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Family Law

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Articles

LESBIAN MOTHERS IN DISPUTE: *T v B*

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Mr Justice Moylan's decision in *T v B (Parental Responsibility: Financial Provision)* [2010] EWHC 144 (Fam), [2010] 2 FLR (forthcoming) is the latest of only a handful of published cases to deal with same sex parenting disputes and the impact of assisted reproduction law. The case vividly highlights how the principle of parenthood, traditionally a comfortable and familiar concept to family lawyers related to biology (which is therefore a question of fact rather than law), becomes much more complex in relation to families created through assisted reproduction or in alternative family structures.

Assisted reproduction law can (but does not always) override biology to confer parenthood on a non-genetic parent from birth. Parliament has overhauled assisted reproduction law significantly (and non-retrospectively) three times in the last 25 years, with the latest changes which came into effect last year enabling lesbian couples to be named on a birth certificate together for the first time. For assisted reproduction families, whether a person is treated as a legal parent (and so is financially responsible for a child) therefore depends on many different considerations, including marital status, the date of conception and the law in force at the time, whether they conceived at a licensed clinic in the UK, outside the UK or by private arrangement at home, whether they are in a same sex or heterosexual relationship, whether they have taken steps post-birth to adopt and whether they have subsequently married or entered into a civil partnership.

THE FACTS OF THE CASE

A lesbian couple, who had lived together since 1994 (but critically were not civil partners) conceived a child together using anonymous donor sperm at a UK licensed fertility clinic. Their child, by virtue of s 28(6) of the Human Fertilisation and Embryology Act 1990 (HFEA 1990) therefore had no legal father. The child was born in 2000 and, as the court acknowledged:

> 'The decision for (the applicant) to become pregnant was a decision which both acknowledge was ultimately reached jointly by the parties . . . Both took on the role of parents after the child's birth.'

The couple separated and in January 2009 the non-birth mother applied to court and was awarded a shared residence order, giving her parental responsibility for the child.

The matter before the court, however, concerned not parental responsibility or the arrangements for care of the child but a contested application by the child's birth mother against the non-birth mother for a financial order under Sch 1 of the Children Act 1989. As the applicant's lawyer said:

> 'She cannot on the one hand fight for parental responsibility and then seek to dissociate herself from the financial obligation of someone with the responsibility of a parent. Any interpretation of the law accommodating such a position would, it is submitted, be grotesque.'

The issue to be determined by the court was whether the respondent, who was not the child's biological mother nor an adoptive parent nor a legal step-parent, could be held financially responsible under the provisions of Sch 1 and, more

specifically, whether she was a 'parent' by virtue of the social role she had played in her child's care for 10 years, and/or by virtue of the parental responsibility she had sought and been awarded by the court.

SCHEDULE 1 TO THE CHILDREN ACT 1989

Paragraph 1 of Sch 1 allows a range of adults with responsibility for a child to make an application to the court for a financial order, including parents, guardians, special guardians and any person in whose favour a residence order is in force. Interestingly, by virtue of her residence order, the respondent could therefore have made an application against the applicant for a Sch 1 order had she wished to do so. However, whether the non-birth mother could herself be held financially responsible was a more complex question which the court was tasked to determine.

An application for a Sch 1 order can only be made against a 'parent'. Paragraph (2) of Sch 1 sets out the types of orders which may be made by the court and in each case the order (whether for periodical payments, a lump sum or a settlement of property) is an order 'requiring either or both of the parents' to make financial provision for the child. Despite the reference to 'parent' in various places in the Children Act 1989 (for example in setting out the persons who are entitled to apply without leave for a s 8 order) the Act gives no general definition of what a 'parent' is. The only limited definition given is in para 16(2) of Sch 1 which applies only for the purposes of Sch 1, and which states:

> 'In this Schedule . . . "parent" includes (a) any party to a marriage (whether or not subsisting) in relation to whom the child concerned is a child of the family, and (b) any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child concerned is a child of the family.'

This definition acts to extend the natural meaning of parent and the category of people against whom a Sch 1 order can be made to cover step-parents as well as those otherwise considered parents by the natural meaning of the term. In this particular case, the couple were not civil partners and the non-birth bother was not biologically connected to the child, so the extended definition of parent in para 16(2) was not of assistance. The court therefore had to consider the natural meaning of the term 'parent' for the purposes of the Children Act 1989, in order to decide whether a financial order could be made against the respondent. Could a wide interpretation be taken in the light of the unusual circumstances or was the respondent's lack of biological connection with her child fatal to the application against her?

THE COURT'S DECISION

The court was faced with two alternative interpretations of the law. On the one hand, as the applicant argued, 'It would be a nonsense for the definition of parent to give a broad construction for the purpose of welfare decisions, but a narrow construction for the purposes of financial relief under Sch 1'. The respondent should not be permitted to have the benefits of shared care and parental responsibility without being willing to shoulder the financial burden associated with parenthood. On the other hand, as the respondent argued, the court simply had no power to make a Sch 1 order against a person who was not a parent, and 'the only people against whom financial orders can be made under Sch 1 are a child's legal parents being the biological parents or, for example, by operation of the HFEA 2008' (or other statutory mechanism). Parliament (in the HFEAs of 1990 and 2008 and their precursors) had legislated to award legal parenthood to certain non-biological parents, and it would create significant uncertainty if the courts applied a discretionary definition which effectively overrode these provisions and could, potentially, mean that anyone with practical responsibility for a child could be defined as a parent.

While Mr Justice Moylan expressed his sympathy for the wider moral position, his decision was clear and the application for a Sch 1 order consequently failed on the basis that the lesbian non-birth mother was not a legal parent:

> 'In my view, the word 'parent' in Sch 1 means legal parent . . . It is for the legislature to determine who should be liable to financial claims for the benefit

> of children . . . It is not for the courts to determine, by reference to an essentially discretionary test, that a person should in the circumstances of the particular case be treated as a parent and thereby potentially have the financial obligations imposed by Sch 1.'

PREVIOUS CASE LAW

This case follows *Re G (Children)* [2006] UKHL 43, [2006] 2 FLR 629, the first published case to grapple significantly with the relative rights and status of separated a lesbian couple who had conceived a child together, and a case which also addressed the concept of parenthood in same sex parenting situations. This case involved two children conceived through donor insemination by a lesbian couple, and an appeal to the House of Lords against a decision that residence be awarded to the non-birth mother following a relationship breakdown. Baroness Hale considered very carefully the significance of parenthood, highlighting that a person may become a parent in three ways: through genetic parenthood, through gestational parenthood or through social/psychological parenthood. Ultimately, the birth mother's identity as a genetic and gestational parent as well as a social parent had not been given due weight in the context of the residence dispute.

The decision in *Re G*, while further demonstrating the difficulties experienced by the courts in grappling with concepts of parenthood, highlights the court's greater flexibility to determine s 8 applications on discretionary welfare grounds. As *T v B* now soberingly demonstrates, the concept of parenthood is black and white with no middle ground. The court's wide ranging discretion to make best interest-based decisions for children, normally the very linchpin of Children Act 1989 applications, does not apply to parenthood. Parenthood is governed by biology or statutory mechanism, most notably in this case assisted reproduction law.

WHAT MAKES A PARENT?

In most traditional family law cases, the issue of who is a parent is rarely considered, the focus instead being on the acquisition and exercise of parental responsibility and post-birth arrangements for a child's care. This is because, in the vast majority of cases, parenthood is obvious: it flows from biological paternity or maternity (subject to certain rebuttable common law presumptions) and is a question of fact rather than a question of law.

Not so for families created through assisted reproduction. Here the law applies legislative rules which explicitly override biology. So, for example, a sperm or egg donor who donates through a licensed clinic is not (by virtue of s 33 and 41 of the HFEA 2008, formerly ss 27 and 28(6) of the HFEA 1990) the legal parent of his or her biological child. Similarly, the male partner of a woman who conceives with donor sperm has long been treated as his child's legal father, even though he is not the biological father. (Notably in *T v B*, if the non-birth mother had been an unmarried father who had conceived with donor sperm he would have been financially responsible). The law on donor conception is particularly complex, the law having been changed non-retrospectively in 1987, 1990 and 2008, creating different law for families conceived at different times.

Parliament has also recently enacted new law (in ss 42 and 43 of the HFEA 2008) explicitly to make a lesbian non-birth mother the legal parent of a child she conceives with her partner. In line with the existing law on donor conception which benefits infertile fathers conceiving with donor sperm, a lesbian partner will now be treated as the other 'parent' of a child if:

- the couple are civil partners at the time of conception, the birth mother conceives through artificial insemination or embryo transfer, and both partners consent to the conception, or
- if the couple are not civil partners, they conceive at an HFEA licensed fertility clinic in the UK and both sign the requisite parenthood election forms before conception to confirm that they intend both partners to become the child's legal parents.

The new rules were – explicitly – not made retrospective by Parliament. Sections 42 and 43 of the Human Fertilisation and Embryology Act 2008 came into force on 6 April 2009 and only apply to children conceived after that date. Children conceived by lesbian parents before 6 April 2009 will continue to fall under the old law, which only recognises the woman who gives birth as the child's parent, in the absence of an adoption order.

WIDER IMPLICATIONS

The decision in *T v B*, although morally wrong, is legally right in the light of recent Parliamentary intervention in assisted reproduction law. The court simply did not have the power to confer the financial responsibilities of legal parenthood on a lesbian partner retrospectively, however equitable that may be in practice. Parliament has expressly provided for joint parenthood only for lesbian couples prospectively, in certain circumstances as provided prescriptively by the legislation. There is no discretion. As time goes forward, the new assisted reproduction laws will make greater numbers of lesbian non-birth mothers financially responsible. However, many children conceived before 6 April 2009 will remain unprotected, as will some of those conceived after 6 April 2009, including children conceived by non-civil partners informally with a known donor or outside the UK.

As was highlighted in *T v B*, remedies are available if the couple become civil partners, since an application under Sch 1 can explicitly be made against a step parent. In other cases, lesbian non-birth mothers who have adopted their child will have acquired financial responsibility by operation of law. *T v B* demonstrates that one cannot apply traditional concepts of family law to alternative family structures in which legal, biological and social parentage are not all united in the same parents. Family law usually considers parenting disputes in a pragmatic and discretionary way, led by the best interests of the child. Assisted reproduction law is a very different beast. Its driving force is clarity and certainty, rather than welfare, and parenthood (and by extension financial responsibility is not within the court's gift.