

Jumping to inclusion

Natalie Gamble looks at how the Human Fertilisation and Embryology Act 2008 will affect same-sex couples having children together



Same-sex conception is an increasingly common part of modern life, and there are various possible scenarios. Lesbian couples may conceive through a licensed fertility clinic using a registered sperm donor, or may make a private arrangement with a friend or known donor. Gay men may conceive through surrogacy (admittedly rarely and mainly abroad to date), or may act as co-parents, conceiving a child with a lesbian couple or a single woman with an agreement to share parenting.

Though a few couples have pioneered same-sex conception in decades past, the last couple of years have seen the flood-gates open. There are a number of reasons. The changing policy of the Human Fertilisation and Embryology Authority (the Authority) has, since 2003, enabled widespread access to licensed fertility treatment for lesbian couples. The growth of the web has allowed couples to access information about how to start a family, as well as to make contacts with co-parents, donors and surrogates. And of course more liberal social attitudes and legislation like the Civil Partnership Act 2004 (CPA 2004) have ratified that same-sex relationships are an acceptable part of society, making the choice to start a family just a normal part of life.

What this means for family lawyers

Same-sex conception is without doubt creating a store of future work for family lawyers. While existing experience of dealing with divorce law can to some degree just be transplanted across to civil partnership dissolution work, things get more complicated where children are involved, and particularly children conceived within a same-sex partnership. Understanding the status of everyone involved – birth mother, non-birth mother, biological father, non-biological

father, donor and surrogate – requires an understanding of the rules that govern parenthood in assisted reproduction cases, and this is a complex area of law where the rules are about to change significantly.

The Human Fertilisation and Embryology Act 2008

The Human Fertilisation and Embryology Act 2008 (HFEA 2008) received royal assent on 13 November 2008 and is expected to come into force in stages in 2009/2010. It will introduce important new rights for gay and lesbian parents.

One of the most significant changes is the automatic new parental recognition for lesbian partners following donor conception. Section 42(1) of the HFEA 2008 applies to civil partners and states:

If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership, then... the other party to the civil partnership is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

So where a woman in a civil partnership conceives a child through IVF or artificial insemination after April 2009, her civil partner will, provided she consents to the conception, be treated as the other parent of her child.

Section 43 of the HFEA 2008 provides similar recognition for unregistered lesbian partners. Here the rules are slightly different, but an unregistered lesbian partner will be recognised as a parent if:

- her partner does not have a civil partner or husband who would otherwise be the child's second parent;

'The parenthood rules for same-sex families are complex, and a history of recent legal reform means that even siblings within the same family could be treated differently by the law.'

- her partner conceives at an Authority-licensed clinic; and
- both partners sign the required forms at the clinic electing for the non-birth mother to be treated as a parent.

The new rules are of wide application. While s43 requires unregistered couples to conceive at a licensed clinic, there is no equivalent requirement for civil partners. This means that civil partners conceiving at home with a known donor by private arrangement will both become legal parents, provided that they conceive by 'artificial insemination' and the non-birth mother consents. These rules match the existing donor conception provisions for heterosexual couples, which have for many years afforded parental status to a husband conceiving with a known sperm donor at home, but they are likely to be much more widely applicable in practice to lesbian couples.

The status of 'parent' given to the non-birth mother by ss42 and 43 of the HFEA 2008 is essentially equivalent to fatherhood. If the couple are civil partners, the non-birth mother will have parental responsibility automatically and can be named on the birth certificate without attending the birth registration. If the couple are not civil partners, the non-birth mother's parental responsibility is dependent on her being named on the birth certificate or, failing that, she can acquire parental responsibility later by agreement or by court order. She will, regardless, be financially responsible for the child just like a natural father.

The new rules will also have an impact on the status of the biological father. Under the current law, if a lesbian couple conceive at a licensed clinic using a registered sperm donor, his rights and

responsibilities as a parent are excluded by s28(6) of the Human Fertilisation and Embryology Act 1990 and the child has no legal father. However, if a lesbian couple conceives at home by private arrangement or conceives through a clinic using a known donor who intends to act as a co-parent, the donor will be the legal father of the child. Section 45(1) of the HFEA 2008 will change this. It states:

Where a woman is treated by virtue of s42 or 43 as a parent of the child, no man is to be treated as the father of the child.

The law does not create room for three parents. If a child has two mothers (or more accurately a mother and a second female parent), then there is no legal father. Section 48(2) of the HFEA 2008 states that:

... where by virtue of s45 a person is not to be treated as a parent of the child, that person is to be treated in law as not being the parent of the child for any purpose.

This makes it absolutely clear that the natural father of a donor-conceived child will have no status in law as a parent, whatever his involvement, if his biological child has two female parents.

Changes to the surrogacy rules

Gay men conceiving through surrogacy are also given new rights by the HFEA 2008, though these rules are expected to come into force a year later than the new rights for lesbian couples, in April 2010. The law allows commissioning parents in surrogacy arrangements to apply for a parental order within six months of the birth to reassign parenthood from the surrogate mother (and her husband if she has one) to the commissioning parents.

The current law only allows applications from heterosexual married couples, but s54 of the HFEA 2008 will, from April 2010, allow applications from unmarried and same-sex couples.

Various conditions must be complied with, including that the surrogate mother consents and that no more than 'reasonable expenses' has been paid. However, assuming that the criteria are satisfied, from April 2010 two men will be able to commission the birth of a child using a surrogate mother and then obtain a parental order to become the child's legal parents, ultimately obtaining a UK birth certificate in their joint names.

Changes before the HFEA 2008

The HFEA 2008 changes are not the only ones to affect same-sex parents in recent years. Perhaps most importantly, the CPA 2004 enabled the children of either civil partner to be regarded as 'children of the family', allowing the court wide latitude to make orders where a couple are civil partners.

From 31 December 2005 the Adoption and Children Act 2002 (ACA 2002) also allowed same-sex couples (whether civil partners or not) to adopt a child and so acquire full and equal parental rights. The ACA 2002 and CPA 2004 also amended s4 of the Children Act 1989,

Key legislation

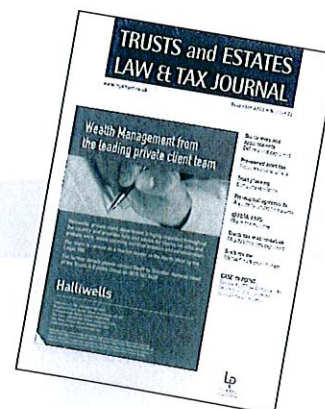
- Human Fertilisation and Embryology Act 2008 – ss42-43, 45, 48, 54
- Human Fertilisation and Embryology Act 1990 – s28(6)
- Civil Partnership Act 2004 – ss63, 75, 78
- Adoption and Children Act 2002 – ss49-51, 112, 144(4)
- Children Act 1989 – ss4A, 8

A practical guide designed to keep busy practitioners up to date with the latest changes in the law and practice.

**TRUSTS and ESTATES
LAW & TAX JOURNAL**

For subscription information call us on 020 7396 9313

- Practical articles • Case reports • Drafting hints
- Tactical advice • Latest legal developments



allowing step parents (including the civil partner of a parent) to acquire parental responsibility through agreement with the other parent(s), or through an application to the court. Before these changes, it was immensely difficult for same-sex partners to acquire parenthood status, the only option often being to acquire parental responsibility indirectly through a residence order obtained with the leave of the court.

Since 2006, well-informed same-sex couples have had the opportunity to acquire joint parental status, though not all conceiving children together have done so. In the future, the HFEA 2008 will confer joint parental status in many cases automatically. For family lawyers, this means that careful enquiries need to be made of any same-sex family clients to ascertain both the dates of conception of any children, and what steps (if any) have been taken to acquire legal status for a non-parent partner if a child was conceived before the HFEA 2008 came into force. Whether or not the couple are civil partners will also be significant in determining whether the children can be treated as 'children of the family'.

Case study 1: Ali and Leona

Ali and Leona are a same-sex couple (not civil partners) with two children, both conceived together through artificial insemination at a licensed clinic with an anonymous donor. Damian was born in September 2007 and Eve in November 2011. Ali and Leona have now separated and Ali, the non-birth mother, consults you for advice.

The first thing to note is that Ali and Leona are not civil partners, so there is no opportunity for the court to treat the children as 'children of the family'. However, Ali is likely to be Eve's parent. Since she was conceived after April 2009, you need to ask firstly whether Ali and Leona signed the relevant election forms at the clinic and secondly whether Ali was named on the birth certificate. If the answer to both questions is yes, Ali will be Eve's parent and will have parental responsibility. She is in the same position, essentially, as an unmarried natural father with parental responsibility.

In respect of Damian (conceived before April 2009), things are rather different. Ali will not automatically be recognised as his parent, and you need to ask whether Ali took any steps to obtain a residence order or to adopt Damian. If

not, this leaves Ali essentially with no legal relationship with Damian, nor any financial responsibility for him. The court may in practice be willing to assist using its powers under the Children Act 1989, but Ali's legal position in respect of Damian is uncertain.

Case study 2: John, James, Nicky and Sue

John and James are civil partners, as are their friends, Nicky and Sue. The two couples decided to help each other start a family and in November 2008 John and Nicky conceive their first child, Daisy. A second child – Ben – is conceived in January 2010 by James and

biological father, is not treated as his father 'for any legal purpose' under HFEA 2008. It is difficult to speculate as to how the courts will deal with these sorts of complex legal situations, where a child has been treated as a child of the family, but where the father's legal status as a parent is very clearly excluded by the law. It seems likely the court will take a pragmatic approach, but this could cause confusion in other sperm donation situations, where a bright line excluding parental status is necessary.

Conclusions

Same-sex conception is without doubt legally complex. The changes being

The CPA 2004 enabled the children of either civil partner to be regarded as 'children of the family' allowing the court wide latitude to make orders where a couple are civil partners.

Sue. The children live primarily with the two mothers, but John and James both play an active role. John and James have now separated and James consults you for advice.

The underlying legal position here is complex. Daisy was conceived before the HFEA 2008 became law, and so her legal parents are her biological parents, John and Nicky. James, as John's civil partner, is treated as her step-parent and she will be a 'child of the family'.

Ben, however, was conceived after HFEA 2008 came into force and, since Nicky and Sue were civil partners conceiving through assisted reproduction, under the terms of s42 they are his legal parents. James, despite being Ben's

introduced by HFEA 2008 are on the whole very welcome, and will introduce important recognition for parents of children who have until now largely been left in a legal lacuna. But family lawyers advising same-sex families need to take care. The parenthood rules for same-sex families are complex, and a history of recent legal reform means that even siblings within the same family could be treated differently by the law. Very little can be assumed. Family lawyers will need to investigate the family circumstances thoroughly in every case, and be well versed in the assisted reproduction rules, if they are to grapple with the challenge of advising pink parents. ■

Key dates

21 December 2005

First civil partnerships registered in England and Wales.

31 December 2005

Relevant parts of the ACA 2002 come into force, allowing same-sex partners to apply for adoption or parental responsibility in respect of their partner/civil partner's children.

April 2009

New status for lesbian parents will apply to children conceived after this date

April 2010

Gay men with children born after this date can apply for a parental order (within six months of the birth, or within six months of the law coming into force if later).