

# PR granted to a non-birth mother in a disputed lesbian parenting case

*Jade Quirke and Heidi Burrows* NGA Law

---

*A review of the High Court Family Division case of FC v MC [2021] EWHC 154 (Fam) (29 January 2021)*

In an important decision on same-sex parenting, the High Court has ruled in favour of a non-birth lesbian mother seeking parental responsibility (PR) despite her lack of legal parenthood. In granting PR the court effectively treated the non-birth lesbian mother in the same way as a biological and legal father for the purpose of applying the PR legal test.

The case concerned an application by a non-birth mother (FC) to secure PR for her son (D), aged five. The application was opposed by D's biological and birth mother, (MC), who had been in a same-sex relationship with FC for eight years until the couple separated in 2018. Both parties were unrepresented, D was represented by his Rule 16.4 Guardian.

D was conceived via artificial insemination at home with the assistance of a known sperm donor. He was born in January 2016. As conception took place outside a UK licenced fertility clinic and the couple were not married or civilly partnered at the time, FC could not be named on D's birth certificate as she was not his second legal parent. However, the reality of D's situation was that he was jointly cared for by MC and FC from birth.

In August 2018 the parties separated and D had regular contact with FC until June 2019. Contact then stopped entirely in June 2019 following a heated argument and in August 2019 FC made an application for a "spends time with" and PR order.

According to FC, D's conception was jointly planned and it was always the intention that she and MC would be joint parents and she would be fully involved in D's life. They had ruled out the option to conceive at a fertility clinic due to the expense, and it was decided that MC would be the birth mother. However, FC attended all antenatal appointments, was fully involved in caring for D and, during the first nine months of his life, cared for him on a full-time basis whilst MC went back to full-time studying. When D was born, FC changed her surname so that it was the same as MC and D's, and he always called her "Mummy". FC told the court that the couple were so excited and involved with the birth and parenting that the issue of FC's legal status in respect of D "simply got forgotten or overlooked".

These facts were not disputed by MC although her statements suggested that she had always considered herself to be the "main" or "exclusive" parent at times and she did not agree to FC securing PR.

Why did MC oppose the application?

- MC considered herself as the primary parent and the person who had taken responsibility for D throughout his life.
- She could not see what benefit it was to D for FC to have PR.
- She expressed worries about FC's commitment to D.
- She was concerned that sharing PR with FC would undermine her parenting in practical terms, since FC would not parent consistently with her parenting style and would not uphold the enforcement of boundaries.

## Legal parenthood and PR for same-sex parents

The dispute might, on the facts, sound just like cases family lawyers deal with every day concerning contact between parents who have separated acrimoniously. But what made this case interesting, and the reason it was reported, was that it concerned same-sex parents who were not both legal parents.

Most separated parents do not need to think about whether they are their child's legal parent and whether they have PR, but for parents of children conceived through donor conception or in same-sex relationships, the law has 

*"MC's statements suggested that she had always considered herself to be the 'main' or 'exclusive' parent at times."*

some very specific rules about who is and who is not a parent and this can fundamentally affect their legal status.

*“In strict legal terms, FC had no parental connection with D, although of course emotionally and psychologically she did. To formalise her legal relationship, FC therefore applied to the court for the “spends time with” and PR orders so she could share PR with MC.”*

Non-birth mothers with children conceived before 6 April 2009, and unmarried non-birth mothers who conceive through artificial home insemination or at a clinic overseas will not be legal parents.

In this case D was conceived via artificial home insemination with donor sperm and so it was accepted by all that FC did not fall within the definition of a legal parent (following ss42-43 of the Human Fertilisation and Embryology Act 2008). In strict legal terms, this meant she had no parental connection with D, although of course emotionally and psychologically she did.

To formalise her legal relationship, FC therefore applied to the court for the “spends time with” and PR orders so she could share PR with MC. This would not make her a full legal parent (including for the purposes of things like inheritance) but it would mean she had shared responsibility for D while he was a child. PR is defined in s3(1) of the Children Act 1989 as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child, and his property”.

### **What does the court need to consider before granting PR?**

In all Children Act applications the welfare of the child is of course the court’s paramount consideration, but how that is assessed in relation to PR has been considered in various previous cases.

In *Re G (Children) (Residence: Same-sex partner)* [2006] UKHL 43, Baroness Hale had considered how the law applies to same-sex parents. She held there were number of different ways that a person may be a parent, including being a social and psychological parent. This is a key concept for same-sex couples where one parent – whilst not being the biological or gestational parent – is by all the other accounts a parent. The judgment in *Re G* in effect established that same-sex parents could be treated in the same way as other parents even if they were not legal parents.

In *Re H (Minors) (Local authority: Parental rights (No 3))* [1991] Fam 151 the Court of Appeal had also highlighted three particular factors the court should take into account when considering an application by a father for PR. These were:

- the degree of commitment the father had shown to the child
- the degree of attachment between them
- the motivation behind the father’s application

### **What did the court decide in this case?**

Ultimately, the judge found that it was in D’s best interests for FC to have PR and for there to be a shared care/lives with order. She accepted FC’s evidence that she had made a lifelong commitment to D from the time of his birth and that she continued to show such commitment at the time the application was made. At paragraph 23 the judge went on to say:

“In my view, it follows that whatever agreement or understanding the parties may have had at the time of conception and birth will not be determinative in deciding whether parental responsibility should be granted. That is not to say that such an agreement is wholly irrelevant, as it may provide evidence as to the commitment of the applicant to the child and be informative as to the nature of the relationship that they have with the child. However, evidence as to the applicant’s current commitment and attachment to the child is likely to be of greater interest to the court than the parties’ earlier intentions.”

Within the judgment it is clear that the judge did give thought to what would happen if FC misused her PR, as case law shows this would be a reason to refuse an application. However, the judge found there was no evidence of this and considered FC’s motivations were genuine and her motivations for making the application were not based on “ill will or a desire to thwart or control”. She also considered MC’s worries about sharing PR with FC and concluded that they were typical worries that separated parents have to deal with.

In terms of Cafcass, the judge placed little weight on the reporting officer’s addendum report as it was drawn up after only a limited period of contact. Nevertheless, Cafcass found evidence that FC had shown the requisite commitment, attachment and motivation for PR and was positive about her observations of FC and D’s contact.

Ultimately, the judge concluded that D viewed FC as his parent and it was therefore appropriate for the law to reflect that both meaningful and important relationship.

### **Why is this decision significant?**

By combining the rationale of *Re G* and *Re H*, this case has established that same-sex parents who are psychological

parents can be granted PR according to the same test which applies to biological and legal fathers, even if they are not legal parents. This is significant for same-sex parents since the test is a relatively light one, assessing attachment, commitment and motivation rather than any more substantive welfare factors.

Many same-sex female couples choose to conceive via artificial donor insemination at home, and where they are not married or in civil partnership at the time of conception, the non-birth mother will not be the legal parent. As this case identifies, the law is often at odds with the reality

of a child's situation upon birth and disputes between same-sex parents can be messy to untangle, leaving non-birth mothers feeling vulnerable and anxious. However, it is increasingly the case that the courts will look to the reality of the situation than to the legal status of a same-sex parent. Even where the law excludes someone's legal parenthood, the family court can still give them rights if they can demonstrate real commitment and a parental relationship with a child.

*Heidi@ngalaw.co.uk*  
*jade@ngalaw.co.uk* 