identity development, especially examined through the lens of narrative identity theory as detailed in the previous chapter.

Similarly, the personal accounts of individuals born as a result of gamete donation “highlight a number of psychological implications of not knowing one’s donor, including a feeling of incompleteness, lack of genetic continuity, and lack of understanding one’s place within the family”.³³⁰ Others have articulated a “sense of loss, disappointment,

³²³ At 70-74.

³²⁴ At 71.

³²⁵ At 81.

³²⁶ At 166.

³²⁷ David Howe and Julia Feast *Adoption, Search and Reunion: The Long Term Experience of Adopted Adults* (The Children’s Society, London, 2000) at 169.

³²⁸ Ravelingien and Pennings, above n 232, at 33-34.

³²⁹ Haimes and Timms, above n 235, at 63.

³³⁰ Ravelingien and Pennings, above n 232, at 34. However, Ruru urges caution in equating the right to know one’s whakapapa as is acknowledged with adoption, to cases of donor-conception. As Ruru states, “It may be premature to correlate the customary right of the child to know his or her whakapapa in this new contemporary medical era.” See Jacinta Ruru “Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand” (2005) 19(3) *International Journal of Law, Policy and the Family* 327 at 339. More research in this area may be required to ensure that proposed reforms adequately consider aspects of whakapapa within the context of gamete and embryo donation.

anger and resentment, sometimes directed at the individuals involved in their conception, but also at the system itself, which facilitated the maintenance of the fiction”.³³¹ Indeed some such individuals report feeling as though their “entire life was based on a lie” and that they have difficulties trusting others as a result of the concealment of their genetic parentage.³³² In order to minimise the possibility of such harm, and to recognise the fact children are now conceived and raised in an array of complex circumstances, a right to know one’s parents under article 7(1) of UNCROC should include a child’s complete genetic, gestational, social, and legal parentage where possible.

However, the scope of the right to know one’s parents under article 7(1) of UNCROC, is unclear, with a distinct lack of clarity regarding the amount of information required to satisfy the right. Does merely providing basic factual information about individuals’ genetic parents (such as names) suffice to meet a State’s obligation? Or is more comprehensive information required to contextualise who genetic forebears are as people?³³³ Pennings takes the latter position, and elucidates:³³⁴

The whole question of the knowledge of one’s genetic ancestors is not restricted to or satisfied by the release of the name of the genitor ... The child does not obtain the information he needs when he is told that his genetic father is William Jones or John Doe ... Much more useful is the provision of general information about the donor as a real person, what he was like, how he saw himself, what his hobbies, interests and skills are.

This mirrors the personal accounts of some adopted individuals who sought detailed information about their genetic parents,³³⁵ best encapsulated by one research participant in an adoption study who said “[y]ou want information that brings people to life to help you build a true picture of your origins.”³³⁶ Such an approach resonates with the theoretical conception of narrative identity and the select aspects of whakapapa detailed in the previous chapter. However, from a practical perspective, requiring parties to

³³¹ Law Commission *New Issues in Legal Parenthood*, above n 75, at 112.

³³² AJ Turner and A Coyle “What Does It Mean to be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy” (2000) 15(9) *Human Reproduction* 2041 at 2045.

³³³ As discussed in the previous chapter, from a Māori perspective, children would ideally be taught about “their ancestors, their achievements and where they came from”. This requires more than merely knowing their names. See Newman, above n 153, at 16. See also Durie, above n 4, at 147.

³³⁴ Guido Pennings “The Right to Privacy and Access to Information about One’s Genetic Origins” (2001) 20(1) *Medicine and Law* 1 at 12.

³³⁵ Triseliotis, above n 5, at 148-153.

³³⁶ At 152.

UNCROC to collect such in-depth and highly subjective personal information in all cases of adoption, gamete donation, embryo donation, and surrogacy, may be too heavy an administrative burden to place upon them, and such information would be difficult to include on a child's birth certificate.

In Aotearoa New Zealand, a middle ground has been established between the collection of purely basic factual information and more in-depth personal narratives. For example, where children have been conceived via fertility clinic administered AHR involving gamete or embryo donation, the Human Assisted Reproductive Technology Act 2004 (the HART Act) compels fertility providers to collect particular information.³³⁷ This includes basic factual details such as the donor's name, gender, and address, as well as their date and location of birth.³³⁸ Ethnic and cultural information is also required, alongside known details about a Māori donor's whānau, hapū, and iwi.³³⁹ A comprehensive medical history is also collected, which includes information about the donor, as well as the donor's parents, grandparents, children, and siblings.³⁴⁰ Personal information pertaining to the donor's height, eye colour, and hair colour is also recorded, alongside "the donor's reasons for donating".³⁴¹ It is important to note that this provision creates a minimum statutory requirement and does not prevent fertility providers from obtaining more detailed personal information from donors.

However, focusing on the amount and depth of information to be collected to ensure children can obtain a sense of their donors as people misses the obvious point that all the information in the world is of no assistance to a child if they do not know to look for such information in the first place. Currently, the only way children raised by heterosexual parents know that they were conceived via gamete or embryo donation (or born via surrogacy) is if their legal parents tell them.³⁴² Their birth certificate entirely conceals the

³³⁷ HART Act 2004, s 47.

³³⁸ Sections 47(1)(a) to 47(1)(d).

³³⁹ Sections 47(1)(g) and 47(1)(h).

³⁴⁰ Section 47(1)(i).

³⁴¹ Sections 47(1)(e), 47(1)(f) and 47(1)(j).

³⁴² Of course, where a child is raised by same-sex parents, the involvement of a donor and/or a gestational surrogate is impossible to hide. However, research suggests that many heterosexual couples who have conceived a child with the assistance of a gamete donor are reluctant to tell their children. See Jennifer Readings and others "Secrecy, Disclosure and Everything In-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22(5) *Reproductive BioMedicine Online* 485 at 492-494; and Eric Blyth "Information on Genetic Origins in Donor-Assisted Conception: Is Knowing Who You Are a Human Rights Issue?" (2002) 5(4) *Human Fertility* 185 at 189.

reality of their conception and birth. As Blyth and Frith explain:³⁴³

Donor-conceived people's ability to access information to which they are entitled is entirely dependent on their awareness of the nature of their conception and this is clearly compromised if parents do not tell their children about their conception in the first place.

Consequently, for the purposes of this thesis, the most important aspect of a child's right to know their parents is ensuring children are informed about the reality of their genetic and gestational origins. The best way to achieve this is to include such information on a child's birth certificate. For example, if the child was conceived using a sperm donor, basic identifying information about the sperm donor (such as their name and/or fertility clinic information, date of birth, and place of birth) should be included on the child's birth certificate, alongside details of the child's legal parents.³⁴⁴ Such an approach is detailed in Chapter Eight. This is the only way to sufficiently satisfy the rights of children to know their parents under article 7(1) and the needs of Māori children to know aspects of their whakapapa (as explained in Chapter Four).

B Right to Preserve One's Identity – Article 8

The right to know one's parents under article 7(1) of UNCROC can also be seen as part of a child's right to preserve their identity under article 8(1), which is particularly relevant for the purposes of this thesis.³⁴⁵ Article 8 proclaims:³⁴⁶

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

³⁴³ Eric Blyth and Lucy Frith "Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity" (2009) 23(2) *International Journal of Law, Policy and the Family* 174 at 185.

³⁴⁴ As previously mentioned, due to difficulties in enforcing the accurate provision of such information, some children's birth certificates will still not reflect the reality of their genetic and gestational origins, even if these proposed reforms are adopted. However, the reforms would at least provide an opportunity for this information to be included and send a strong message that this information matters for children.

³⁴⁵ Besson, above n 309, at 143.

³⁴⁶ UNCROC, above n 7, art 8.

In an international human rights context, this is an exceptional and innovative provision, in that no other human rights treaty contains anything similar.³⁴⁷ As Besson points out, UNCROC “is the first human rights convention to contain provisions granting explicitly not only the adult’s, but also the child’s right to know her origins”.³⁴⁸

The provision does not define the concept of identity. Therefore, “it is not obvious how or by whom the construction of this identity is to be determined”.³⁴⁹ Instead, the wording proffers a non-exhaustive meaning of identity that includes “nationality, name, and family relations”. Given the inclusive use of language, identity is not limited to these matters,³⁵⁰ and can also be seen to protect other important aspects of a child’s identity such as “the child’s personal history, its race, culture, religion, language and its physical appearance, abilities and inclinations”.³⁵¹ This expansive conception of identity is consistent with a social constructionist understanding of the self (as examined in the previous chapter), and reflects the social and political worlds children are born into, which are not of their own making. All aspects of a child’s identity are important and warrant further discussion and legal protection. However, this section focuses solely on identity under UNCROC in relation to a child’s rights to know their genetic origins.

It is widely agreed that the right to preserve one’s identity under article 8(1) of UNCROC also includes the right to be informed about one’s genetic origins.³⁵² As Freeman declares, “the right to identity is a right not to be deceived about [one’s] true origins”.³⁵³ Likewise, according to Giroux and De Lorenzi, UNCROC “recognizes a right to identity. One important aspect of this right is the right to know one’s origins”.³⁵⁴ This is consistent with the significance within Māori culture of children knowing their whakapapa.

However, this thesis takes this idea one step further and argues that a child’s right to preserve their identity includes their right, not just to know their genetic origins, but to

³⁴⁷ See Doek, above n 305, at 5; Jaime Sergio Cerda “The Draft Convention on the Rights of the Child: New Rights” (1990) 12(1) *Human Rights Quarterly* 115 at 115; and Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, The Hague, 1999) at 162.

³⁴⁸ Besson, above n 309, at 142.

³⁴⁹ Anat Scolnicov “The Child’s Right to Religious Freedom and Formation of Identity” (2007) 15(2) *The International Journal of Children’s Rights* 251 at 266.

³⁵⁰ Hodgson, above n 297, at 265. See also Cerda, above n 347 at 116 where the author notes “that the elements specifically mentioned [in article 8] are purely illustrative, and others could therefore be envisaged.”

³⁵¹ Besson, above n 309, at 144. See also Hodgkin and Newell, above n 236, at 115; and Hodgson, above n 297, at 265.

³⁵² See Doek, above n 305, at 12.

³⁵³ Freeman, above n 6, at 291.

³⁵⁴ Giroux and De Lorenzi, above n 305, at 93.

know their gestational parentage as well. This is based on the theories of social and narrative identity examined in Chapter Four, which recognise the importance of knowing where you came from in order to construct and shape your identity moving forward. Part of knowing where one comes from relates to the importance of knowing the circumstances surrounding one's birth.³⁵⁵ Such ideas reverberate with the centrality of "cosmogonical whakapapa" within Māori culture, as discussed in the previous chapter.³⁵⁶

This approach can be accommodated within the term "family relations", which is "usually interpreted as going beyond knowing one's legal parents" and extending "to biological and birth parents as well".³⁵⁷ This interpretation is also consistent with the all-encompassing definition of parentage argued for above regarding a child's right to know their parents under article 7(1). The rationale for adopting a broad definition of parentage here is even more applicable than it was under article 7(1), because the use of the term "family relations" is undoubtedly of wider application than the term "parents"; and arguably incorporates other family members who are important to the child.³⁵⁸ Therefore, if article 7(1) were to be construed narrowly in such a way as to exclude some aspects of a child's genetic or gestational parentage, article 8(1) could be used to protect a child's right to obtain information about these individuals. Indeed, it would be disingenuous to argue that a child's genetic and gestational parents are not their family relations, when these are the individuals responsible for bringing the child into the world.

In terms of the obligations to uphold a child's right to preserve their identity, the state has a duty "to safeguard the child's right to identity as a right to protection of ties meaningful to the child" because such ties "delineate the child's identity".³⁵⁹ This generates both negative and positive duties; negative in terms of the obligation not to interfere with a child's identity; and positive as a result of the need to record information necessary to enhance a child's sense of identity.³⁶⁰ As Hodgkin and Newell note, article 8(1) requires "both the non-interference in identity and the maintenance of records relating to

³⁵⁵ Besson, above n 309, at 140.

³⁵⁶ See Roberts and others, above n 244, at 3-4.

³⁵⁷ Besson, above n 309, at 143. See also Hodgkin and Newell, above n 236, at 114.

³⁵⁸ Hodgkin and Newell, above n 236, at 114.

³⁵⁹ Ronen, above n 175, at 147. Note that Ronen's conception of ties that are meaningful for children include animals as well as geographical places and inanimate objects. This idea links to broader concepts of whakapapa not examined in detail in this thesis, but which are acknowledged as being of vital importance for many Māori individuals. See Roberts, above n 249; and Roberts and others, above n 244.

³⁶⁰ Giroux and De Lorenzi, above n 305, at 85-86.

genealogy, birth registration and details relating to early infancy that the child could not be expected to remember”.³⁶¹

UNCROC does not just give a child the right to preserve their identity; under article 8(2) it also obliges signatories who have ratified UNCROC to assist a child in re-establishing their identity where they have been “illegally deprived” of some aspect of it.³⁶² Given that the “concealment of reality ... may have serious negative consequences for the development of personal identity and well-being”, this thesis argues that a child whose birth certificate is inaccurate, in that it does not match the reality of their conception and the circumstances surrounding it, is unlawfully deprived of an important aspect of their identity.³⁶³ This deprivation is especially evident when children are conceived as a result of AHR following gamete or embryo donation and are not informed of their genetic heritage.³⁶⁴

Of course, UNCROC was not constructed with donor-conceived children or children born via surrogacy in mind, but signatories who have ratified UNCROC have an obligation to implement and interpret article 8(1) “in a dynamic manner and with the present day conditions in mind”.³⁶⁵ This is because “the Convention is a living instrument and its interpretation should reflect new developments that may arise in the area of children’s rights”.³⁶⁶ Such an approach was indeed envisioned at the time of the implementation of UNCROC. As Cerda explained in 1990:³⁶⁷

... the future interpretation of the Convention could be made more comprehensive by the addition, either to the body of principles, or through jurisprudence, of aspects of the concept of identity that were not envisaged by the authors of the text themselves.

³⁶¹ Hodgkin and Newell, above n 236, at 115.

³⁶² UNCROC, above n 7, art 8(2).

³⁶³ See Doek, above n 305, at 11.

³⁶⁴ Besson, above n 309, at 140.

³⁶⁵ Doek, above n 305, at 13. In fact, this provision was drafted as a direct response to Argentina’s military junta that took place between 1976-1983, in which large numbers of children were kidnapped or separated from their families by force. Some of these children were later adopted by other families with military connections. After the conclusion of the military junta, there was a desire to reunite these children with their birth families, so as to re-establish their “true and genuine identity as soon as possible”. Thus, the first draft of article 8 was submitted by the delegation of Argentina as a response to “politically motivated disappearances of children”. See Doek, above n 305, at 7. See also Besson, above n 309, at 143.

³⁶⁶ Doek, above n 305, at 3.

³⁶⁷ Cerda, above n 347, at 116.

This provides further impetus to implement an expansive interpretation of the right to preserve one's identity under article 8(1) that includes a child's genetic and gestational origins, alongside their legal parentage. This is consistent with Besson's argument that:³⁶⁸

The final aim in the enforcement of the child's right to know [their] origins should be to reduce the growing gap between [their] biological, social and legal identities ... Only so will each individual child be able to live a coherent albeit truthful existence.

The importance of a child being able to live a "coherent" and "truthful existence" is one of the primary justifications for the reforms proposed in Chapter Eight of this thesis, which would ensure a child's birth certificate contains information about their genetic and gestational parentage and accommodates more than two legal parents.³⁶⁹ Such reforms would better meet Aotearoa New Zealand's obligations under articles 7 and 8 of UNCROC to uphold the rights of children to know their parents and to preserve their identities.

III Legal Conceptions of Identity in Aotearoa New Zealand

Aside from ratifying UNCROC, Aotearoa New Zealand has also emphasised the importance of a child's identity in our domestic legislation and case law. This section sets out the legislative provisions relevant to the protection of a child's identity contained in the Care of Children Act, the Oranga Tamariki Act 1989, and the HART Act.³⁷⁰ This section also examines a variety of child-focused case law in order to demonstrate the legal importance placed upon a child's identity within Aotearoa New Zealand.

A Legislation

The Care of Children Act and the Oranga Tamariki Act are key parts of Aotearoa New Zealand's child law regime. Both statutes include provisions that expressly acknowledge the importance of a child's identity. Disappointingly, other significant family law statutes, such as the Status of Children Act and the Adoption Act 1955 do not expressly recognise the importance of preserving a child's identity. The HART Act does not specifically mention the word identity, but does emphasise the importance of children born as a result of AHR involving embryo or gamete donation knowing their genetic origins and having

³⁶⁸ Besson, above n 309, at 157.

³⁶⁹ At 157.

³⁷⁰ The Oranga Tamariki Act is also known as the Children's and Young People's Well-Being Act. However, for the purposes of this thesis, it is solely referred to as the Oranga Tamariki Act.

access to information about their donors, which is implicitly premised on notions of identity.

1 *Care of Children Act 2004*

This Act primarily focuses on the guardianship and care of children in Aotearoa New Zealand. It recognises “certain rights of children”,³⁷¹ and sets out the “duties, powers, rights, and responsibilities” of parents and guardians.³⁷² The overall purpose of the Act is to “promote children’s welfare and best interests, and facilitate their development”.³⁷³ As a result, the legislation elevates the welfare and best interests of children to a mandatory consideration. As s 4(1) of the Act states: “[t]he welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration”.³⁷⁴

As part of the assessment of the welfare and best interests of children, the court must take into account the principles listed in s 5.³⁷⁵ For the purposes of this thesis, the most relevant principle is s 5(f), which states that “a child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.”³⁷⁶ The wording used is inclusive, which allows for a variety of different aspects of a child’s identity to be incorporated within the provision, as well as the examples listed. Arguably, whakapapa easily fits within this wording, despite not being specifically mentioned. Both s 5(f) of the Act and article 8(1) of UNCROC talk of preserving a child’s identity; however, s 5(f) of the Act takes this one step further by seeking, not just to preserve a child’s identity, but to strengthen it. This is clear evidence that a child’s identity is a crucial part of child law in Aotearoa New Zealand.³⁷⁷

2 *Oranga Tamariki Act 1989*

Though not as directly relevant for the purposes of this thesis, another important child-focused statute, the Oranga Tamariki Act, also expressly refers to the importance of a child’s identity. This Act will be significantly amended when the remaining parts of the

³⁷¹ Care of Children Act, s 3(1)(b).

³⁷² Section 3(2)(a).

³⁷³ Section 3(1)(a).

³⁷⁴ Section 4(1).

³⁷⁵ Section 4(2)(a)(ii).

³⁷⁶ Section s 5(f).

³⁷⁷ However, one should not over-emphasise the importance of s 5(f), at the expense of other s 5 factors, as demonstrated by the Court of Appeal decision in *Nikau v Nikau*. In this case, mātua whāngai sought leave to appeal from a decision granting day-to-day care of a child (who had previously been in their care) to the child’s genetic parents. In declining leave, the Court of Appeal agreed with Woolford J in the High Court that too much weight had been placed on s 5(f) in the earlier Family Court decision that granted day-to-day care to the mātua whāngai. See *Nikau v Nikau*, above n 16, at [26] and [34].

Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 comes into force on 1 July 2019 (or earlier by Order in Council).³⁷⁸ Given the temporal proximity of these changes, this thesis refers solely to the forthcoming provisions.

The stated object of the Act is to “promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups”.³⁷⁹ It does this by “supporting and protecting children” to “prevent them from suffering harm ... abuse, neglect, ill-treatment, or deprivation”.³⁸⁰ In some circumstances, this may involve removing a child or young person from their legal parents. It also ensures that children and young persons who commit offences are held accountable and encouraged “to accept responsibility for their behaviour” and are responded to in a way that “promotes their rights and best interests and acknowledges their needs”.³⁸¹

The significance of a child’s identity is acknowledged in two vital parts of the Act. Firstly, the Act provides a list of overarching principles that must guide any court or individual exercising power under the Act.³⁸² This includes adopting a “holistic approach” that views a child “as a whole person” based on the consideration of an inclusive list of factors pertaining to a child’s identity, including their developmental potential, whakapapa, cultural and gender identity, and sexual orientation.³⁸³ Secondly, the importance of a child’s identity is further recognised in the care and protection part of the Act. The specific care and protection principles contained in s 13 of the Act require the placement of children who must be removed from their own family group to be guided by the recognition and promotion of “the importance of mana tamaiti (tamariki), whakapapa, and whanaungatanga”.³⁸⁴ The Act provides the following definitions of these terms:³⁸⁵

³⁷⁸ Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act, s 2.

³⁷⁹ Oranga Tamariki Act, s 4 (as will be amended by s 9 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act).

³⁸⁰ Section 4(1)(b)(i) (as will be amended by s 9 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act).

³⁸¹ Section 4(1)(i)(i) (as will be amended by s 9 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act).

³⁸² Section 5 (as will be amended by s 11 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act).

³⁸³ Section 5(1)(b)(vi) (as will be amended by s 11 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act).

³⁸⁴ Section 13(2)(i)(iii)(C) (as will be amended by s 16 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act).

³⁸⁵ Section 2(1) (as will be amended by s 7 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act). This will be the first time these terms have been legislatively defined (and indeed the first time the term “mana tamaiti (tamariki)” has appeared in legislation). This demonstrates a move towards greater recognition of key Māori conceptions of identity. This is consistent with the emphasis placed on aspects of whakapapa in the previous chapter, and using the concept as a rationale for birth certificates to include children’s genetic parentage.

mana tamaiti (tamariki) means the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person.

whakapapa, in relation to a person, means the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend.

whanaungatanga, in relation to a person, means—

- (a) the purposeful carrying out of responsibilities based on obligations to whakapapa:
- (b) the kinship that provides the foundations for reciprocal obligations and responsibilities to be met:
- (c) the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity, and connection.

All three of these terms are significant in relation to a child’s sense of identity, especially regarding a child’s genetic and cultural identity. The fact both sets of core principles contained within the Oranga Tamariki Act recognise the importance of a child’s identity when care and protection decisions are being made suggests that Aotearoa New Zealand has incorporated at least some aspects of a child’s right to preserve their identity from article 8(1) of UNCROC into our domestic law. This is further supported by the fact the Act expressly acknowledges the operation of UNCROC, stating that during decision-making processes, a child’s “rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld”.³⁸⁶

3 *Human Assisted Reproductive Technology Act 2004*

The HART Act regulates AHR procedures and research. It prohibits “undesirable” activities, such as: the commercialisation of gametes and embryos,³⁸⁷ human embryo sex selection,³⁸⁸ cloning of human embryos for reproductive purposes, the creation of hybrid embryos (as a result of the combination of human and non-human gametes or human and

³⁸⁶ Section 5(1)(b)(i) (as will be amended by s 11 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act).

³⁸⁷ HART Act, s 13.

³⁸⁸ Section 11.

non-human embryos), and the implantation of human embryos in animals, or animal embryos in humans.³⁸⁹

While the HART Act does not address general conceptions of identity, it does expressly acknowledge the need for individuals born as a result of gamete or embryo donation to “be made aware of their genetic origins and be able to access information about those origins”.³⁹⁰ Indeed, one of the express purposes of the Act is to “establish a comprehensive information-keeping regime to ensure that people born from donated embryos or donated cells can find out about their genetic origins”.³⁹¹ To that end, the Act requires fertility providers to give the Registrar-General (appointed under the Births, Deaths, Marriages, and Relationships Registration Act and the State Sector Act 1988) a specified list of information about donors where the donated gamete or embryo results “in the birth of a living donor offspring”.³⁹² Despite knowing one’s genetic origins having particular significance for Māori children (as examined in the previous chapter), whakapapa is not specifically mentioned in the HART Act. However, the Act does expressly acknowledge that “the needs, values, and beliefs of Māori should be considered and treated with respect”,³⁹³ which signifies that the importance of whakapapa can easily be incorporated within the current wording.

As discussed above, children knowing their genetic origins is an important aspect of their identity under articles 7(1) and 8(1) of UNCROC, and plays an important role in the establishment of Māori children’s whakapapa. The fact the HART Act expressly recognises the importance of individuals being able to find out about their genetic origins demonstrates the significance already placed upon this information within our domestic legislation. This thesis merely argues for an extension of these pre-existing principles to encompass the information contained in a child’s birth certificate.

B Case Law

The courts in Aotearoa New Zealand have not extensively canvassed a child’s right to identity, and no agreed theoretical approach to identity has been adopted. However, the courts do generally acknowledge that a child’s identity is important in a variety of family law matters. Unsurprisingly, the majority of the cases emphasising the importance of a child’s identity are decided under the Care of Children Act. As discussed above, this Act requires courts to take into account the principles listed in s 5, which include preserving

³⁸⁹ See ss 8 and 5 of the HART Act, and the list of prohibited actions contained in Schedule 1.

³⁹⁰ Section 4(e).

³⁹¹ Section 3(f).

³⁹² Section 48(2).

³⁹³ Section 4(f).

and strengthening a child's identity.³⁹⁴ Adoption cases also commonly refer to a child's right to identity.

In some cases, the concept of identity is merely acknowledged via a generalised statement as to its importance, without the provision of detailed analysis. For example, in *Dradler v Ministry of Social Development*, in refusing to make an interim adoption order, Judge Riddell said "[l]egal identity is not a concept which can be glossed over."³⁹⁵ In other cases, a child's sense of identity is directly connected to the child's genetic parents. In *Prescott v Cooper*, a case in which a father was seeking unsupervised contact with his four-year-old son, Judge Moss noted that the child's identity was "bound up with the identity of each of his parents" and she was concerned that the child's identity would not be "fully expressed" if he did not "have a constructive nurturing relationship with each of his parents".³⁹⁶ The primacy accorded to a child's genetic parentage is also apparent in the High Court decision of *Nikau v Nikau*, a case involving a dispute between birth parents and mātua whāngai over a child's day-to-day care.³⁹⁷ In this case Woolford J held that the term "parent" in s 5(b) of the Care of Children Act, which states that "a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians" refers solely to a genetic parent. As Woolford J said, "the reference to 'parent' in s 5(b) must be a biological parent".³⁹⁸

This mirrors some cases decided under the Guardianship Act 1968 (before the enactment of the Care of Children Act) that emphasised the importance of genetic parentage relationships between children and parents. In *Williams v Cousins*, a case involving a genetic father seeking to be appointed a guardian of his two children aged five and four years of age, Judge Inglis QC highlighted the significance of genetic connections when he said: "the child's welfare will ordinarily be enhanced by the sense of personal identity which comes from the child's blood tie and continuing contact with each parent".³⁹⁹ However, the Judge noted that genetics alone were not enough to establish that the genetic

³⁹⁴ Care of Children Act, s 5(f).

³⁹⁵ *Dradler v Ministry of Social Development* [2015] NZFC 1477 at [97].

³⁹⁶ *Prescott v Cooper* [2014] NZFC 4869 at [50]. See also *Atkinson v Ministry of Social Development* [2009] NZFLR 625 (HC), where a two-year-old child's contact with his genetic mother four times a year was deemed sufficient to establish his sense of identity.

³⁹⁷ *Nikau v Nikau*, above n 308.

³⁹⁸ At [47]. The child's mātua whāngai sought leave to appeal this decision. While the Court of Appeal agreed that there was "an issue of law capable of bona fide argument" as to whether the emphasis on genetic parentage was "correct in light of tikanga" and "the status of whāngai parents in Te Ao Māori", they did not make a ruling on the particular issue and declined leave for appeal. See *Nikau v Nikau*, above n 16, at [29] and [34].

³⁹⁹ *Williams v Cousins* FC New Plymouth FP043/238/99, 8 June 2000 at 3.

father should be awarded guardianship of the child, and that he also needed to demonstrate “the measure of parenting responsibility that he can offer the children”.⁴⁰⁰

Some cases display a more erudite interpretation of the importance of a child knowing their genetic origins. For example, in *Re B*, a case about the best placement for a four-year-old boy, decided under what is now known as the Oranga Tamariki Act, Judge Ullrich QC demonstrated a nuanced understanding of the vital connections between genetic parentage, whakapapa, and identity that intersect with the theoretical discussion of these concepts in the previous chapter.⁴⁰¹ The Judge unequivocally acknowledged the importance of genetic connections, especially for Māori children, and how vital knowing such information is from an identity development perspective, stating:⁴⁰²

A placement for a child completely outside his or her blood family may sever all ties with his or her genetic heritage. That connection with blood family is socially important, particularly in [Māori] society where whakapapa (knowledge of one’s genealogy) provides identity, a sense of belonging, history and a sense of one’s place in the world ... Knowledge about our families has also become more relevant as genetic research reveals how much of our personalities and health issues are attributable to our genetic inheritance.

Despite making a custody order under s 101 of the Act in favour of the child’s non-kin caregivers, Judge Ullrich QC was cognisant of the need for the child to have regular contact with his mother and maternal grandmother, as well as his uncle, aunt, and cousin to preserve the child’s familial connection and sense of identity.⁴⁰³

Several other child law cases also emphasise the importance of whakapapa to a child’s sense of identity. For example, in *BL v AG*, Whata J stated that “[w]hakapapa is an ingredient of identity and providing physical connection to a child’s whakapapa, to a child’s heritage, is a legitimate consideration.”⁴⁰⁴ Likewise, Malosi J in *JH v FM* acknowledged that learning about their whakapapa would enable children “to know [their] place in the world, to have a sense of belonging and security about who [they are] and from whom [they descend]”.⁴⁰⁵ However, such cases provide a general, rather than extended, analysis of whakapapa.

⁴⁰⁰ At 4.

⁴⁰¹ *Re B* FC Porirua FAM-2005-091-556, 26 April 2007.

⁴⁰² At [16].

⁴⁰³ At [130] to [134].

⁴⁰⁴ *BL v AG* [2018] NZHC 1581, [2018] NZFLR 516 at [22].

⁴⁰⁵ *JH v FM* FC Manukau FAM-2009-092-2474, 28 April 2010 at [25].

In other cases, judges take an expansive view of identity that can be seen as incorporating some aspects of narrative identity theory as conceptualised in the previous chapter. For example, in *LR v FFGR*, a case focused on contact arrangements for three children aged 15, 10, and eight years of age, it was held that a child’s right to preserve and strengthen their identity extends beyond the inclusive list of matters contained in s 5(f) of the Care of Children Act. As Judge Binns said, identity “encompasses a wider view of their own individual identities and is not just related to culture, language and religion”.⁴⁰⁶ Likewise, in *Spalding v Spalding*, a case about appropriate care arrangements for an 11-year-old child as a result of safety concerns about the mother’s partner, Judge de Jong justified a belated judicial interview with the child on the basis of preserving and strengthening the child’s identity. The Judge conceived of his obligation under the Care of Children Act to preserve and strengthen the child’s identity broadly, incorporating the child’s identity and “everything else that shapes a young person’s sense of self, self esteem, self worth and confidence as contemplated by s 5(f)”.⁴⁰⁷

Parallels between concepts of legal identity and narrative identity theory are especially demonstrable in *Gebrien v Todd*, a complex case about the day-to-day care, contact, and safety of a four-year-old girl.⁴⁰⁸ In this case, Judge Moss expressly conceptualised a view of identity that incorporated the importance of children’s narratives about themselves. Here, the child’s mother had been intentionally deceptive about the identity of the child’s genetic father, which resulted in the generation of an inaccurate birth certificate naming the mother’s partner as the father of the child instead of the child’s genetic father. The Judge found that the mother’s actions had “compromised” the child’s entitlement under UNCROC to “know her parents”,⁴⁰⁹ and held that the child was “entitled to know an accurate narrative for her parentage and wider family”.⁴¹⁰ To rectify this deception, Judge Moss emphasised the importance of the child being told the truth, noting that the child needed “to have a carefully scripted narrative introduced to her urgently to render normal the information about her parentage which is new to her.”⁴¹¹

Requiring a child to be given an accurate narrative about their genetic origins intersects with the key tenets of identity theory espoused in the previous chapter, especially in relation to narrative identity theory and the importance of whakapapa. As discussed throughout this thesis, knowing the truth about one’s genetic origins is a vital aspect of a child’s identity and birth narrative, as demonstrated by its express legal recognition in the

⁴⁰⁶ *LR v FFGR* [2012] NZFC 8682 at [6].

⁴⁰⁷ *Spalding v Spalding* [2015] NZFC 9963 at [29].

⁴⁰⁸ *Gebrien v Todd* [2015] NZFC 4949.

⁴⁰⁹ At [175].

⁴¹⁰ At [180].

⁴¹¹ At [184].

HART Act. It should also be read into articles 7 and 8 of UNCROC, as well as s 5(f) of the Care of Children Act and ss 5(g) and 13(2)(f)(iii) of the Oranga Tamariki Act as discussed above.

The significance placed on a child's birth certificate reflecting the truth of their genetic origins in this case is also especially relevant for the purposes of this thesis. Here, Judge Moss noted that the mother's deception in relation to intentionally registering her partner instead of the genetic father on the child's birth certificate needed to "be rectified", and said that "any official or documented basis for [the child's] identity must be corrected forthwith".⁴¹² It transpired that a new accurate birth certificate had been produced, but Judge Moss was concerned that the mother still had the original inaccurate birth certificate in her possession. Therefore, the Judge asked counsel "to consider how the earlier birth certificate can be secured, so that the mother cannot in the future use it".⁴¹³

This case demonstrates the value placed on birth certificates in relation to a child's identity development and the need for such documents to be accurate. This is inconsistent with current practices involving gamete and embryo donors being excluded from a child's birth certificate, and the fact that, as discussed above, children born as a result of gamete and embryo donation are unaware of their ability to access information about their donor or donors if they are unaware of their origins in the first place. The court's negative view of the mother's deception in this case is therefore particularly ironic given the state's role in the production of birth certificates known to be inaccurate in relation to a child's genetic origins. Indeed, the Status of Children Act prevents donors from being included on a child's birth certificate, even where all the individuals involved wish the donor to be included. The reforms proposed in this thesis, would remedy such deception and better enhance a child's right to know their identity and whakapapa, facilitating a child and their family constructing their identity alongside accurate information about the child's genetic origins.

IV Summary of Chapter Five

In a legal context, the concept of identity cannot be considered in a vacuum. To that end, this chapter outlined the legal basis for the reforms suggested in this thesis. It first considered legal identity in relation to our international obligations under articles 7 and 8 of UNCROC. This discussion suggested that children's rights to know their parents and preserve their identities should be interpreted expansively, in such a way as to incorporate all aspects of a child's parentage. This chapter also considered the protection of identity within key provisions of our domestic family law legislation and established support for

⁴¹² At [175].

⁴¹³ At [175].

the inclusion of genetic and gestational parentage within the pre-existing legislative framework. The cases examined here conceptualise identity in a variety of different ways. They largely emphasise the importance of knowing one's genetic origins and whakapapa, and at times adopt expansive definitions of identity that parallel aspects of narrative identity theory. Such precedents demonstrate the ability to accommodate theoretical and cultural conceptions of identity within family law and underpin an extension of these principles to birth certification and parentage models. The following chapter explores whether legal conceptions of parentage could be expanded to include more than two legal parents.

CHAPTER SIX

Legal Parentage and the Two-Parent Paradigm

Children, who are being parented by more than two adults, are not legally protected in their relationships with more than two parents. As a result, children can be deprived of their relationships with people who have been functioning as their parents, people who they love and call ‘mom’ and ‘dad’.⁴¹⁴

I Introduction to Chapter Six

Conceptions of legal parentage in Aotearoa New Zealand have not kept pace with modern family formation. This chapter examines the current model of legal parentage, with a particular focus on the inconsistent treatment of genetic, gestational, and social connections it generates. It critiques one of the core principles of legal parentage, the two-parent paradigm, which prevents children from having more than two legal parents at any given time. It ultimately recommends the expansion of legal parentage to provide legal recognition to more than two individuals (further developed in Chapter Seven), and addresses possible concerns raised by such a proposal.

II Conceptualising Legal Parentage

This section highlights that the current definition of legal parentage is inconsistent and insufficiently child-focused. It also provides a consideration of the connection between legal parentage and the rights and responsibilities of guardianship.

A Who is a Legal Parent?

Legal parentage embodies aspects of genetic, gestational, and social conceptions of parentage, alongside other factors. This creates a number of inconsistent pathways to becoming a legal parent that, in several instances, prioritise the relationships (or lack thereof) between parents, rather than as between children and their genetic, gestational, and social parents. As previously discussed, in some circumstances, these rules fail to give sufficient weight to the importance, in terms of identity theory and Māori conceptions of identity, of children knowing their genetic origins or whakapapa and do not meet our obligations in this regard under UNCROC.

⁴¹⁴ Ann E Kinsey “A Modern King Solomon’s Dilemma: Why State Legislatures Should Give Courts the Discretion to Find that a Child Has More than Two Legal Parents” (2014) 51(1) San Diego Law Review 295 at 297.

Despite the historical emphasis on genetic parentage, genetics have very little to do with attaining legal parentage. Many genetic parents become legal parents, not through their genetic connections to children, but due to their relationships with gestational carriers and surrogates. Other genetic parents fail to obtain legal parentage as a result of their classification as a gamete donor. Unless gamete donors are in an intimate relationship with the gestational carrier (either during or after conception via AHR), they are expressly excluded from legal parentage.⁴¹⁵ Consequently, many genetic parents are not recorded on children's birth certificates. This prevents some children from accessing details about their genetic heritage, which UNCROC arguably guarantees. These factors underpin the proposed inclusion of known information about all children's genetic origins on their birth certificates (as specified in Chapter Eight).

Gestational parentage guarantees the individual giving birth legal parentage status, regardless of whether the child was conceived via sexual intercourse or AHR.⁴¹⁶ This supersedes any genetic relationship to the child other individuals may have, and applies equally to gestational carriers and surrogates. Therefore, the current legal parentage model privileges gestation above all else. This recognises the fundamental connection between gestational carriers (or surrogates) and children, which can significantly impact the health, development, and future identities of children (as examined in Chapter Four).

However, the priority afforded to gestation does not always extend to informing children of their gestational heritage. Gestational surrogates are legal parents upon birth and recorded on the child's birth certificate accordingly. However, once intending parents adopt children, new birth certificates are generated containing only the names of the adoptive parents. Gestational surrogates' details are relegated to original birth certificates, which children are unable to access until they turn 20.⁴¹⁷ This undervalues the important connection between children and gestational surrogates, despite the priority given to this connection by legal parentage rules in the first place. It also unnecessarily hinders the ability of children to know their gestational heritage, leaving it entirely to the intended parents' discretion as to whether they inform their children. While children can access this information once they reach adulthood, this is problematic (as stated in Chapter Five), given that their ability to seek such information is "compromised if parents do not tell their children about their conception in the first place".⁴¹⁸ This provides the rationale for including details about gestational carriers and surrogates on every child's birth certificate.

⁴¹⁵ Status of Children Act, ss 19-24. There is currently no mechanism for donors' partners to become legal parents.

⁴¹⁶ Sections 5 and 17.

⁴¹⁷ Adult Adoption Information Act, ss 2 and 4.

⁴¹⁸ Eric Blyth and Lucy Frith, above n 343, at 185.

Other individuals obtain legal parentage, not based on genetic, gestational, or social parentage, but due to their relationships with gestational carriers or surrogates. To this end, an individual married to someone who gestates a child becomes a legal parent to children born during their marriage or within 10 months of its dissolution “by death or otherwise”.⁴¹⁹ This provision does not appear to extend to individuals in de facto relationships.⁴²⁰ This presumption of legal parentage seems to assume a genetic relationship between the spouse of a gestational carrier or surrogate and the resulting child. This is demonstrated by the fact legal parentage is presumed “in the absence of evidence to the contrary”.⁴²¹ Even where there is “evidence to the contrary”, this individual is still deemed to be a legal parent, where for example, their spouse, acting as a gestational surrogate, gives birth to a child neither of them are genetically related to.⁴²²

Inexplicably, it is easier for individuals in de facto relationships with gestational carriers or surrogates to obtain legal parentage of children conceived via AHR (with whom they have no genetic connection) than acquiring legal parentage of children conceived via sexual intercourse in circumstances where they may indeed be genetic parents. In the former situation, the Status of Children Act operates to provide a presumption of legal parentage, whereby such individuals are deemed to be “for all purposes, a parent of any child of the pregnancy”.⁴²³ To obtain legal parentage in the latter circumstances, they must jointly register the child’s birth with the gestational carrier, or jointly sign a deed to this effect.⁴²⁴ Indeed, being named on a child’s birth certificate is “prima facie evidence” of legal parentage, which is why decisions about who is included on a birth certificate require careful consideration.⁴²⁵ If either parent refuses to cooperate, a declaration of paternity can be sought from the Family Court or High Court deeming the individual to be a legal parent.⁴²⁶ Such methods of obtaining legal parentage apply to those in de facto

⁴¹⁹ Status of Children Act, s 5.

⁴²⁰ There is some debate as to whether this provision extends to de facto relationships or is limited solely to marriage. See Law Commission *New Issues in Legal Parenthood*, above n 75, at 119. For the purposes of this thesis, it is assumed to only apply to marriage.

⁴²¹ Status of Children Act, s 5.

⁴²² Section 18.

⁴²³ Section 18.

⁴²⁴ Section 8.

⁴²⁵ Section 8. *Hemmes v Young* provides clear authority that s 8 (as well as ss 7 and 10) of the Act pertain to the acquisition of legal parentage even though this is not explicitly stated in the legislation. See *Hemmes v Young* [2005] NZSC 47, [2006] 2 NZLR 1 at [11]-[14]. See also Births, Deaths, Marriages, and Relationships Registration Act, s 71.

⁴²⁶ Status of Children Act, ss 8 and 10. Gestational carriers can also seek paternity orders under s 47 of the Family Proceedings Act 1980. Under s 51, the Family Court will not make such an order unless the court is satisfied that the individual is “the father of the child”.

relationships, as well as situations where the child's conception was the result of a brief sexual encounter.

These alternate pathways highlight the inconsistent treatment of genetic and social parents, and illustrate that legal parentage is not child-focused. Whether someone is a legal parent of a child is not necessarily based on their intended relationship with them, but rather on their particular relationship (of lack thereof) with the individual who gives birth. This privileges relationships between adults, as opposed to relationships between children and their genetic, gestational, and social parents. From a child-focused perspective, being a legal parent should primarily be about the intended (or current) parent-child relationship. Black agrees, stating that the "best interest of the child requires" us to "prioritize the vertical relationship between parent and child, rather than the horizontal relationship with the other parent".⁴²⁷

The child-focused nature of adoption (which encompasses social and legal parentage) is an obvious exception that actively seeks to enhance the "vertical" relationships between children and the individuals raising them (or intending to raise them).⁴²⁸ Consequently, neither an interim or final adoption order can be made unless the court is satisfied that the "welfare and interests of the child will be promoted by the adoption" and that the individual seeking to adopt the child "is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child".⁴²⁹ The proposed reforms, whereby the child's original legal parents would remain present on their birth certificate alongside the child's adoptive parents, do not seek to diminish the significance of the child's relationship with their adoptive parents. They are designed to ensure children know their genetic origins and whakapapa from the outset, rather than continuing to conceal this information on a separate birth certificate not available to the child until adulthood.

The different ways of obtaining legal parentage demonstrate that the current system is overly complex and insufficiently child-focused (with the exception of adoption). Each route contains its own idiosyncrasies, which ultimately result "in a law which is neither just, certain or practical".⁴³⁰ This is amplified when children are conceived and born via AHR into diverse family structures. Such matters only become more complicated when considered alongside the operation of guardianship rights and responsibilities.

⁴²⁷ Lynda Wray Black "The Birth of a Parent: Defining Parentage for Lenders of Genetic Material" (2014) 92(4) *Nebraska Law Review* 799 at 837. See also Chapter Seven.

⁴²⁸ At 837.

⁴²⁹ Adoption Act, s 11.

⁴³⁰ Thérèse Callus "A New Parenthood Paradigm for Twenty-First Century Family Law in England and Wales" (2012) 32(3) *Legal Studies* 347 at 355.

B Legal Parentage and Guardianship

Despite the close associations between legal parentage and guardianship, they remain separate concepts. Legal parentage is about status, whereas guardianship is about the ability to exercise the rights and responsibilities traditionally associated with being a parent. As Barton and Douglas explain, “[t]he law distinguishes between legal parenthood – the status of being a parent – and parental responsibility – the power to act as a parent.”⁴³¹ Likewise, Rao asserts:⁴³²

... having the status of legal parent for a child does not necessarily mean holding ‘parental responsibility’ for that child – the two concepts, although connected, do not always go hand in hand.

The distinction between being a parent and acting as a parent is demonstrated by the fact that different individuals can fulfil these roles. In this way, a legal parent whose guardianship rights have been terminated, has no power to act as a parent, whereas a legal stranger can be afforded the guardianship rights and responsibilities of a parent.

As with legal parentage, there are several ways to become a child’s guardian under the Care of Children Act. Automatic guardianship is based on legal parentage status, whereby the individual and their married or civil union spouse (at any period between the child’s conception and birth) or their de facto partner (with whom they were living at any stage during the same period) are joint guardians.⁴³³ As explained in Chapter Three, the fact that individuals who would not otherwise be guardians of children, become guardians due to being named on the children’s birth certificates, once again illuminates the significance of birth certificates.⁴³⁴ Genetic parents who are not in a relationship with the gestational carrier or listed on a child’s birth certificate can also seek to be appointed as a guardian and they must be appointed “unless to do so would be contrary to the child’s welfare and best interests”.⁴³⁵ Non-parent individuals can also be appointed as guardians.⁴³⁶ Children can also be placed under the guardianship of the court, either generally, or for a particular reason such as consenting to medical procedures.⁴³⁷

⁴³¹ Chris Barton and Gillian Douglas *Law and Parenthood* (Butterworths, London, 1995) at 49.

⁴³² Anita Rao “Parenthood in the Context of Assisted Reproductive Treatment” in Ruth Cabeza and others (eds) *Surrogacy: Law, Practice and Policy in England and Wales* (LexisNexis, Bristol, 2018) 11 at 11.

⁴³³ Care of Children Act, s 17.

⁴³⁴ Section 18.

⁴³⁵ Care of Children Act, s 19.

⁴³⁶ Sections 21-27.

⁴³⁷ Sections 30-36.

Guardianship confers extensive obligations; to be a guardian of a child is to have “all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child”.⁴³⁸ This includes providing day-to-day care for a child, as well as “contributing to the child’s intellectual, emotional, physical, social, cultural, and other personal development”.⁴³⁹ The exercise of guardianship also involves making decisions for or alongside children “about important matters affecting” them such as their names, where they live, the medical treatment they undergo, their education, and their “child’s culture, language, and religious denomination and practice”.⁴⁴⁰ Therefore, significant power is bestowed upon guardians to assist them in raising the children in their care.

Given the broad rights and responsibilities that accompany guardianship, one way to address the difficulties caused by a lack of legal recognition for some social parents in multi-parent families, would be to appoint them as additional guardians.⁴⁴¹ They would not have legal parentage status (as they would under the reforms proposed in this thesis), but it would prevent them from being excluded from important matters affecting the child.⁴⁴² The child’s legal parents (and fellow guardians) would be obliged to act jointly with them when making such decisions.⁴⁴³ If conflict arose about day-to-day care or contact, they would also be entitled to apply for a parenting order without needing to seek leave from the court to apply.⁴⁴⁴ This suggests that, from a practical perspective, obtaining legal parentage status is wholly unnecessary in order to effectively raise children.

However, the benefits conferred upon children by legal parentage and guardianship are not functionally equivalent for three fundamental reasons.⁴⁴⁵ First, the rights and responsibilities of guardianship are entirely temporary. They expire when the child turns

⁴³⁸ Section 15.

⁴³⁹ Sections 16(1)(a) and 16(2).

⁴⁴⁰ Sections 16(1)(c) and 16(1)(b).

⁴⁴¹ There are two possible pathways depending on the nature of their relationship with the child’s legal parents. According to ss 21-25, if they are a “spouse or partner of a parent” they can be appointed as an additional guardian by written agreement to that effect, accompanied by a statutory declaration, which must be approved by a Family Court Registrar. Otherwise, under s 27, they can apply to become a court-appointed guardian, which requires a potentially stressful and expensive court hearing. This operates particularly unfairly on multi-parent families containing at least one same-sex couple, given the extra social parents are not usually in an intimate relationship with the same-sex couple who have legal parentage.

⁴⁴² Care of Children Act, ss 15 and 16.

⁴⁴³ Section 16(5).

⁴⁴⁴ Sections 47(1)(b) and 48.

⁴⁴⁵ Legal parentage and guardianship are also not equivalent in a personal sense. In making a final adoption order in *Re SJKB*, Judge O’Dwyer held that obtaining guardianship is not the same psychologically as obtaining an adoption order granting legal parentage. Judge O’Dwyer expressly acknowledged that guardianship does not provide the same “emotional and psychological security or ... sense of equality and unity” as legal parentage. See *Re SJKB* FC Dunedin FAM-2009-009-3958, 24 November 2010 at [45].

18, or earlier enters into a marriage, civil union, or de facto relationship.⁴⁴⁶ In contrast, legal parentage is forever and creates a “lifelong connection between a parent and a child” that continues even after the rights and responsibilities of guardianship have ceased.⁴⁴⁷ As Bainham explains, a “legal parent will remain a parent for life” and “the legal family relationship of parent and child will endure for good” despite the fact that “many of the legal effects of [guardianship] will terminate when the child attains majority”.⁴⁴⁸ Legal parentage also “defines all other recognised family relationships”.⁴⁴⁹ Second, the court can remove a guardian if they are “unwilling to perform or exercise [their] duties, powers, rights, and responsibilities” or where they are “for some grave reason unfit to be a guardian of the child”.⁴⁵⁰ However, given legal parentage is for life, it cannot be removed by the court in this way.

Third, the financial implications of these relationships differ significantly. Individuals exercising guardianship rights and responsibilities, who are not legal (or genetic) parents, are not usually obliged to pay child support.⁴⁵¹ This means, for example, that where individuals in a polyamorous multi-parent family separate, and not all social parents raising the children have legal parentage status, those who continue caring for the children are unable to obtain the same financial support they would otherwise have been entitled to if they were part of a two-parent family. This unfairly financially disadvantages the children in these families. In rare situations, step-parents can be deemed liable to pay child support.⁴⁵² However, many additional social parents in multi-parent families would not usually be considered step-parents (except perhaps in the polyamorous example provided above). Likewise, children whose non-legal social parents die, are unable to inherit under the Administration Act 1969 (if the guardian dies intestate),⁴⁵³ nor can they

⁴⁴⁶ Section 28. Guardianship also terminates upon the death of a child. See *Re JSB* [2010] 2 NZLR 236 (HC) at [45].

⁴⁴⁷ Rao, above n 432, at 11.

⁴⁴⁸ Andrew Bainham “Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions” in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds) *What is a Parent? A Socio-Legal Analysis* (Hart, Oxford, 1999) 25 at 34-35.

⁴⁴⁹ Rao, above n 432, at 11.

⁴⁵⁰ Care of Children Act, ss 28-29. Courts are generally reluctant to remove a guardian, except in the most compelling cases. See *N v C-D* [2009] NZFLR 193 (FC), where a genetic father who had seriously sexually assaulted his child was removed as a guardian. See also *Re B* FC Nelson FAM-2003-009-4314, 2 November 2005, where removal of a genetic father’s guardianship occurred due to his conviction for the manslaughter of the children’s genetic mother.

⁴⁵¹ Child Support Act 1991, s 7. See Law Commission *New Issues in Legal Parenthood*, above n 75, at 18.

⁴⁵² Child Support Act, s 99.

⁴⁵³ Administration Act 1969, ss 77-78.

bring a claim under the Family Protection Act 1955.⁴⁵⁴ As Rao explains, legal parentage alone “gives the child rights of inheritance from the parent”.⁴⁵⁵ This is analogous to *Keelan v Peach*, whereby the Court of Appeal held that children raised in customary Māori whāngai relationships which, much like guardianship, do not transfer children’s legal parentage to the individuals raising them, are not “children of the deceased” under s 3 of the Family Protection Act and therefore cannot bring a claim under the Act.⁴⁵⁶ Consequently, guardianship alone does not protect children’s relationships with their parental figures to the same degree that legal parentage does.⁴⁵⁷

Not everyone agrees that all social parents need equal legal rights. Several commentators argue that the best way to legally incorporate multi-parent families is to establish a “hierarchy of parentage”, whereby some individuals have legal parentage and others have some lesser form of legal recognition.⁴⁵⁸ The current interplay between legal parentage and guardianship explained above is entirely compatible with such an approach. However, from a child-focused perspective, upholding legal inequalities between the individuals raising children in intentional multi-parent families leaves children vulnerable to things that may go wrong in the future and cannot be justified. Consequently, the reforms proposed here are premised on the idea that within the specific subset of social parentage discussed in this thesis (as defined in Chapter One), social parents should have equal status as legal parents (with corresponding guardianship rights and responsibilities). This avoids the creation of second-class parents, which can increase familial conflict, and, most importantly, provides permanent legal recognition of the important relationships between children and the individuals who raise them. This would “ensure that many more children would have continued access to all the people with whom they have formed significant, parental attachments”.⁴⁵⁹

⁴⁵⁴ Family Protection Act 1955, ss 2-3. In some instances, step-children can bring claims, but many of the children in multi-parent families could not accurately be classified as step-children.

⁴⁵⁵ Rao, above n 432, at 11.

⁴⁵⁶ *Keelan v Peach* [2003] 1 NZLR 589 at [43].

⁴⁵⁷ See Law Commission *New Issues in Legal Parenthood*, above n 75, at 15-20.

⁴⁵⁸ See Melanie B Jacobs “Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents” (2007) 9(2) *Journal of Law & Family Studies* 309 at 335. See generally Myrisha S Lewis “Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents” (2016) 16(2) *Nevada Law Journal* 743; Alison Harvison Young “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family” (1998) 6(3) *Journal of Gender, Social Policy & and the Law* 505; and June Carbone and Naomi Cahn “Parents, Babies, and More Parents” (2017) 92(1) *Chicago-Kent Law Review* 9.

⁴⁵⁹ Deborah H Wald “The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage” (2007) 15(3) *Journal of Gender, Social Policy & and the Law* 379 at 410.

This does not mean that all legal parents will share day-to-day care or exercise their guardianship rights and responsibilities equally. All parents and/or guardians choose to exercise their rights and responsibilities in distinct ways. There are many examples of absentee legal parents in dual-parent families who never see their children and are not fundamentally involved in their daily lives. Other legal parents are involved in every aspect of their child's life. However, these individuals still have equal status as legal parents and guardians. Multi-parent families should have the same ability to choose how to structure their ongoing relationships with the children in their lives.

III Extending Legal Parentage Beyond the Two-Parent Paradigm

The complete modernisation of legal parentage is beyond the scope of this thesis.⁴⁶⁰ However, removing the two-parent paradigm, which permits a child to have no more than two legal parents at any given time, could make a big difference to the lives of children currently living in multi-parent families and those who may do so in the future. Consequently, this section deconstructs the two-parent paradigm and argues for the expansion of legal parentage to encompass more than two individuals.

A What is the Two-Parent Paradigm?

The two-parent paradigm is primarily based on genetics, whereby people are regarded “as having two parents, a mother and a father, each of whom contributes to the child's biological inheritance”.⁴⁶¹ This evokes the (now outdated) notion that children are primarily born to married heterosexual couples.⁴⁶² Historically, children born outside of marriage were deemed to be illegitimate and had fewer legal rights than children born within traditional nuclear families. Family law has since advanced and now acknowledges that all children (conceived via sexual intercourse or AHR) are of equal status, regardless of whether they were born to, or adopted by, two individuals in a formally recognised or de facto relationship, two individuals who were never in a

⁴⁶⁰ Other scholars have attempted to redesign parentage more generally with varying degrees of success. See Tim Bayne and Avery Kolers “Towards a Pluralist Account of Parenthood” (2003) 17(3) *Bioethics* 221; Joseph Millum “How Do We Acquire Parental Rights” (2010) 36(1) *Social Theory and Practice* 112; and John Lawrence Hill “What Does It Mean to be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights” (1991) 66(2) *New York University Law Review* 353. Bainham provides the most well-known example. His response is to differentiate between concepts of parentage, parenthood, and parental responsibility. See Bainham, above n 448.

⁴⁶¹ Johnson, above n 10, at 47.

⁴⁶² Carbone and Cahn, above n 458, at 13.

relationship, or just one individual.⁴⁶³ However, despite this progress, the two-parent paradigm remains. As Cammu notes:⁴⁶⁴

Although family law has changed drastically over the course of the past few decades, the recognition of *who* may be regarded as [a] parent did not bring along changes to *how many* legal parents a child may have.

Despite the limited role genetics actually plays in obtaining legal parentage, the two-parent paradigm continues to privilege genetic connections with children as being “more authentic and inexorable than socially inscribed ones”.⁴⁶⁵ This creates an internal inconsistency within the current model of legal parentage. Over-emphasising genetics also presents genetic family relationships as natural, uncontroversial, and uncomplicated by value judgments or politics, but this actually “masks historical and cultural constructions of family and kinship”.⁴⁶⁶ As Kennedy explains, “[p]opular and legal constructions of the family evoke an inherent and unproblematic nexus between biological and social kinship.”⁴⁶⁷

However, legal parentage is an inconsistent circumstance-specific mixture of genetic, gestational, and social parentage, and is not solely based on genetics. Indeed, the only factor that guarantees the conferral of legal parentage is the act of giving birth. Otherwise, one’s legal status depends on the particular situation, and often focuses on the types of relationships between the adults involved. This reflects the fact that the two-parent paradigm, and legal parentage itself, are social and legal constructions dependent on adult-focused norms, rather than a “natural” expression of family relationships. Consequently, they are like any other family law principles that can, and should, evolve over time to align with changing societal needs.⁴⁶⁸

B Deconstructing the Two-Parent Paradigm

Many children functionally, if not legally, have more than two parents. Therefore, the time has come to reform the two-parent paradigm. The need for change is premised on

⁴⁶³ Status of Children Act, s 3.

⁴⁶⁴ Nola Cammu “How Should We Name the Parents? The Challenges of Plus-Two-Parent Families for Legal Kinship Terminology” (2017) 31 *International Journal of Law, Policy and the Family* 328 at 339.

⁴⁶⁵ Aileen Kennedy “Biology, Parentage and Responsibility in Australian Family Law: Accounting for the ‘Vagaries of Nature’” in Craig Lind, Heather Keating, and Jo Bridgeman (eds) *Taking Responsibility, Law and the Changing Family* (Ashgate, Farnham, 2011) 177 at 177.

⁴⁶⁶ At 177.

⁴⁶⁷ At 196.

⁴⁶⁸ See Stoddard, above n 27, at 973; and Sifris “Lesbian Parenting in Australia”, above n 27, at 9-15 and 22-23.

the fact children can now have three genetic parents and that legal parentage should reflect the lived realities of all children, including those raised in multi-parent families.

1 Children with three genetic parents

While the notion of a child having more than two genetic parents might once have sounded far-fetched, this is now very much a reality; indeed, it has technically been possible for a child to have three genetic parents since the 1990s.⁴⁶⁹

The creation of children with three genetic parents is a consequence of AHR procedures designed to prevent individuals suffering from mitochondrial disease from passing this onto their children.⁴⁷⁰ Two techniques are possible, maternal spindle transfer (MST) and pronuclear transfer (PNT), which both involve mitochondrial donation from the ovum of a third party. MST involves removing the nucleus from the genetically problematic ovum and inserting it into a healthy donor ovum in place of the donor's discarded nucleus.⁴⁷¹ The resulting ovum, created from both ova (and therefore carrying both individuals' DNA; nuclear DNA from the individual with mitochondrial disease, and mitochondrial DNA from the donor) is then fertilised to create an embryo.⁴⁷² PNT involves creating two fertilised embryos, one using the genetically problematic ovum, and the other using the donor's ovum.⁴⁷³ The nuclear material from the fertilised embryo created from the donor's ovum is then removed and replaced with the nuclear material from the embryo created with the intended parent's ovum (avoiding passing on the faulty mitochondria).⁴⁷⁴ Such procedures have been regulated in the United Kingdom since 2015,⁴⁷⁵ and can only

⁴⁶⁹ The first children with three genetic parents were born in the 1990s in the United States via ooplasmic transfer (a different technique than that detailed below) which involved injecting fluid (including mitochondria) from donor ovum into the intended parent's ovum. This technique was banned in 2001 due to the creation of other genetic disorders. See Jessica Hamzelou "Everything You Wanted to Know About '3-Parent' Babies" (28 September 2016) *New Scientist* <www.newscientist.com>.

⁴⁷⁰ See Human Fertilisation and Embryology Authority "Mitochondrial Donation Treatment" <www.hfea.gov.uk>. Mitochondrial disease is an umbrella term representative of a number of serious degenerative conditions based on impaired mitochondrial function. Symptoms vary between individuals but can include developmental delays, seizures, muscle weakness, loss of vision, diabetes, liver failure, heart failure, and stroke. See New Zealand Mitochondrial Disease Foundation "What are the Symptoms?" <www.nzmito.org.nz>.

⁴⁷¹ See Human Fertilisation and Embryology Authority, above n 470.

⁴⁷² See Human Fertilisation and Embryology Authority, above n 470.

⁴⁷³ See Human Fertilisation and Embryology Authority, above n 470.

⁴⁷⁴ Ethical concerns have been raised about such procedures, especially in relation to PNT due to the resulting destruction of the embryo created using the intended parent's ovum. See Nishtha Saxena and others "Mitochondrial Donation: A Boon or Curse for the Treatment of Incurable Mitochondrial Diseases" (2018) 11(1) *Journal of Human Reproductive Sciences* 3 at 7-8.

⁴⁷⁵ The United Kingdom was the first country in the world to regulate these procedures. See Thana C de Campos and Caterina Milo "Mitochondrial Donations and the Right to Know and Trace One's

be employed where there is a risk that an extracted ovum “may have mitochondrial abnormalities” and “there is a significant risk that a person with those abnormalities will have or develop serious mitochondrial disease”.⁴⁷⁶

Such scientific advancements demonstrate just how out of date the two-parent paradigm is, and “compel family law to further alter its conception of parentage”.⁴⁷⁷ Carbone and Cahn agree, arguing that “three-parent in vitro fertilization” supports the “recognition of three or more parents”, especially given that “today’s families frequently involve more than two adults in caring for a child”.⁴⁷⁸ This disconnect between the two-parent paradigm and the realities of modern family formation will only increase as the future of AHR reveals itself, and as scientific advancements that already exist, such as transgender pregnancy,⁴⁷⁹ womb transplants,⁴⁸⁰ cloning,⁴⁸¹ and the creation of ova and sperm from stem cells,⁴⁸² become increasingly common routes to having a family. It is not a question of *if* legal parentage will be shared between more than two individuals in the future, but rather *when* legal definitions of parentage will “inexorably result in the recognition of multiple legal parents”.⁴⁸³

2 Children with more than two social parents

A further rationale for moving away from the two-parent paradigm is to better protect children’s ongoing relationships with their social parents, especially for those in pre-existing multi-parent families. While arguably this subset of social parentage (as defined in Chapter One) only affects a small number of children – those conceived via AHR who have more than two social parents from birth – they should be entitled to the same legal protection of their parental relationships as children being raised by one or two

Genetic Origins: An Ethical and Legal Challenge” (2018) 32(2) International Journal of Law, Policy and the Family 170 at 170. This procedure is not currently possible in Aotearoa New Zealand.

⁴⁷⁶ Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015, reg 5. Currently only one clinic (the Newcastle Fertility Centre) is approved to perform these procedures, and is only offering PNT. See Newcastle Fertility Centre “Mitochondrial Donation” <www.newcastle-hospitals.org.uk>.

⁴⁷⁷ Lewis, above n 458, at 772-773.

⁴⁷⁸ Carbone and Cahn, above n 458, at 16.

⁴⁷⁹ See Hoffkling, Obedin-Maliver, and Sevelius, above n 24. See also Amel Alghrani “Assisted Reproductive Technologies and Family Formation: Womb Transplant Technology and the Allocation of Family Responsibilities” in Craig Lind, Heather Keating, and Jo Bridgeman (eds) *Taking Responsibility, Law and the Changing Family* (Ashgate, Farnham, 2011) 221.

⁴⁸⁰ See Alghrani, above n 479.

⁴⁸¹ See Lee M Silver *Remaking Eden: Cloning and Beyond in a Brave New World* (Weidenfeld & Nicolson, London, 1998) at 91-130.

⁴⁸² See Henry T Greely *The End of Sex and the Future of Human Reproduction* (Harvard University Press, Cambridge, 2016) at 89-100 and 121-136.

⁴⁸³ Carbone and Cahn, above n 458, at 13.

individuals. In these circumstances, a failure to ascribe legal parentage to pre-existing social parents may have negative consequences for children. It essentially creates uncertainty and makes children’s ongoing relationships with their parental figures unnecessarily vulnerable.⁴⁸⁴

Such vulnerabilities are particularly evident when relationships within multi-parent families break down. In these circumstances, individuals lacking legal parentage (who are also not additional guardians) are “essentially legal strangers to children they may have helped to raise or create” and could effectively be shut out of their children’s lives and excluded from parental decision-making.⁴⁸⁵ For example, the legal parents could decide to relocate with the child and the social parents would be powerless to prevent this. This could have negative consequences for children, given losing a relationship with one or more of their social parents “can be detrimental to the child’s well-being and [their] best interests”.⁴⁸⁶ As Lewis elucidates “without the legal recognition of full parentage, children may be deprived of ... contact with their perceived parents, which may be traumatic to them”.⁴⁸⁷ Even where non-legal parents are appointed as additional guardians in an attempt to mitigate the exclusions created by the two-parent paradigm, children can still be negatively disadvantaged, especially in relation to inheritance matters.⁴⁸⁸

The two-parent paradigm also continues to detach family law from the lived realities of children living in multi-parent families. This is problematic, given democratic societies are supposed to “strive to ensure connection between legal and social realities”,⁴⁸⁹ especially in regard to legal parentage, where the ability to “reconnect social reality with legal responsibilities” is vital.⁴⁹⁰ As Callus explains, “the purpose of the law must surely be to give effect to the daily life and experiences of children” and to “legally recognise those who are most implicated in their day-to-day welfare”.⁴⁹¹ Consequently, this thesis argues that “[c]ontinued reliance on the two-parent paradigm unnecessarily eliminates many caring individuals from children’s lives” and that it is in the best interests of

⁴⁸⁴ Kinsey, above n 414, at 300.

⁴⁸⁵ Jacobs, above n 458, at 314.

⁴⁸⁶ Lewis, above n 458, at 753-754.

⁴⁸⁷ At 745.

⁴⁸⁸ This is evidenced in the above discussion of *Keelan v Peach*, whereby the Court of Appeal held that whāngai children are unable to make claims under the Family Protection Act due to a whāngai parent’s lack of legal parentage status. See *Keelan v Peach* [2003] 1 NZLR 589 at [43].

⁴⁸⁹ Callus, above n 430, at 349.

⁴⁹⁰ At 362.

⁴⁹¹ At 368.

children for all of their social parents to be properly acknowledged by the law.⁴⁹² As well as better aligning legal parentage and the reality of family life, a move away from the two-parent paradigm would produce positive outcomes for children already living in such families and would have “a significant and positive practical and psychological impact” on their lives.⁴⁹³

C Multiple Legal Parents and the Potential for Increased Conflict

It is important to acknowledge that such recommendations do not have universal appeal. Some commentators suggest that allowing children to have more than two legal parents (with the accompanying guardianship rights and responsibilities that usually follow) would amplify conflict in relation to parental decision-making, thereby making multi-parent families “unworkable” from a practical perspective and requiring greater judicial intervention.⁴⁹⁴ As Jacobs explains:⁴⁹⁵

Perhaps the most significant obstacle in recognizing multiple parentage is the concern that there will be too many cooks in the kitchen: it is hard enough for two parents to agree on the best way in which to raise a child, so how will three (or four or more) negotiate the difficulties of custody, visitation, and the like.

Even in families exhibiting minimal conflict between the legal parents (who had all assumed the rights and responsibilities of guardianship), some commentators were concerned that typical guardianship decisions would be made more difficult. As Kelly elucidates, “[p]ractical matters that require parental consent, such as medical decision making, travel, and schooling, could also become more complicated even in the absence of conflict.”⁴⁹⁶

It cannot be disputed that input from additional legal parents *may* result in more conflict, although, as yet, there is no research to suggest this is the case. However, the mere possibility of increased conflict is not a legitimate reason to prevent the extension of legal parentage, especially because “family dynamics are such that potential for conflict

⁴⁹² Jacobs, above n 458, at 314.

⁴⁹³ Gerber and Lindner, above n 2, at 35. See also Callus, above n 430, at 364.

⁴⁹⁴ Carbone and Cahn, above n 458, at 12. See also Elizabeth A Pfenson “Too Many Cooks in the Kitchen: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California’s Recently-Proposed Multiple-Parents Bill” (2013) 88(4) Notre Dame Law Review 2023 at 2062-2063.

⁴⁹⁵ Jacobs, above n 458, at 326. See also Carbone and Cahn, above n 458, at 39.

⁴⁹⁶ Fiona Kelly “Multiple-Parent Families under BC’s New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting” (2014) 47(2) University of British Columbia Law Review 565 at 574-575.

between the parents will always be present”.⁴⁹⁷ It is likely that many legal parents from multi-parent families will be able to resolve their parenting disputes between themselves, just as many traditional and multi-parent families already do, without undue conflict or requiring judicial intervention. There will always be some legal parents (and others) embroiled in conflict with each other about guardianship, day-to-day care, and contact matters, but this is no different than the current position with one or two-parent families. As Callus explains “the change towards recognising more than two parents ... would not actually cause any more conflict than would otherwise exist under the current regime”.⁴⁹⁸ Abraham agrees, stating that it is “doubtful that the administrative strain imposed by multiparents is significantly more strenuous than ... when dealing with any two-parent dispute”.⁴⁹⁹

If anything, the current inadequate legal parentage laws in Aotearoa New Zealand inflame, rather than diminish, such conflict, which often occurs as a result of social parents (who are not additional guardians) being excluded from important decisions about children’s lives. Legally recognising all such parents may actually reduce inter-family conflict, because all the individuals would have equal legal parentage from the outset (including the guardianship rights and responsibilities that usually go along with it). They would also be bound to act jointly with the child’s other guardians.⁵⁰⁰

IV Summary of Chapter Six

This chapter illustrated that legal parentage is based on an inconsistent amalgamation of genetic, gestational, and social parentage that is often insufficiently child-focused in its operation. It also demonstrated that guardianship is unable to provide children in multi-parent families with the same level of permanent protection of their parental relationships as legal parentage. It suggested that removing the outdated and overly intransigent limitations of the two-parent paradigm and expanding legal parentage to encompass more than two individuals would reduce some of the disadvantages experienced by children when only some of their social parents are legally recognised. A proposal for achieving such reform within the current legislative framework (with some amendment) is detailed in the following chapter.

⁴⁹⁷ Callus, above n 430, at 367. See also Haim Abraham “A Family is What You Make It? Legal Recognition and Regulation of Multiple Parents” (2017) 25(4) *American University Journal of Gender, Social Policy and the Law* 405 at 421.

⁴⁹⁸ Callus, above n 430, at 361.

⁴⁹⁹ Abraham, above n 497, at 421.

⁵⁰⁰ Care of Children Act, s 16(5).

CHAPTER SEVEN

Legal Parentage for Multi-Parent Families

As birth certificates are currently restricted to record only two parents, children with three or four parents are denied the opportunity to have their family unit accurately recorded and their identity reflected in these essential documents.⁵⁰¹

I Introduction to Chapter Seven

This chapter argues for the expansion of legal parentage to recognise multi-parent families in light of children’s rights to preserve their identities, and to circumvent “situations of exclusion and invisibility”.⁵⁰² It develops a new intentional legal parentage model for Aotearoa New Zealand that allows children conceived via AHR to have more than two legal parents from birth, drawing on comparable multi-parent models in British Columbia (BC) and California. The proposed reforms are designed to incorporate additional willing individuals via agreement, not to force legal parentage onto individuals who do not wish to assume this role, or to force legal parents to share this role with others.⁵⁰³ The chapter carefully considers when and how the model applies (particularly in regard to the exclusion of surrogacy), and provides a draft “intentional multi-parent agreement”, for use by intending parents. The chapter also discusses a process for retrospective applications of the model, and addresses concerns around dispute resolution.

II Models of Intentional Legal Parentage in Other Jurisdictions

BC and California have developed distinct ways of incorporating more than two parents into their definitions of legal parentage. The following sections analyse the advantages and disadvantages each model provides.

A British Columbia

⁵⁰¹ Gerber and Lindner, above n 2, at 36.

⁵⁰² Cammu, above n 464, at 339.

⁵⁰³ Given the focus on intention, this model is expressly limited to situations involving AHR. This ensures that the model only operates in situations where the decision to conceive a child requires active steps, rather than is the unintended result of a sexual encounter.

In BC, legislation providing for more than two legally recognised parents has been in force since March 2013,⁵⁰⁴ and was designed to provide consistency and certainty for multi-parent families.⁵⁰⁵ Section 30 of the BC Family Law Act allows for more than two individuals to be recognised as a child’s parents where they make an agreement to that effect.⁵⁰⁶ The provision creates an exception to the general rule preventing a donor from being a legal parent.⁵⁰⁷ It only applies where a child is conceived as a result of AHR and the written agreement between the parents must be executed before the child is conceived. No allowances are made for retrospective agreements. The provision fails to provide a clear path for resolving conflict that may arise between parties,⁵⁰⁸ which is particularly problematic when the reforms were expressly designed to provide more certainty for multi-parent families.⁵⁰⁹

This provision also arbitrarily limits the number of parents who can be included to three (unless creative statutory interpretation is employed).⁵¹⁰ This is unhelpful given that one of the most common multi-parent family groupings is based on a child having four parents as a result of a female and male same-sex couple having and raising a child together. Kelly also criticises this aspect of the provision, noting that “failing to recognize a fairly common multiple-parent arrangement within the lesbian and gay community – a lesbian couple and gay couple co-parenting a child or children – is a significant omission”.⁵¹¹ This means that some multi-parent families “will be left with only partial legal coverage”.⁵¹² This limitation also fails to reflect how such multi-parent families actually operate. As Kelly explains:⁵¹³

... empirical research indicates that, where a lesbian couple have a parenting arrangement with a gay couple, the mothers typically

⁵⁰⁴ This was part of a wider overhaul of the family law justice system in BC during this time, culminating in the enactment of the Family Law Act in 2013, which replaced the earlier Family Relations Act.

⁵⁰⁵ Ministry of Justice (British Columbia) “The Family Law Act Explained – Part 3: Parentage” (2013) <www2.gov.bc.ca>. This particular change was the result of five years of public consultation. See Kelly, above n 496, at 576.

⁵⁰⁶ Family Law Act SBC 2011 c 25, s 30.

⁵⁰⁷ As in Aotearoa New Zealand, the general rule in BC is that donors are not parents. See Family Law Act SBC c 25, s 24. Section 30 provides an exception to this rule.

⁵⁰⁸ Kelly, above n 496, at 581.

⁵⁰⁹ Ministry of Justice (British Columbia), above n 505.

⁵¹⁰ See Kelly, above n 496, at 585-587.

⁵¹¹ At 587.

⁵¹² At 587.

⁵¹³ At 583.

consider both the child's biological father *and* his male partner to be the child's parents ... In other words, these families have *four* parents, two of whom share no biological link to the child. Thus, even within the lesbian and gay community ... polyparenting is significantly more complex than section 30 permits.

Section 30 also requires that the third parent seeking inclusion must be either a genetic parent or a gestational carrier of the child.⁵¹⁴ This, coupled with the three-parent limit, means that partners of parents are not treated equally. An individual who is in a relationship with a gestational carrier is usually able to be a legal parent alongside a donor, but individuals who are in a relationship with a donor are not. Even the rules relating to gestational carriers are inconsistent. Where two individuals plus a gestational carrier intend to become parents together, there is no room for the gestational carrier's partner to also be legally recognised as a parent. However, a gestational carrier's partner can be a legally recognised parent where the gestational carrier, their partner, and a donor of their choosing all intend to become parents. The three-parent limit is ultimately problematic, because legally recognising three out of four of a child's parents creates the exact same issues for children as only recognising two out of three of their parents.

Despite these problems, s 30 is a positive step forward, especially for three-parent families, and "serves as legislative acknowledgment of the changing nature of Canadian families".⁵¹⁵ The provision is valuable not just for the positive and practical benefits it confers upon multi-parent families, and the increased security it gives children, but also because it conveys an important "message to wider society that non-nuclear families are both functional and socially valuable".⁵¹⁶

B California

California enacted amendments to its Family Code allowing a child to have more than two legally recognised parents in October 2013. These reforms were in direct response to a complex parentage case *In Re MC*.⁵¹⁷ It involved a parentage dispute between three individuals; the child's genetic mother, her same-sex spouse (who was living with the genetic mother when the child was born), and the child's genetic father (who had a brief intimate relationship with the genetic mother while she was separated from her same-sex spouse).⁵¹⁸ The case fell to be decided after the genetic mother was convicted of being an

⁵¹⁴ At 581.

⁵¹⁵ At 567.

⁵¹⁶ At 595.

⁵¹⁷ *In Re MC* 195 Cal App 4th 197 (2011).

⁵¹⁸ At 203-204.

accessory to the attempted murder of her same-sex spouse.⁵¹⁹ Consequently, the child was in foster care awaiting a determination of legal parentage.

The lower court had determined that all three individuals were the legal parents of the child.⁵²⁰ However, given the existence of long-standing precedent that a child can only have two legal parents at any given time, the California Court of Appeal overturned this finding, and sent it back to the lower court to determine whether the genetic father or the genetic mother's same-sex spouse was the child's other parent.⁵²¹ Nevertheless, the Court was sympathetic to the issues raised by the particular facts of the case and suggested the Legislature consider changing the law to legally recognise three parents in such situations.⁵²²

The Legislature ultimately responded with the introduction of Senate Bill No 274 (the Bill), which, for the first time, allowed a child to have more than two legal parents.⁵²³ The Bill focused squarely on the welfare and best interests of the child, based on an acknowledgement of the psychological harm suffered by children when all of their parents are not legally recognised:⁵²⁴

Most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way. Separating a child from a parent has a devastating psychological and emotional impact on the child, and courts must have the power to protect children from this harm.

The reforms did not alter any of the usual legal parentage criteria and only applied "in the rare case where a child truly has more than two parents".⁵²⁵ As a result of the passing of the Bill, the California Family Code now allows a court to recognise more than two legal parents "if the court finds that recognizing only two parents would be detrimental to the child".⁵²⁶ This provision is of wider application than the BC scheme (and the proposed Aotearoa New Zealand model) because it is not limited to family formation involving AHR.

⁵¹⁹ At 204.

⁵²⁰ At 210.

⁵²¹ At 214 and 225.

⁵²² At 214.

⁵²³ SB 274, 2013-2014 Leg Reg Sess (Cal 2013) at 1.

⁵²⁴ At 2.

⁵²⁵ At 3.

⁵²⁶ Cal Fam Code, § 7612(c).

The child-focused approach taken in California is commendable. The provision of wide judicial discretion certainly overcomes the arbitrary three-parent maximum generated by the overly prescriptive provision in BC. However, the Californian approach has several disadvantages. First, the provision does not contemplate a child being *born* with more than two legal parents. Rather this approach caters for more legal parents being *added in* after several years, once they have established a relationship with the child and are fulfilling the requirements of a social parent. Allowing a child's legal parents to change over time could create uncertainty that may not be in their best interests. This approach is also likely to result in an increase in parentage disputes in the Family Court, because the only way to be *added in* is via a hearing. Parents are not allowed to decide this for themselves. This demonstrates the primary difference between the BC model, which merely recognises three legal parents where everyone agrees, and the Californian approach, which actively regulates who else can obtain legal parentage. As Abraham explains, the courts in California “do not simply recognize multiparents, they regulate them and have wide discretion over the decision whether to confer parental status or not”.⁵²⁷ This regulatory approach prevents individuals from making their own choices about the composition of their families.

The wide judicial discretion generated by the provision also give judges significant latitude to add further legal parents (such as step-parents) at a later date, despite the fact such individuals were never intended to be legal parents. Making these people legal parents may cause conflict where the child's other legal parents do not agree that a particular individual should be added. Such conflict between legal parents can have a negative impact upon children. There is also a possibility that, given the subjective nature of judicial discretion, judges could misapply their power based on preconceptions about the types of people who make good parents. As Pfenson explains:⁵²⁸

If the best interests standard was used to resolve conflicting presumptions, then courts would be welcome to find, for example, that wealthy, privileged, and stable individuals are a child's parents ... rather than other less well off, less stable vying adults. The discretion ... invites judicial abuse, as judges would inevitably bring their own biases to bear in determinations.

While it is unlikely that many judges would behave in this way, the existence of the risk undermines the efficacy of the child-focused nature of the provision.

⁵²⁷ Abraham, above n 497, at 431.

⁵²⁸ Pfenson, above n 494, at 2053.

III An Intentional Legal Parentage Model for Aotearoa New Zealand

In response to the strengths and weaknesses of the international approaches examined above, this section provides a model of reform for Aotearoa New Zealand, in situations where more than two individuals share a pre-birth (preferably pre-conception) intention to jointly parent a child together. It is premised on the fact that some so-called donors intend (in agreement with the other individuals involved) to actively raise the children they help bring into existence. To ensure the model only captures individuals who truly intend to become parents, it is limited to children conceived via AHR. It also entirely excludes surrogacy, because the proposed model is based on the expansion of legal parentage to additional individuals, whereas surrogacy requires a transfer of legal parentage to different individuals, which can only be achieved via adoption.

A Not All Donors Are the Same

People provide gametes to others for a variety of reasons. Some individuals view their actions as little more than helping strangers who are unable to conceive naturally. Others seek to help friends and family who are struggling to have children of their own. A select number donate their gametes with the intention of raising the child they helped to create. Yet, under the Status of Children Act, these individuals are all treated in exactly the same way, regardless of their motivation, because donors are “not, for any purpose, a parent of any child of the pregnancy” unless they are in an intimate relationship with the individual giving birth to the child.⁵²⁹ This is based on an outdated assumption “that donors do not wish to become social, let alone legal, parents”.⁵³⁰

In a practical sense, these provisions prevent some willing individuals from becoming legal parents, despite the fact that they intentionally helped bring children into the world to love, raise, and nurture. These individuals are not excluded because they are incapable of being parents, or to protect the best interests of children. Rather, they are excluded (despite their important genetic connection to the child) merely to uphold the outdated two-parent paradigm and to create a perceived degree of certainty. Such an approach is acceptable where that person never intended to be a legal parent, because, as was established in Chapter Six, genetic parentage is not the primary way to obtain legal parentage. However, in situations where the donor (and possibly their partner) intended to raise the child alongside and in agreement with the child’s other parents, such an approach is unnecessarily harsh. It seems incongruous that a genetic parent who has, in agreement with the child’s other parental figures, “intended, anticipated, planned for,

⁵²⁹ Status of Children Act, ss 19-22. See also Chapter Six.

⁵³⁰ Cammu, above n 464, at 330. See also Black, above n 427, at 818.

loved, raised, and financially supported a child”, is not a legal parent simply due to their technical classification as a donor.⁵³¹

Such an approach operates most unfairly on same-sex couples who require the involvement of at least one additional person to enable them to have a child in the first place. It removes any choice these individuals have in terms of how to structure their intended families. As Kinsey explains:⁵³²

The reality for these families is that more than two people are required to bring a child into existence. Thus, when a couple chooses to procreate with someone who will be active in the child’s life, the child should be able to have the state recognize that person as a legal parent.

Some same-sex couples who use a donor to conceive do not wish that individual to have any further involvement in their child’s life. However, others intentionally decide to use a particular person’s gametes based on a desire to have a child with that individual (and also possibly their partner) and for their child to have an ongoing relationship with that individual (and their partner) to complement their own parenting.⁵³³ The Status of Children Act’s current inflexibility in terms of donors, whereby “the possibility of a parental role for the donor is . . . excluded from the outset” does a disservice to the children born into such arrangements.⁵³⁴ The blanket ban on donors (and their partners) obtaining legal parentage is no longer fit for purpose (if it ever was) and is in need of reform.

B Intentional Conceptions of Legal Parentage

An intention to parent, or more specifically, to love, nurture, and raise a child, is at the heart of the intentional legal parentage model proposed in this thesis.⁵³⁵ As Callus rightly states, “[i]t is important for children to know and be cared for by parents who love them, and crucial that the state provide adequate mechanisms to recognise these vital functions.”⁵³⁶ An intentional model of legal parentage “takes the intentions to rear and

⁵³¹ Black, above n 427, at 801.

⁵³² Kinsey, above n 414, at 326.

⁵³³ Carbone and Cahn, above n 458, at 17.

⁵³⁴ Cammu, above n 464, at 333.

⁵³⁵ Other proponents of intentional parenthood include: Marjorie Maguire Shultz “Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality” (1990) 2 Wisconsin Law Review 297; Hill, above n 460; and Richard F Storrow “Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage” (2002) 53(3) Hastings Law Journal 597.

⁵³⁶ Callus, above n 430, at 368.

nurture as relevant ... to the ascription of parenthood”.⁵³⁷ Under this model, the parents of a child at birth are “the party or parties responsible for bringing the child into the world with the intention of raising it”.⁵³⁸ In some ways, this is entirely uncontroversial because intention already forms part of Aotearoa New Zealand’s legal parentage matrix in some circumstances. For example, those adoption orders made before an adoptive parent has developed a social parentage relationship with the child, are made on the basis of an intent to parent the child in question. The most important prerequisite is their intention to love, nurture, and raise the child. Similarly, where a partner of a genetic and/or gestational parent becomes a legal parent based solely on their relationship with the genetic and/or gestational parent, their legal parentage status is based on their presumed intention to raise and parent the child alongside the other legal parents.

The intentional legal parentage model proposed here suggests that an individual (and their partner where relevant) who donates genetic material via AHR (and who are not in an intimate relationship with the gestational carrier) should be able to become a legal parent of a resulting child in particular circumstances. This would not classify all donors (and their partners) as legal parents. Rather, it would create a rebuttable presumption that donors (and their partners) are not legal parents *unless* they can provide evidence of an agreement to this effect between the child’s legal parents and the additional individuals seeking to become legal parents.⁵³⁹ This would be demonstrated by the execution (after the receipt of independent legal advice) of an “intentional multi-parent agreement” by all of the parties seeking to become legally recognised parents, ideally before the child is conceived as a result of AHR, although the agreement could be executed at any time prior to the child’s birth. An exemplar of the proposed “intentional multi-parent agreement” is included here:⁵⁴⁰

⁵³⁷ Bayne and Kolers, above n 460, at 236.

⁵³⁸ Hill, above n 460, at 387.

⁵³⁹ This would require legislative reform of the current Status of Children Act. This could be achieved through collapsing ss 20 and 22 of the Act (currently pertaining to situations of gamete donation where a woman acts alone in using a donor) into one gender neutral provision that provides an exception to the usual rule discounting the gamete donor. This exception would apply to situations where a non-partnered gestational carrier uses an individual’s sperm, where that individual and their partner (together with the gestational carrier) intend to become joint legal parents of the resulting child. Evidence would be provided by way of an executed “intentional multi-parent agreement”. Likewise, ss 19 and 21 of the Act (about partnered women using gamete donors) could be reformed in the same way, to allow the gestational carrier, their partner, the sperm provider, and the sperm provider’s partner to become joint legal parents (as well as other multi-parent family groupings). Section 41 of the Care of Children Act does allow legal parents to make agreements with gamete donors about contact with a child conceived as a result of their donation. Such agreements are not enforceable, though they can be embodied in a court order by consent. Even if such an order is made, it does not protect a child’s relationship with the gamete donor in the same way as either legal parentage or guardianship.

⁵⁴⁰ This “intentional multi-parent agreement” would usually be accompanied by a separate parenting agreement setting out the proposed details of the child’s care.

DEED OF INTENTIONAL MULTI-PARENT AGREEMENT

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Dated _____ 2019

PARTIES

_____ *NAME OF PARTY* _____, of _____ *PLACE* _____,

_____ *NAME OF PARTY* _____, of _____ *PLACE* _____,

_____ *NAME OF PARTY* _____, of _____ *PLACE* _____,

_____ *NAME OF PARTY* _____, of _____ *PLACE* _____,

BACKGROUND

- A. The parties wish to record their agreement in writing to jointly share legal parentage, pursuant to the Status of Children Act 1969, of a future child (“the child”), to be intentionally conceived via assisted human reproduction.

- B. The parties also wish to record their agreement in writing to jointly share the rights and responsibilities of guardianship, pursuant to the Care of Children Act 2004, for the future child, to be intentionally conceived via assisted human reproduction.

AGREEMENT

- C. The parties agree:

Conception of Child

- 1. The child will be intentionally conceived via assisted human reproduction on _____ *DATE* _____.

- 2. The child will be intentionally conceived via assisted human reproduction at _____ *PLACE or CLINIC* _____.

Gestational Parentage of Child

3. The parties agree that _____ *NAME OF PARTY* _____ will gestate the child.

This individual must be one of the parties and cannot be a gestational surrogate external to the parties' family group.

Genetic Parentage of Child

4. The parties agree that _____ *NAME/NAMES or CLINIC* _____ will provide the ovum/ova used to conceive the child.

Delete if not relevant

5. The parties agree that _____ *NAME or CLINIC* _____ will provide the sperm used to conceive the child.

Delete if not relevant

6. The parties agree that _____ *NAME or CLINIC* _____ will provide the embryo used to create the child. The ovum/ova used to create the embryo was provided by _____ *NAME or CLINIC* _____ and the sperm used to create the embryo was provided by _____ *NAME or CLINIC* _____

Delete if not relevant

Birth Certificate

7. The parties agree that all of the parties' names will be recorded in the legal parentage section of the child's birth certificate, pursuant to the Births, Deaths, Marriages, and Relationships Registration Act 1995.
8. The parties agree that the relevant parties' names will be recorded in the relevant genetic and gestational heritage sections of the child's birth certificate, pursuant to the Births, Deaths, Marriages, and Relationships Registration Act 1995.

Parentage and Guardianship

9. The parties agree that all parties will be the permanent legal parents of the child, pursuant to the Status of Children Act 1969, and that this agreement represents a departure from their statutory legal parentage entitlements under that Act.

- 10. The parties agree that all parties will undertake the rights and responsibilities of guardianship, pursuant to the Care of Children Act 2004, and acknowledge that they must act jointly (consulting whenever practicable with an aim to reaching agreement) when making guardianship decisions for the child.
- 11. The parties also acknowledge that guardianship rights and responsibilities can be removed by the court.

General

- 12. The parties consider that the provisions of this agreement are just, fair and reasonable and binding upon them.
- 13. The parties have each received independent legal advice before signing this deed and they have had explained to them its effects and implications.

PARTY ONE

SIGNED BY _____)
 _____)
 _____) X _____

In the presence of:

Signature:

Witness:

Occupation:

Address:

I, _____ *NAME OF LAWYER* _____ of _____ *PLACE* _____,
 _____ *OCCUPATION* _____, **HEREBY CERTIFY** that prior to the
 execution of this document by _____ *NAME OF PARTY* _____

I fully explained the effects and implications of it to them.

X _____ *SIGNATURE OF LAWYER* _____

PARTY TWO

SIGNED BY)
)
) X _____

In the presence of:

Signature:

Witness:

Occupation:

Address:

I, _____ *NAME OF LAWYER* _____ of _____ *PLACE* _____,
 _____ *OCCUPATION* _____, **HEREBY CERTIFY** that prior to the
 execution of this document by _____ *NAME OF PARTY* _____

I fully explained the effects and implications of it to them.

X _____ *SIGNATURE OF LAWYER* _____

PARTY THREE

SIGNED BY)
)
) X _____

In the presence of:

Signature:

Witness:

Occupation:

Address:

I, _____ *NAME OF LAWYER* _____ of _____ *PLACE* _____,
_____ *OCCUPATION* _____, **HEREBY CERTIFY** that prior to the
execution of this document by _____ *NAME OF PARTY* _____

I fully explained the effects and implications of it to them.

X _____ *SIGNATURE OF LAWYER* _____

PARTY FOUR

SIGNED BY)
)
) X _____

In the presence of:

Signature:

Witness:

Occupation:

Address:

I, _____ *NAME OF LAWYER* _____ of _____ *PLACE* _____,
_____ *OCCUPATION* _____, **HEREBY CERTIFY** that prior to the
execution of this document by _____ *NAME OF PARTY* _____

I fully explained the effects and implications of it to them.

X _____ *SIGNATURE OF LAWYER* _____

The agreement should apply regardless of whether the AHR procedure takes place at a fertility clinic or via a more informal DIY method. Fertility clinics would be able to provide blank copies of this agreement (alongside their pre-existing consent forms) and a list of suggested lawyers who could provide separate legal advice and assist with the execution process. Blank copies of such agreements could also be obtained directly from law firms, and other places where individuals contemplating parenthood seek information such as medical practices. The executed agreement would need to be submitted as part of the birth registration process to ensure all of the parents' names could be included on the child's birth certificate from the outset, without the need for a court hearing (except in cases where there was some kind of dispute either as to the agreement itself, or to its effects).

Some critics of intentionalist conceptions of parentage argue that such models are not sufficiently child-focused and can actually disadvantage diverse families.⁵⁴¹ However, granting legal parentage based on an intention to jointly raise a child, emphasises the intended relationship between each individual and the child, rather than the relationships between the adults themselves.⁵⁴² This recognises that the "best interests of the child are independent of the relationship between the child's parents".⁵⁴³ Such an approach ensures children are kept at the heart of the regime. Consequently, the particular intentional parentage model espoused here is more child-focused than other alternatives and more inclusive of diverse family formation. This is not to say that intention should be the only criterion for attributing legal parentage to individuals, or that it should apply in all circumstances. However, where more than two individuals jointly create a family through the use of AHR, and everyone intends for all of those individuals to obtain legal parentage, then this choice should be respected and legally recognised. This will ensure legal parentage rules in Aotearoa New Zealand reflect the intent of the individuals deliberately bringing children into the world.

C Why is Surrogacy Excluded?

Taken to its obvious conclusion, a model of intentional legal parentage would overrule the legal priority currently given to gestational surrogates (and gestational carriers generally), whereby they are always the legal parent of the child upon birth.⁵⁴⁴ In line with a pure intentionalist approach, the rights of intended parents would be prioritised over those of the gestational surrogate, essentially making surrogacy arrangements

⁵⁴¹ See generally, Liezl van Zyl "Intentional Parenthood and the Nuclear Family" (2002) 23(2) *Journal of Medical Humanities* 107.

⁵⁴² Cutas, above n 10, at 735.

⁵⁴³ Lewis, above n 458, at 753-754.

⁵⁴⁴ Status of Children Act, s 17. See also Chapter Six.

enforceable. Consequently, gestational surrogates could be compelled to relinquish the children they give birth to without the safeguards currently afforded to them by the adoption process, whereby their formal consent to the adoption cannot usually be superseded.⁵⁴⁵

However, the intentional legal parentage model proposed here expressly excludes surrogacy and does not alter the legal position of gestational surrogates in any way. Gestational surrogates continue to be unable to enter into enforceable surrogacy agreements and remain the legal parent of any child they gestate, until and unless they consent to a formal adoption after the birth of such child.⁵⁴⁶ The rationale for this is threefold. First, as examined in Chapter Four, the physical relationship between a foetus and a gestational surrogate (or gestational carrier) is significant and can greatly impact the child's future identity. Consequently, the physical performance of pregnancy and childbirth needs to be valued and protected, not just in terms of bringing human beings into existence, but also as a vital part of a child's identity upon birth and into the future. Ensuring all individuals who gestate a child are categorised as a legal parent upon that child's birth protects and prioritises the special relationship between a foetus and the individual who gestates them and precludes surrogacy from being included within the proposed model.

Second, excluding surrogacy from the proposed model best upholds the fundamental right to bodily integrity that is particularly relevant in relation to pregnancy and childbirth. As Bayne and Kolers explain, "the move to the special moral relationship between gestational mother and child is quick" precisely because the "liberal doctrine of sovereignty over one's person ... supports the idea that one bears a special relation to things that are, or used to be, part of one's body".⁵⁴⁷ Allowing gestational surrogates to transfer the legal parentage of a child to other individuals prior to the child's birth could negatively impact the exercise of their own bodily integrity, where, for example, medical decisions need to be made, that could harm the unborn child, to preserve the life of the gestational surrogate.⁵⁴⁸

Third, the exclusion of surrogacy reflects the fact that the consequences of enforceable pre-conception or pre-birth agreements as to a child's future legal parentage (as proposed

⁵⁴⁵ Adoption Act, ss 7-8.

⁵⁴⁶ Debate remains about the ethical ramifications of making surrogacy agreements enforceable. See Cabeza and others, above n 19, at 162-183; and Henaghan, Ballantyne, and Helm, above n 19, at 277-288.

⁵⁴⁷ Bayne and Kolers, above n 460, at 229.

⁵⁴⁸ To avoid such problems, many surrogacy agreements that transfer legal parentage from the gestational surrogate to the intended parents do not come into force until the child is born. See generally Steven H Snyder and Mary Patricia Byrn "The Use of Prebirth Parentage Orders in Surrogacy Proceedings" (2005) 39(3) Family Law Quarterly 633.

here) do not operate equally upon gestational carriers and gestational surrogates. Making such an agreement would not alter a gestational carrier's status as a legal parent at all. Regardless of whether they had a child (conceived via AHR) alone, or with their de facto partner, or executed an enforceable "intentional multi-parent agreement" with other individuals, the gestational carrier's status as a legal parent of the child (and their inclusion on a child's birth certificate) remains.⁵⁴⁹ However, in relation to a gestational surrogate (who conceives a child via AHR), such an agreement would fundamentally transform them from a legal parent into a legal stranger, with no recognised connection to the child. Executing an enforceable agreement in favour of other individuals would entirely revoke their own legal status. They would no longer be a legal parent of the resulting child and would be unable to obtain or exercise any guardianship rights or responsibilities. The significant difference in the operation of such agreements on gestational carriers and gestational surrogates (whereby the gestational carrier's legal status does not change in any way, compared to the fundamental alteration of the gestational surrogate's legal position) provides an important justification for the exclusion of surrogacy from the intentional legal parentage model proposed here. This exclusion also provides consistency between gestational carriers and gestational surrogates, whereby the only way they can opt out of legal parentage is via a formal adoption process.

Not everyone agrees that gestational surrogates should continue to enjoy legal priority over intended parents. Hill argues that the commissioning parents should be given precedence, stating "the balance of equities favors the claims of the intended parents over those of the gestational host".⁵⁵⁰ This is primarily based on the "intended parents role as prime movers in the pro-creative relationship" as well as the "importance of having the identity of the parents determined from conception onward".⁵⁵¹ To Hill, these factors "outweigh the potential harm to the gestational host in compelled relinquishment".⁵⁵² Likewise, in *Johnson v Calvert*, a well-known case that involved a dispute over legal parentage between genetic intending parents and a gestational surrogate who changed her mind and wanted to keep the twins she had given birth to, the majority of the California

⁵⁴⁹ As discussed in Chapter Three, legal parentage (and being named on a child's birth certificate) provides a straightforward way to obtain legal rights and responsibilities in relation to a child, as encompassed in the concept of guardianship. See ss 15-18 of the Care of Children Act. While these differing scenarios may generate some practical differences, in terms of, for example, one's obligations to act jointly with the child's other guardians, the gestational carrier's status as a legal parent does not change. See s 16(5) of the Care of Children Act and s 17 of the Status of Children Act.

⁵⁵⁰ Hill, above n 460, at 419. Hill's arguments are cited with approval by the California Supreme Court in *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 782.

⁵⁵¹ Hill, above n 460, at 419.

⁵⁵² At 419.

Supreme Court held that the intended parents were the children’s legal parents because “they intended to procreate a child genetically related to them by the only available means”.⁵⁵³ However, this fails to give adequate weight to the unique connection between a foetus and their gestational surrogate that can impact the child’s ongoing identity as well as the bodily integrity of the gestational surrogate.

In light of these arguments, surrogacy is expressly excluded from the operation of the intentional parentage model proposed in this thesis. This means that gestational surrogates (as well as gestational carriers) and their partners continue to have priority in terms of legal parentage. However, this does not entirely sever the possibility of surrogacy being used to create a multi-parent family. Where a gestational surrogate wishes to have a child on behalf of a multi-parent family (that the gestational surrogate is not a part of), the court should be able to make an adoption order, once the child is born, in favour of more than two parents in appropriate circumstances following the usual formal process. This would require some minor amendments to the Adoption Act in order to remove the current two-parent maximum, but could otherwise be easily accommodated with the current adoption regime.

IV Making Intentional Legal Parentage Work

This section details the operation of the proposed model from a practical perspective and provides guidance as to the permitted number of legal parents a child may have without the imposition of a prescribed figure. It develops a procedure providing retrospective legal recognition for pre-existing multi-parent families, to ensure the children within them have the same legal protection as such families in the future hopefully will, as well as a general dispute resolution process to address conflict that may arise between the legal parents.

A How Many is Too Many: Three Parents, or Four, or More?

If legal parentage is to be extended beyond two parents, the question then becomes: how many parents should be recognised? Rather than providing an arbitrary answer to this question, the proposed model balances the need for flexibility to include diverse family structures, against the need to protect the best interests of children from large groups of individuals seeking to obtain legal parentage for nefarious purposes.⁵⁵⁴

⁵⁵³ *Johnson v Calvert*, above n 550, at 787. The California Supreme Court recognised that an individual could obtain legal parentage via either genetic or gestational parentage. Where such roles are split between two individuals (as it was between the genetic mother and the gestational surrogate who carried the twins in this case), the genetic parent is to be given legal priority over the gestational surrogate. See *Johnson v Calvert*, above n 550, at 782.

⁵⁵⁴ See Doni Whitsett and Stephen A Kent “Cults and Families” (2003) 84(4) *Families in Society* 491 at 493-496.

Under the proposed model, three or four individuals could automatically be granted legal parentage upon the child's birth and be included on a child's birth certificate, without the need for a court hearing (unless the validity or operation of the agreement is challenged). For this to occur, all the individuals seeking to become legally recognised parents would have to obtain independent legal advice and then collectively execute an "intentional multi-parent agreement" before the child is born (ideally before the child is conceived). This agreement would need to be included alongside the child's birth registration documentation to enable all of the individuals to be incorporated on the child's birth certificate.

Where more than four individuals seek legal parentage over a child, the Family Court would need to resolve the matter in line with the welfare and best interests of the child. Such individuals would be unable to automatically acquire legal parentage status, or exercise guardianship rights and responsibilities, or be included on a child's birth certificate unless and until the Family Court made a ruling in their favour.⁵⁵⁵ It seems unlikely that many groups of five or more individuals would be successful in persuading a court that they should all be legal parents. But it leaves open the possibility of such a finding in the rare case where such an outcome truly is in the welfare and best interests of the particular child. This approach provides greater certainty for three and four parent families, alongside flexibility to include more complex family structures where appropriate, so long as the arrangement can be shown to be in the welfare and best interests of the child.

B Retrospective Legal Recognition for Multi-Parent Families

The proposed model is premised on a child having more than two legal parents where an "intentional multi-parent agreement" is executed prior to the child's birth. But what of the multi-parent families who are currently raising children together? The arguments for moving away from the two-parent paradigm especially apply to children already living in such situations. As a result, the proposed model would make allowances for pre-existing multi-parent families that were intentionally formed via AHR to retrospectively seek legal recognition.

This would involve the individuals seeking a "legal parentage declaration" from the Family Court or High Court, along the same lines as a paternity declaration under the Status of Children Act (with minor amendments).⁵⁵⁶ The individuals seeking the

⁵⁵⁵ In the meantime, the gestational carrier would be the legal parent of the child, in accordance with the legal priority currently afforded to such individuals, and they alone would be able to exercise necessary guardianship rights and responsibilities for the child.

⁵⁵⁶ Status of Children Act, s 10. Reforming this provision to include "legal parentage declarations" alongside paternity declarations would be consistent with the Supreme Court's findings in *Hemmes*

declaration would need to satisfy the court that a parent-child relationship exists between the individuals seeking to become additional legal parents and the child (or children) in question (and that such relationships should be legally recognised).⁵⁵⁷ Questions of fact would be decided on the balance of probabilities in a comparable way to paternity declarations.⁵⁵⁸ If all the other legal parents were in agreement, it would be easier for the court to make such a declaration, than in cases involving significant conflict. The making of such a declaration in relevant cases would align with a slightly expanded understanding of s 3 of the Status of Children Act, which focuses on the importance of the legal child-parent relationship rather than the relationship between the child’s legal parents.

C Resolving Disputes Between Multiple Parents

The proposed intentional legal parentage model would focus on the recognition of multi-parent families from birth (as in BC), rather than actively regulating who should or should not be added as an additional parent at a later date (as in California). This would prevent the state from unnecessarily interfering with the ways individuals choose to structure their families intentionally created through AHR. The family justice system would not need to be involved unless there is a dispute between the legal parents, either as to the validity or ongoing operation of the “intentional multi-parent agreement”, or where guardianship disputes arise, or where the child’s safety is jeopardised. This would mirror what already happens in families with one or two legal parents, where the courts do not become involved unless such involvement is necessary.

Disputes over day-to-day care and contact, as well as guardianship matters, may arise in multi-parent families just as they do in more traditional families where legal parents have different ideas about how to raise their children. In such situations, most legal parents are able to resolve their differences and agree on the best approach to take for their child, without recourse to the family justice system. There is no evidence to suggest that multi-parent families would not follow the same pattern. Where they cannot resolve such matters, they can undertake family dispute resolution (FDR).⁵⁵⁹ If this process fails to generate agreement, they can then apply to the Family Court to resolve their

v Young that such declarations pertain only to legal parentage status, rather than genetic parentage. See *Hemmes v Young*, above n 425, at [9] to [18].

⁵⁵⁷ Status of Children Act, s 10(2).

⁵⁵⁸ Section 10(6). If s 10 of the Act was reformed to accommodate “legal parentage declarations”, this would enable such declarations to be sought after the death of either the additional parent or the child in question by those with “a proper interest in the result”. See ss 10(1)(c) and 10(2). For a detailed account of posthumous reproduction, see Nicola Peart “Life Beyond Death: Regulating Posthumous Reproduction in New Zealand” (2015) 46(3) *Victoria University of Wellington Law Review* 725; and ACART *Posthumous Reproduction: Consultation Document* (ACART, Wellington, 2018).

⁵⁵⁹ Care of Children Act, s 46E.

differences.⁵⁶⁰ As with any other dispute under the Care of Children Act, the court would determine the case in accordance with the paramountcy principle, whereby the welfare and best interests of the particular child, in their particular circumstances, would be “the first and paramount consideration”.⁵⁶¹ Pre-existing family justice mechanisms, as currently prescribed, would work just as adequately for multi-parent families, as they do for one and two legal parent families.

V Summary of Chapter Seven

This chapter advanced an intentional model of legal parentage (drawing on those in BC and California) that would allow for the legal recognition of more than two parents in Aotearoa New Zealand. The model would be limited to families created via AHR (expressly excluding surrogacy) where more than two individuals intend to raise a child together in a variety of different family groupings and premised on the execution of an “intentional multi-parent agreement”. The model would also provide mechanisms for limiting the number of legal parents, conferring retrospective legal recognition for pre-existing multi-parent families, and resolving conflict.

⁵⁶⁰ Sections 46R and 48.

⁵⁶¹ Section 4.

CHAPTER EIGHT

The Reimagined Birth Certificate

Birth certificates should reflect a child's reality, rather than excluding one or more parents because of technical restrictions, namely that no more than two parents can be recorded on a birth certificate.⁵⁶²

I Introduction to Chapter Eight

Having considered the deficiencies of birth certificates and the inadequacies of legal parentage and the two-parent paradigm, this chapter outlines possible reforms to solve these problems. The reforms are based on two key ideas. First, birth certificates should contain more information about a child's genetic and gestational origins. This is premised on the historic, legal, and personal significance of birth certificates, alongside theoretical and cultural understandings of identity. This is reinforced by a child's right to identity under UNCROC. Second, birth certificates should incorporate more than two legal parents in relevant circumstances. This reflects the proposed expansion of legal parentage beyond two individuals, due to the inconsistencies created by current legal parentage models and the deconstruction of the two-parent paradigm. Such reform is based on the creation of an intentional model of parentage that incorporates more than two legal parents where children are conceived via AHR with the intention of being raised by more than two individuals from the outset.

This chapter uses a prototype to demonstrate how these reforms could be incorporated into Aotearoa New Zealand's birth certification regime. This reimagined birth certificate, a more inclusive document designed to enhance children's identities and afford legal parentage status to all of their intended parents, establishes that such reforms are achievable.

II Reforming Birth Certificates

This section details the two proposed birth certificate reforms at the heart of this thesis: incorporating children's genetic and gestational origins on their birth certificates, and including more than two legal parents in relevant circumstances. This section also addresses questions of privacy and parental terminology.

A Including Genetic and Gestational Parentage

⁵⁶² Gerber and Lindner, above n 2, at 37.

The birth certificate prototype proposed below creates several new sections containing information not previously included on birth certificates. The genetic heritage section contains the details of the individuals who provided the ovum (or ova where mitochondrial donation occurs) and the sperm that resulted in the conception of the particular child.⁵⁶³ The same information is recorded about these individuals as is currently recorded for legal parents. Where fertility clinic based gamete or mitochondrial donation is used, the name of the donor will not always be available. In this instance, this part of the birth certificate will contain the information provided by the clinic. This means children will know a donor was used and they can apply under the HART Act to obtain additional information about their donor once they reach 18 (if they wish) in line with current practice.⁵⁶⁴ This ensures children are aware of their genetic parentage from a young age, in line with suggested best practice in this area,⁵⁶⁵ and that they know about the existence of further information should they wish to pursue it.⁵⁶⁶

The proposed birth certificate contains information about the gestational carrier or surrogate who carries the child. Such individuals are included to reflect the impact gestation may have on a child's ongoing identity, especially in terms of their health and developmental abilities (as examined in Chapter Four).

Space is also provided to include the child's legal parents upon birth, alongside their current legal parents (and the date and place of adoption if relevant), which is particularly useful for adopted children. This represents a significant change from the current system that involves the generation of two separate birth certificates. The original birth certificate contains the name of the legal parents upon birth. Once the adoption process has taken place, a new birth certificate is issued that contains no trace of the adoption or the child's previous legal parents. An adopted child is currently unable to obtain a copy of their original birth certificate until they turn 20.⁵⁶⁷ This is inconsistent with the current era of open adoption.⁵⁶⁸

In most circumstances, where a child's legal parentage matches their genetic and gestational parentage, these proposed reforms will not fundamentally change the information recorded on a birth certificate, just the location of that information. For

⁵⁶³ This is premised on a child's right to know their genetic origins, which includes the mitochondria donor. Debate remains about whether the donor's contribution to the resultant child should be considered "negligible" or "substantial". See de Campos and Milo, above n 475, at 177.

⁵⁶⁴ HART Act, s 50.

⁵⁶⁵ See Blyth, above n 342, at 187; Readings and others, above n 342, at 493; and de Campos and Milo, above n 475, at 173.

⁵⁶⁶ See Ravelingien and Pennings, above n 232, at 34.

⁵⁶⁷ Adult Adoption Information Act, ss 4 and 2.

⁵⁶⁸ Oranga Tamariki "Adopting a Child in New Zealand" <www.orangatamariki.govt.nz>.

example, where Anahera and Ben (a cis-gendered heterosexual couple) conceive their daughter Marama via sexual intercourse, Anahera's name is included in the genetic, gestational, and legal parentage sections of Marama's birth certificate and Ben's name is included in the genetic and legal parentage sections. However, if the input of a gamete donor is required Marama's genetic and legal parentage will differ. For example, if Ben was infertile and a sperm donor was used, Anahera's name would be included in the genetic, gestational, and legal parentage sections of Marama's birth certificate just as before. This time however, Ben's name would only be included in the legal parentage section and the sperm donor's details (or fertility clinic identifying information) would be included in the genetic parentage section. Note that Marama's legal parentage has not changed. Anahera and Ben remain her legal parents. The only difference is that her birth certificate now reflects the reality of her conception, allowing her to make an informed decision about requesting further information about the donor when she turns 18.⁵⁶⁹

An additional layer of complexity is created if a gestational surrogate is required. In this example, Anahera and Ben conceive Marama using their own gametes via IVF. Anahera is unable to carry the child, so her sister Hauku acts as the gestational surrogate. Upon Marama's birth, Hauku and her partner Jia are Marama's legal parents. Once the required adoption process is complete, Anahera and Ben become her legal parents. They are both then listed as Marama's genetic and current legal parents. Hauku's name is included in the gestational parentage section. Hauku and her partner Jia are listed as Marama's legal parents upon birth, followed by the date of adoption. Anahera and Ben are still ultimately acknowledged as Marama's legal parents. But the reforms ensure Hauku's significant contribution in bringing Marama into the world and Jia's support role are properly acknowledged and not hidden behind the text of Marama's birth certificate.

1 Privacy considerations

The nature of the reforms recommended in this thesis raise significant privacy considerations. Given the limited scope of this thesis, this section contemplates privacy specifically in terms of the practical operation of the reimagined birth certificate at the centre of the proposed reforms. Given the vast subject area, it does not attempt to provide a detailed theoretical analysis of privacy law more generally.⁵⁷⁰

The suggested inclusion of known information about children's genetic and gestational parentage would greatly increase the amount of personal information contained on a birth certificate, as compared to birth certificates in their current form, which only contain

⁵⁶⁹ If the conception process was via more of a DIY method, the sperm donor's actual name and details may be recorded. In this instance, Marama would not need to wait until she was 18 to access this information.

⁵⁷⁰ For a detailed examination of privacy law in Aotearoa New Zealand, see Paul Roth *Privacy Law and Practice* (looseleaf ed, LexisNexis).

information about a child’s current legal parents. It seems likely that many individuals would feel uncomfortable using a birth certificate containing detailed information about their genetic or gestational origins for the various purposes birth certificates can currently be used for, which are often administrative in nature. For example, a young person enrolling for university study must provide a certified copy of their birth certificate, and may understandably not wish individuals to know they were born as a result of sperm donation, or gestational surrogacy, or that they were adopted when they were five years old. This is amplified by the fact that such information is wholly immaterial to their enrolment application. Likewise, some individuals may be uneasy about others accessing such personal information given that any person can request the birth certificate of an individual born in Aotearoa New Zealand within the last 100 years if they have that individual’s full name and date of birth.⁵⁷¹ This is because birth records are essentially a “public register”.⁵⁷²

The reimagined birth certificate proposed in this thesis (the prototype of which is set out below) has been designed in such a way as to directly alleviate these concerns. This is achieved through splitting the proposed birth certificate across two pages. The first page is a standalone document, which contains the exact same information about individuals and their legal parents that birth certificates currently do (albeit with space to include up to four legal parents). Individuals are free to use this single page for all legal and administrative functions current birth certificates can be used for and only this page will be released to people requesting an individual’s birth certificate via s 74 of the Births, Deaths, Marriages, and Relationships Registration Act. The second page of the proposed birth certificate contains all the personal information about an individual’s genetic and gestational heritage, as well as former changes to their legal parentage and possible adoption details. This second page fulfils no legal or administrative function, except the provision of information. This practical safeguard balances the need for the provision of more information with relevant privacy concerns.

B Including More Than Two Legal Parents

As established in Chapter Three, birth certificates are fundamentally important documents, and being named as a legal parent on a birth certificate usually provides a clear pathway to obtaining guardianship rights and responsibilities for children. As a result of determining (in Chapter Six) that legal parentage should be extended to more than two parents, and the provision of a workable model of intentional legal parentage for multi-parent families (provided in Chapter Seven), it follows that birth registration

⁵⁷¹ See s 74 of the Births, Deaths, Marriages, and Relationships Registration Act. See also New Zealand Government “Order Certificates” <<https://certificates.services.govt.nz>>.

⁵⁷² New Zealand Government “Passports, Citizenship and Identity” <www.govt.nz>.

and certification documentation should allow more than two legal parents to be included. This is an imperative step in acknowledging multi-parent families as legitimate family groups and providing certainty for the children being raised within them. Such reforms would assist in removing residual social stigma in relation to diverse families. As Gerber and Lindner explain, “providing evidence of acceptance of their family by the government and society” is “likely to have a positive impact on a child’s psychological and sociological wellbeing”.⁵⁷³

1 Questions of terminology

Once it has been determined that birth certificates should incorporate more than two legal parents, questions of terminology arise, especially regarding the use of the terms “mother”, “father”, and “parent”. Commentators present diverse views about the appropriate terms of reference in such situations. Some take a gender-neutral approach, suggesting all legal parents are simply referred to as “parents”.⁵⁷⁴ Others suggest that a child can have more than one “mother”,⁵⁷⁵ but more conservative critics recoil from the idea.⁵⁷⁶ The creation of entirely new terminology has also been proposed.⁵⁷⁷

This thesis takes its cue from California, where each parent is allowed to choose if they wish to be identified on a child’s birth certificate as a “mother”, “father”, or “parent”. Ideally, this would apply to all individuals registering a child’s birth or adopting a child, not just in the context of multi-parent families. This approach provides a simple solution and avoids the creation of overly complex or potentially discriminatory rules. It is also the most respectful of individual choice in terms of the diverse ways families (especially multi-parent ones) may choose to structure their relationships with their children. Indeed, Gerber and Lindner describes the Californian approach as “[a]n example of best practice in regards to terminology on birth certificates” because of the respect it affords to “gender non-specificity, and allows parents the greatest amount of flexibility to have their identity accurately recorded on their child’s birth certificate”.⁵⁷⁸

Aotearoa New Zealand is already moving towards this approach within the current two-parent paradigm. This was triggered in 2017 by a female same-sex couple making a

⁵⁷³ Gerber and Lindner, above n 2, at 47.

⁵⁷⁴ See Cammu, above n 464, at 337-340. This reflects the complexity of terminology in families where one or more of a child’s parents are transgender, or where a child’s parents do not identify by traditional gender binaries.

⁵⁷⁵ See Bartlett, above n 82.

⁵⁷⁶ See Alison Diduck “‘If Only We Can Find the Appropriate Terms to Use the Issue Will Be Solved’: Law, Identity and Parenthood” (2007) 19(4) *Child and Family Law Quarterly* 458 at 464-467.

⁵⁷⁷ Cammu, above n 464, at 337-336.

⁵⁷⁸ Gerber and Lindner, above n 2, at 47.

complaint to the Human Rights Commission about the discriminatory terminology used on birth certificates.⁵⁷⁹ In this instance, the gestational carrier had been recorded on the child's birth certificate as a "mother", and her partner (who was the genetic parent of the child) was listed as the "other parent".⁵⁸⁰ The couple claimed they had been "discriminated against on the grounds of gender and sexual orientation".⁵⁸¹ As a result of this, the Department of Internal Affairs now allows individuals in female same-sex relationships (who conceive a child via AHR) to choose whether they wish to be recorded on a child's birth certificate as a "mother" or a "parent", but the term "father" is not permitted.⁵⁸² However, given our current parentage laws, male same-sex couples (where neither of the partners are able to gestate the child) are unable to choose their preferred terminology because they are unable to jointly register the birth of a child.⁵⁸³ This is because the individual who gives birth is always deemed to be the legal parent and an adoption is required to transfer legal parentage from that individual to the male same-sex couple. After an adoption is formalised in such circumstances, they are automatically recorded as "father" and "other parent" on the child's birth certificate.⁵⁸⁴

Possible change in this regard is on the horizon (as referenced in Chapter Two). The Births, Deaths, Marriages, and Relationships Registration Bill 2017 would alter the current Act to allow all parents to choose whether they are referred to as a "mother", "father", or "parent" when registering the birth of their child, and this choice will then be reflected on the child's resulting birth certificate.⁵⁸⁵ According to Births, Deaths and Marriages, if the Bill is enacted, adoptive parents will also be able to choose their preferred terminology when recorded on their child's birth certificate, although the

⁵⁷⁹ Bartlett, above n 82.

⁵⁸⁰ Bartlett, above n 82.

⁵⁸¹ Newshub "NZ Birth Certificate Makes History by Naming Two Parents as 'Mother'" (3 May 2018) <www.newshub.co.nz>.

⁵⁸² See New Zealand Government "Registering a New Baby", above n 66. See also New Zealand Government "Notification of Birth Form" above n 82.

⁵⁸³ The reforms proposed in this thesis, whereby up to four individuals would be able to be (upon proof of a legally executed "intentional multi-parent agreement") recorded on a child's birth certificate from the outset using their preferred terminology, will only alleviate this problem where a male same-sex couple are seeking to parent the child alongside a gestational carrier, not where a gestational surrogate (who is not part of the multi-parent family group) gives birth to the child. This is because the only way to transfer legal parentage from the gestational surrogate to the intending parents is via adoption. Consequently, surrogacy is expressly excluded from the operation of this model. See Chapter Seven for a more detailed explanation.

⁵⁸⁴ When contacted via phone on 5 March 2019, Births, Deaths and Marriages confirmed that only female same-sex couples are able to choose their parental terminology during the birth registration process and that after an adoption order has been made in favour of a male same-sex couple, these individuals are automatically listed on a birth certificate as a "father" and "other parent".

⁵⁸⁵ Births, Deaths, Marriages, and Relationships Registration Bill (296-2), cl 12(2A). Prior to reaching its second reading, the Bill was deferred pending additional public consultation as a result of changes made by the select committee. See Martin, above n 77.

wording of the Bill does not currently signal such a change.⁵⁸⁶ It is hoped that this Bill and other possible future changes (that may include the reforms proposed here) will resolve the inequalities between different family groupings, and allow all legal parents to self-select the terminology that best reflects their relationships with their children.

III The Birth Certificate Prototype

The birth certificate prototype developed in this thesis is a two-page document, which carefully balances three crucial factors: the clear delineation of legal parentage, the inclusion of more information about a child's genetic and gestational origins, and the possible privacy concerns raised by the inclusion of more information about genetic and gestational parentage in a document used for a variety of legal and administrative purposes. The prototype is designed to be used for all children born in Aotearoa New Zealand. This reflects the importance of all children knowing where they come from, in terms of their genetic, gestational, and legal parentage, and ensures the birth certificates of children born into diverse families appear and function in exactly the same way (albeit with some additional information included in the supplementary sections) as those of children who are conceived via sexual intercourse and born into a more traditional two-parent family.

The first page of the birth certificate prototype contains information about a child's legal identity. It is broken into two parts: a section containing the child's details, which includes their name, date and place of birth, and citizenship status, as well as a section setting out their legal parentage. This first page includes all of the information currently included on a child's birth certificate, but features two important differences: space is provided for up to four parents to be included, and each parent is able to specify their connection to the child by choosing whether they wish to be recorded as a "mother", "father", or "parent" (as discussed above).

This page operates as a stand-alone (single-sided) document for all relevant legal and administrative purposes. It fulfils the exact same legal functions that birth certificates in their current form encompass. For privacy reasons, it is entirely independent from the following parts of the document. A proposed draft of this page is included below.⁵⁸⁷

⁵⁸⁶ When contacted via phone on 5 March 2019, Births, Deaths and Marriages said that the administration of birth certificates will change significantly if the Bill is enacted and that such changes would include adoptive parents being able to choose their preferred terminology on their child's birth certificate.

⁵⁸⁷ All artwork created by Susan Fern Art <www.susanfernart.etsy.com> and reproduced with permission.

AOTEAROA NEW ZEALAND BIRTH CERTIFICATE
Legal Identity Information

DETAILS OF CHILD

First name(s):
Surname:
Registered sex:
Date of birth:
Place of birth:
Still-birth:
Multiple birth:
New Zealand citizen by birth:
Name changes:

LEGAL PARENTAGE OF CHILD

LEGAL PARENT
Chosen Title:

First name(s):
Surname:
Registered sex:
Date of birth:
Place of birth:
Former name(s):

LEGAL PARENT
Chosen Title:

First name(s):
Surname:
Registered sex:
Date of birth:
Place of birth:
Former name(s):

LEGAL PARENT
Chosen Title:

First name(s):
Surname:
Registered sex:
Date of birth:
Place of birth:
Former name(s):

LEGAL PARENT
Chosen Title:

First name(s):
Surname:
Registered sex:
Date of birth:
Place of birth:
Former name(s):

The second and third pages of the prototype include supplementary information about a child's broader identity not currently included on a child's birth certificate in Aotearoa New Zealand. These pages focus on the specific circumstances surrounding the child's conception and gestation and record changes over time to a child's legal parentage. This supplementary information is split into four main sections across two pages, and is designed to be printed as a separate (double-sided) one-page document.

The second page of the birth certificate prototype (the front page of the supplementary information section) contains two parts: the child's genetic heritage, followed by their

gestational heritage. Where a genetic parent gestates a child, that individual's name will appear in both parts. However, where gestational surrogacy occurs (and the surrogate is not a genetic parent of the child) these parts will contain different names.

Within the genetic heritage section there is space for two ovum providers. This will rarely be relevant, but reflects the possibility of mitochondrial donation procedures, which require ova from two individuals, to prevent mitochondrial diseases from being passed on to future generations. Such techniques, that technically result in a child having three genetic parents, are not currently possible in Aotearoa New Zealand. However, a child could feasibly be conceived via this technique elsewhere in the world before being born here, therefore the possibility is accommodated within the prototype. The proposed second page is provided below.

AOTEAROA NEW ZEALAND BIRTH CERTIFICATE
Supplementary Information
Genetic and Gestational Heritage of

Date of Birth:

GENETIC HERITAGE OF CHILD

PROVIDER OF OVUM
(Nucleus)

First name(s):
Surname:
Registered sex:
Date of birth:
Place of birth:
Former name(s):

PROVIDER OF OVUM
(If Mitochondrial Donation Occurs)

First name(s):
Surname:
Registered sex:
Date of birth:
Place of birth:
Former name(s):

PROVIDER OF SPERM

First name(s):
Surname:
Registered sex:
Date of birth:
Place of birth:
Former name(s):

GESTATIONAL HERITAGE OF CHILD

First name(s):
Surname:
Registered sex:
Date of birth:
Place of birth:
Former name(s):

The third page of the prototype (the back page of the supplementary information section) focuses on changes in a child’s legal parentage between the child’s birth and the current time, and consists of three parts. Firstly, it contains space for up to four individuals to be included as the child’s legal parents upon birth. Secondly, where legal parentage has been transferred via adoption, it includes the place and date of adoption. Finally, in terms of the child’s current legal parentage, it refers the reader directly back to the first page of the birth certificate prototype which contains details about the child’s legal identity, including their current legal parentage. A draft of the third page is included below.

AOTEAROA NEW ZEALAND BIRTH CERTIFICATE
Supplementary Information
Parental Heritage of
Date of Birth:

LEGAL PARENTAGE UPON BIRTH

LEGAL PARENT
Chosen Title

First name(s):
Surname:

Registered sex:

Date of birth:
Place of birth:

Former name(s):

LEGAL PARENT
Chosen Title:

First name(s):
Surname:

Registered sex:

Date of birth:
Place of birth:

Former name(s):

LEGAL PARENT
Chosen Title:

First name(s):
Surname:

Registered sex:

Date of birth:
Place of birth:

Former name(s):

LEGAL PARENT
Chosen Title:

First name(s):
Surname:

Registered sex:

Date of birth:
Place of birth:

Former name(s):

ADOPTION DETAILS

Date of Adoption:

Day Month Year

Place of Adoption:

Location

CURRENT LEGAL PARENTAGE

See Legal Identity Information on first page

IV Summary of Chapter Eight

This chapter detailed the operation of the reimagined birth certificate proposed in this thesis, which better reflects the importance of children knowing their genetic and gestational parentage and the need for increased legal recognition of multi-parent families where children are intentionally brought into the world via AHR and raised by more than two individuals. It provided a prototype of the reimagined birth certificate alongside an explanation of the particular features it contains. This illustrates how birth certificates can be reformed to enhance a child's right to know and preserve their identity and incorporate more than two legal parents in relevant circumstances. This can be achieved, while still preserving their current legal functionality, and without compromising valid privacy considerations.

CHAPTER NINE

Conclusion

All social life is essentially *practical*. All mysteries which lead theory to mysticism find their rational solution in human practice and in the comprehension of this practice ... The philosophers have only *interpreted* the world, in various ways; the point is to *change* it.⁵⁸⁸

The vast societal changes in Aotearoa New Zealand over the past few decades have occasioned the expansion of legal recognition to families far beyond the traditional model of the heteronormative nuclear family. This highlights the socially constructed nature of legal rules, and their ability to evolve over time to reflect changing societal norms.⁵⁸⁹ At its core, this is what this thesis is about: the expansion of legal parentage and the creation of birth certificates that better align with the diverse ways children are conceived, born, and live in contemporary family structures. The rationale for these suggested changes centres on the importance, from an identity development perspective, of children (and adults) knowing who they are and where they come from. This is reinforced by the intersectionality of aspects of Māori identity development, social constructionist conceptions of the self, and narrative identity theory, alongside the prominence already given to the protection of children’s identities within contemporary international and domestic family law.⁵⁹⁰ It also acknowledges the disadvantages children experience if their relationships with all of their social parents are not afforded sufficient legal protection.

Within this context, this thesis creates a new model of legal parentage by design, incorporating more than two individuals based on intentional conceptions of parenthood without the need for judicial intervention.⁵⁹¹ It is designed to apply in limited circumstances, where children are intentionally raised in multi-parent families, and highlights that the benefits conferred upon children by legal parentage and guardianship are not functionally equivalent. Two safeguards are provided to ensure the intentionality of these family groupings. First, the model only applies to children conceived via AHR (in the broad sense defined in Chapter One). Second, all intended legal parents of the child must obtain independent legal advice and execute an “intentional multi-parent

⁵⁸⁸ Karl Marx “Theses on Feuerbach” in Karl Marx and Frederick Engels *The German Ideology* (CJ Arthur (ed), International Publishers, New York, 1999) at 122-123.

⁵⁸⁹ See Stoddard, above n 27 at 973; and Sifris “Lesbian Parenting in Australia”, above n 27, at 9-15 and 22-23. See also Chapter Two.

⁵⁹⁰ See Chapters Four and Five.

⁵⁹¹ See Chapters Six and Seven.

agreement” prior to the birth of the child (preferably before the child’s conception), which signals their intention to jointly raise the child.⁵⁹² This reflects a desire to extend legal parentage to additional willing social parents; it does not impose legal parentage upon disinclined or unsuspecting individuals.

These reforms culminate in the creation of a proposed new birth certificate prototype that reimagines birth certificates as more inclusive documents that reflect all children’s genetic, gestational, and legal parentage.⁵⁹³ This would rectify the current informational deficit within birth certificates, whereby in only recording children’s legal parentage, birth certificates fail to reflect the importance of children also knowing their genetic and gestational heritage. These factors can play a significant role in children’s ongoing identity development, and for some children, this information forms an integral part of their continuing life story.⁵⁹⁴ As a result of the proposed expansion of legal parentage beyond two individuals, the prototype also contains space for more than two legal parents to be recorded on a child’s birth certificate in appropriate circumstances. The adoption of this prototype, along with the legislative reforms required to action these changes, would better meet Aotearoa New Zealand’s obligations under UNCROC and better respect Māori conceptions of whakapapa as a taonga guaranteed protection under Te Tiriti o Waitangi.⁵⁹⁵

While this thesis concentrates on a particular subset of familial relationships, this is not to say that other relationships between children and the individuals raising them have adequate legal recognition. Regardless of how children are conceived and born, the inconsistencies generated by legal parentage can disadvantage children in all types of families, including those being raised by mātua whāngai, grandparents, step-parents, and foster parents. The disconnect between current legal parentage rules and the lived realities of children will only widen as society continues to diversify and the future of AHR reveals itself.⁵⁹⁶ To that end, the theoretical and cultural frameworks advanced here could underpin broader improvements to legal parentage and surrogacy laws, to ensure all children’s relationships with the significant individuals in their lives are granted the legal recognition and protection they deserve.

⁵⁹² See Chapter Seven.

⁵⁹³ See Chapter Eight.

⁵⁹⁴ See Chapter Four.

⁵⁹⁵ See Aroha Mead, above n 8, at 128.

⁵⁹⁶ See Chapter Six.

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