Articles

Lesbian parents and sperm donors: *Re G and Re Z*

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On 1 February this year, the *Daily Mail* front page carried the headline: 'Donor Dads win right to see their children – Landmark ruling could affect thousands': (http://www.dailymail.co.uk/news/article-2271568/Donor-dads-win-right-children-play-lives-Landmark-ruling-affect-thousands.html). The newspaper was reporting (or more correctly misreporting) the High Court decision in the case of *Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders)* [2013] EWHC 134 (Fam), [2013] 2 FLR (forthcoming), a family dispute between two lesbian parent families and their known sperm donors. The judgment attracted significant public interest, with national media coverage and the Human Fertilisation and Embryology Authority (HFEA) and British Fertility Society issuing press statements in response to the decision. But what was the case really all about and what was the significance of the High Court ruling?

The facts of the case

The case concerned two families, in separate but related applications. The first (*Re G*) involved a lesbian couple who had conceived with the help of their gay friend. He donated his sperm and the lesbian couple conceived two children by artificial insemination at home, a girl born in 2008 and a boy born in 2010. The second application (*Re Z*) involved a second lesbian couple. They were friends with the first couple and also wanted to become parents and their friends introduced them to their donor's civil partner. The second couple agreed to conceive a child with his help and, again following artificial insemination at home, a boy was born in 2010.

In both cases, the lesbian mothers (who were civil partners) were named on the birth certificates of the children born in 2010, in accordance with the new rights for lesbian parents under the Human Fertilisation and Embryology Act 2008 (the 2008 Act). In both cases this meant that the men, despite being genetic fathers, were legally sperm donors with no parental status. This affected the men's ability to apply for orders under s 8 of the Children Act 1989 (the 1989 Act). When relationships between the adults broke down (essentially because the men desired a parental role which the women felt threatened their families) the men needed the court's leave to make an application under the 1989 Act. In the case of *Re Z* the application was for contact and in the case of *Re G* it was for both contact and residence.

History of the case

The *Re G* application came before Mr Justice Baker in the High Court first. The women were not, at this stage, legally represented, and in a brief directions hearing leave was given and case management directions made. The *Re Z* application came before Mr Justice Baker a few weeks later. This time both the lesbian parents and the donor were legally represented and extensive arguments were presented about the significance of the court's decision on leave for wider public policy on sperm donation.

As a result, Mr Justice Baker decided to revisit his earlier decision granting leave in the *Re G* case, so that the public policy issues could be properly considered. This was the first leave application to come before the court from a genetic father whose parental status was excluded by the 2008 Act and this needed to be properly considered. The judge therefore reversed his earlier decision on leave in the *Re G*

case. There is an interesting passage in the judgment about the judge's power to revisit a decision on leave already made.

What was the legal issue?

At a factual level, this was not, of course, the first dispute between a lesbian couple and a known sperm donor. Previous cases, including *Re D (Contact and PR: Lesbian Mothers and Known Father)* [2006] EWHC 2 (Fam), [2006] 1 FCR 556, *Re B (Role of Biological Father)* [2007] EWHC 1952 (Fam), [2008] 1 FLR 1015, *Re P and L (Contact)* [2011] EWHC 3431 (Fam), [2012] 1 FLR 1068 and *A v B and C (Lesbian Co-Parents: Role of Father)* [2012] EWCA Civ 285, [2012] 2 FLR 607 have considered applications under the 1989 Act from biological fathers who are known sperm donors to lesbian couples. There has been a consistent welfare theme, in each case, of the court seeking to balance, on the one hand, the need to protect the child's primary family unit from intrusion and disruption and, on the other, the need to offer the child some relationship with his or her biological father.

What made *Re G* and *Re Z* different was the legal framework. Parliament had decided, through the 2008 Act, to provide explicitly that men in circumstances like these should not be treated as parents and to give them a legal status identical to that of any other gamete donors including egg donors and sperm donors through licensed clinics.

The law on sperm donation

The public policy behind the 2008 Act changes was therefore key. The law on sperm donation goes back to 1987, when the first legal protection was given to men whose wives conceived with donated sperm through the Family Law Reform Act 1987. This was quickly superseded by the Human Fertilisation and Embryology Act 1990 (the 1990 Act), a major piece of government legislation designed to regulate the new science of fertility treatment, following the birth of the first IVF conceived child in 1978. As well as creating a licensing framework for IVF treatment in the UK, the 1990 Act dictated the legal parentage of children conceived through assisted reproduction. It said that:

- The woman who gave birth (and no other) was the legal mother – a clarification needed given that it was now possible for human eggs to be taken from one woman and transferred to another.
- If a married woman conceived through IVF or artificial insemination with sperm from someone other than her husband, then her husband (and no other man) was the legal father, unless it was shown he did not consent. Conception had to occur through artificial insemination for the Act to apply, but there was no requirement for it to take place at a licensed clinic or under medical supervision.
- Where a non biological mother/father was a parent following egg or sperm donation, the Act expressly stated that they were to be treated as a parent in law 'for all purposes' and that no other person was to be treated as the mother/father in law 'for any purpose'. This clear assignment of parentage – and exclusion of an egg or sperm donor's parental status – expressly applied to 'references to any relationship between two people in any enactment, deed or other instrument or document (whenever passed or made)'. The parenthood provisions in the 1990 Act were therefore overriding, governing all other legal interpretations both prospectively and retrospectively.

The policy behind this law was, self-evidently, legal certainty. Parliament sought to protect (heterosexual) parents from claims from egg and sperm donors, and to protect gamete donors from financial responsibility and possible inheritance claims.

Same-sex parents did not originally benefit from this framework but over the next 15 years, the legal and social landscape changed, with same-sex relationships becoming recognised through civil partnership, adoption and equality laws. When the UK's fertility laws were revisited in 2008 (the 2008 Act being the first major overhaul in 18 years) Parliament extended the existing protection of the law on sperm donation to cover lesbian parents. The new Act paralleled exactly the rules for heterosexual couples conceiving with donor

sperm. This meant that, in respect of children conceived after 6 April 2009:

- If a woman in a civil partnership conceived through IVF or artificial insemination, her civil partner (like a husband) was the other legal parent of the child, unless it was shown she did not consent. As with married couples (and unlike the rules for unmarried and non civilly partnered couples), there was no requirement for conception to take place at a licensed clinic. Legal protection explicitly covered private arrangements with known sperm donors, provided that conception was artificial and not through intercourse.
- In line with the 1990 Act the law provided that, where a lesbian non birth mother was a parent, she was to be treated as a parent in law 'for all purposes' and consequently no man (ie the sperm provider) was to be treated as the father 'for any purpose'. Again the law expressly applied to all other laws and documents.

When the men in *Re G* and *Re Z* sought orders under the 1989 Act, this therefore meant that they were not legal parents but sperm donors in the same position as other kinds of gamete donors, and they therefore required the court's leave to make an application. Section 10(9) of the 1989 Act and *Re B (Paternal Grandmother: Joinder as Party)* [2012] EWCA Civ 737, [2012] 2 FLR 1358 set out the matters to be considered by the court in any application for leave:

- the nature of the proposed application;
- the applicant's connection with the child;
- any risk of the application disrupting the child's life so as to cause harm;
- whether the applicant had an arguable case; and
- any other factors the court considered relevant (which in this case included both the public policy issues related to the 2008 Act and human rights considerations).

What was the decision?

Considering all these factors, Mr Justice Baker decided that the applicants' connection with the children was the most important consideration and gave leave to both men to apply for contact, but denied the application for leave to apply for residence in *Re G*. He held that, on the facts and having considered their rights under Art 8, the men had sufficient connection with the children to justify having their applications for contact heard since the lesbian parents had in each case chosen to involve the men in the children's lives in the early months of their lives. Contrary to the *Daily Mail* headline which suggested that rights of contact had already been given, Mr Justice Baker made it clear that a decision on substantive contact had not yet been made. He said:

> 'When considering an application by a biological father for leave to apply for an order under s 8 of the Children Act 1989 in respect of a child conceived using his sperm by a woman who, at the time of her artificial insemination, was party to a civil partnership, the reforms implemented in the Human Fertilisation and Embryology Act 2008 and the policy underpinning those reforms – to put lesbian couples and their children in exactly the same legal position as other types of parent and children – are relevant factors to be taken into account by the court, alongside all other relevant considerations. In some cases, the reforms, and the policy underpinning those reforms, will be decisive. Each case is, however, fact specific and, on the facts of these cases, I find that the most important factor is the connection that each applicant was allowed by the respondents to form with the child. I therefore grant leave to S and T to make applications for contact orders. I refuse S leave to apply for a residence order. I make it clear, however, that it does not follow that any substantive order for contact will be made in either case. Furthermore, if contact is ordered, it may well be significantly less frequent than the applicants are seeking.'

What was the significance?

The significant public interest in the decision (notwithstanding the misreporting) surrounded its potential implications for the principle that gamete donors have no legal rights in respect of

the children they help conceive. While the *Daily Mail* said that the judgment would affect 'thousands', the HFEA, in its press statement, more sensibly said:

> 'A High Court judge has recently ruled that two sperm donors can apply for contact with the children born from their donation to two same sex couples in a civil partnership. This raises the question of whether, following donor conception treatment, a known donor can seek access to a child that he is biologically related to, even if he is not the legal father. The case has not yet been heard so we do not know whether access will be granted. The judge has made it clear that the case is being considered on the basis of these particular circumstances. However, if contact is granted this may raise concerns for families who have had donor conception treatment using a donor known to them – whether through a private arrangement or through a licensed clinic. We will watch closely to see how the case is resolved.' (www.hfea.gov.uk/7675.html)

In fact, the final outcome of neither case will be made public but do other parents need to be worried by the published decision in the leave application? The decision does, in some respects, open the door to Children Act applications by other gamete donors but only in circumstances where they can establish sufficient 'connection' with the child. In practice, every case will be dealt with fact specifically and the ruling is exceptionally unlikely to apply to donors who have had no contact with the child – for example unknown donors through licensed clinics.

However, it could apply to the many other known egg and sperm donors (including those who have donated through a licensed clinic) if they can demonstrate sufficient connection with the child in practice. As the culture of donation becomes more open and parents are encouraged to tell their children of their genetic origins (quite rightly, since research shows this is best for the child) the line between known and unknown donors is becoming increasingly blurred. It seems unlikely this will be the last leave application from a gamete donor.

Fertility law, family law and public policy

One of the most interesting features of this case is how it demonstrates the tensions the family court experiences when dealing with fertility law. Family law is traditionally flexible, giving the court scope to deal with each case on its own merits. Fertility law, in contrast, is often driven by a Parliamentary wish to create clarity and certainty at a wider public policy level. The two approaches do not always sit together comfortably.

This tension is not unique to known donor disputes. We see a similar conflict in relation to surrogacy cases, where the 2008 Act requires the family court to apply wider public policy against commercial surrogacy. In cases where parents have paid a surrogate mother more than her expenses, public policy comes into direct conflict with the welfare demands of the child in question, whose parentage needs to be secured. As Hedley J described in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733, welfare and public policy can be 'competing and potentially irreconcilably conflicting concepts'.

In a case like *Re G and Re Z*, we see a similar tension. In 2008, Parliament decided to enshrine a two parent model in law for same-sex parents, and to exclude the parental status of known sperm donors to lesbian civil partners. Any decision to allow claims from people who are legally gamete donors undermines that policy, even if justified on welfare grounds in the particular case. This may impact on other families, on public confidence in the legal framework for gamete donation, and even possibly on parents' willingness to tell their children they are donor conceived. These are difficult and complex issues, which stretch far beyond the particular case facts.

Ultimately, the lesson is that family law cases involving any application of the Human Fertilisation and Embryology Acts are complex. The different policy approaches driving fertility law and family law make them difficult bedfellows, and when they both come into play in court it can often feel like trying to mix oil and water.

Natalie Gamble Associates (instructing Alison Russell QC) represented the parents in Re Z.