Challenging Conceptions: Legal Parenthood and the Human Fertilisation and Embryology Bill 2008

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Introduction

The concept of mother and father may seem easy, but practitioners should pause for thought if advising one of the increasing numbers of families created through assisted reproduction.

The most interesting legal situations arise where a third party is involved in the conception. A woman may, for example, conceive with eggs donated by a third party so that she gives birth to a child she is not biologically related to. Alternatively, sperm may be donated by a third party, perhaps because the male partner is infertile, or because the woman being treated is single or in a same sex relationship. A family may also be created through surrogacy, where a third party surrogate mother carries a child but then hands it over to the intended parents at birth.

The first comprehensive legal rules clarifying parenthood in these complex situations were introduced, with admirable foresight, by the Human Fertilisation and Embryology Act 1990 (the 1990 Act). The eighteen year old law is now being updated by the Human Fertilisation and Embryology Bill 2008 (the HFE Bill), which introduces significant changes to the parenthood rules.

Egg donation

A basic principle established by the 1990 Act and confirmed by the HFE Bill is that the woman who gives birth to a child is the legal mother. S 27(1) of the 1990 Act (reinstated as clause 33(1) of the HFE Bill) provides:

"The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child."

This undoubtedly achieves certainty. Motherhood attaches to the woman who gives birth and 'no other woman', thereby protecting the status of a mother conceiving with donated eggs. An egg donor consequently has no parental rights or responsibilities, though she is not written out of the picture entirely: her details are kept on the HFEA Register of Information and non-identifying (and in more recent cases identifying) information is made available to the child in adulthood.

Sperm donation: married couples

S 28 of the 1990 Act provides similar protection for fathers in sperm donation cases. Here the rules work slightly differently, and responsibility is not hinged on pregnancy (obviously), but on the father's relationship with the carrying mother. S 28(2) (reinstated as clause 35(1) of the HFE Bill) provides:

"If, at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was party to a marriage, and the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then.... the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)."

Despite his lack of biological paternity, the carrying mother's husband in a sperm donation case is therefore the legal father. His name is recorded on the birth certificate and he is treated legally like any other married father. The sperm donor has no status as a parent but his details (if the conception occurred at a licensed clinic) are retained on the HFEA Register of Information and are made available to the child in adulthood.

The important thing to understand about s 28(2) is that it operates independently of the common law presumption that a husband is the legal father of his wife's child, and is different because it is not vulnerable to rebuttal by DNA evidence.

This distinction can be enormously significant in practice. Take, for example, the situation where a family friend acts as a known sperm donor and later seeks to assert parental rights. The donor is then the biological father and could rebut the common law presumption that the husband is the father. However, provided the conception was artificial, s 28(2) steps in to protect the husband's status as the legal father.

Sperm donation: unmarried couples

The 1990 Act extends similar protection to unmarried couples. S 28(3) of the 1990 Act provides:

"If no man is treated, by virtue of section 28(2) above, as the father of the child but

(a) *the embryo or the sperm and eggs were placed in the woman or she was artificially inseminated in the course of treatment services provided for her and a man together by a person to whom a licence applies, and*

(b) *the creation of the embryo carried by her was not brought about with the sperm of that man, then… that man shall be treated as the father of the child."*

An unmarried male partner is therefore treated as the legal father in sperm donation cases, provided that the couple has 'treatment together' at an HFEA licensed centre. The concept of 'treatment together' is a grey one, and has created difficulties, most notably in *Re R (A Child) (IVF: Paternity of Child)* [2005] UKHL 33, where a dispute arose over legal fatherhood after an unmarried couple conceiving with donor sperm separated during the course of treatment.

It is probably as a result of this case that we see the first important change introduced by the HFE Bill. To achieve greater certainty, the HFE Bill abolishes the concept of 'treatment together' for unmarried couples and replaces it with a new system of written elections (the 'agreed fatherhood conditions') which, if signed and not withdrawn by the time of treatment, make the male partner the legal father.

Lesbian couples

The 1990 Act did not afford similar recognition to same sex partners of women conceiving through sperm donation. This is probably not surprising, given that the 1990 Act pre-dated civil partnership by some 14 years. However, it means that a lesbian partner is currently not recognised as a parent of a child conceived by her partner unless she has taken active steps to acquire parenthood after the birth through adoption or acquisition of parental responsibility.

The HFE Bill addresses this issue. Provisions identical to those governing heterosexual couples in sperm donation cases will apply to same sex couples who conceive a child with donor sperm after the HFE Bill comes into force (which, according to the HFEA, is expected to be in October 2009). The new provisions will not be retrospective.

So where a female civil partner conceives by 'artificial insemination' (whether through a licensed clinic or by private arrangement) her civil partner will be treated as the child's 'parent' unless it is shown she did not consent. For non civil partners, the non-birth mother will be the child's 'parent' if the couple conceives at an HFEA licensed clinic and if the relevant written elections (in this case the 'agreed female parenthood conditions') are signed and not withdrawn at the time of conception.

The concept of 'parent' in this sense is brand new, and means for the first time that it is possible to be a full legal parent under UK law without being either a mother or a father. Legally, the status of 'parent' in this context is equivalent to fatherhood: if the 'parent' is a civil partner, she will have parental responsibility automatically, but if she is an unregistered partner, her parental responsibility will be contingent on being named on the birth certificate or otherwise acquiring parental responsibility. Regardless, she will be a legal parent for the purposes of inheritance and financial responsibility.

Among other things, the new rules will of course have implications if and when such couples separate. It will be interesting to see, following *Re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43, whether the courts in such circumstances will maintain the principle that biological ties are a relevant consideration in arbitrating between a child's mother and other parent.

The other big implication is that the creation of a family involving a mother and a 'parent' necessarily excludes the presence of a legal father, since the law only allows for two legal parents. This will be particularly important for lesbian couples conceiving with known donors (including those conceiving by private arrangement if they are civil partners), giving certainty that the donor's rights and responsibilities are excluded.

Surrogacy: a lost opportunity?

The parenthood rules in the 1990 Act, created primarily to benefit couples conceiving with donors, produce a less desirable outcome for surrogacy situations. In a typical surrogacy case involving a married surrogate, the legal parents at birth are the surrogate mother (as the carrying mother) and her husband (by virtue of s 28(2)). The intended parents then, even if both are biological parents, have no status in law as parents of their child at birth.

S 30 of the 1990 Act introduced a crude mechanism to address this problem. It enables the intended parents, where at least one of them is a biological parent, to apply for a parental order after a surrogate birth. Like an adoption order, a parental order reassigns parenthood from the surrogate and her husband to the intended parents. Various conditions must be met – including the consent of the surrogate and her husband and the fact that no more than reasonable expenses have been paid – but the process is designed to be quicker and easier than adoption and ultimately gives the intended parents a new birth certificate.

One of the requirements of s 30 is that the applicants must be married to each other. This has until now excluded unmarried and same sex couples (as well as single people) from applying for a parental order, and here the HFE Bill updates the rules. Clause 54 of the HFE Bill recreates s 30 parental orders, but extends the rules to allow applications from civil partners (who might be gay men conceiving through surrogacy or, more rarely, lesbian couples who suffer infertility) and unmarried/unregistered couples living together in an enduring family relationship. Single people remain excluded. In making the law consistent and fair, these changes are welcome, but it is disappointing that the government did not take a more courageous approach to reviewing surrogacy law.

The current rules on parenthood apply awkwardly to surrogacy situations, leaving both the intended parents and the surrogate and her husband vulnerable between the birth and the grant of a parental order (which can take many months). In practice, difficulties sometimes arise over giving consent to immunisations, and there is legal uncertainty over a range of questions during this period, including how the situation would be resolved if one of the intended parents died unexpectedly.

The problems are even more pronounced in relation to international surrogacy situations. The case of *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (which involved a Turkish couple who conceived with a British surrogate mother) highlighted the problems which arise where intended parents do not qualify for a parental order and are left with no other option than to navigate the complex waters of international adoption law. The Parliamentary debate on the HFE Bill also highlighted potential problems for British intended parents conceiving with foreign surrogates, whereby the biological child of British parents could be left legally parentless and stateless in a foreign country. There are also wider problems with the current law, including the fact that the intended mother, having not been pregnant, has no right to maternity leave despite the fact that she is responsible for caring for a newborn child.

The law relating to surrogacy is without doubt unsatisfactory, and the welcome changes being introduced by the HFE Bill do not go far enough to redress the current difficulties. While the changes to the rules for donor conception being introduced by the HFE Bill represent a sensible updating of the law to reflect modern realities, surrogacy law remains in dire need of a more substantial update. With the HFE Bill now in its final stages, we can only hope that we do not have to wait another eighteen years for the next opportunity to arise.

Conclusion

Families created through assisted reproduction involving donors and surrogates remain reasonably rare, but as more women delay childbearing and public tolerance of alternative family structures grows, these complex situations will become increasingly common. The law is changing and challenging the way we think, not just about family law, but about the family itself, and practitioners should be aware of the provisions of the Human Fertilisation and Embryology Bill in order to understand the very basic question of what makes a parent.

The Law of Unintended Consequences? The Impact of Section 1 of the Domestic Violence Crime and Victims Act 2004

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"Women at risk of assault failed by new law says judges"

"Judge John Platt, a circuit judge with more than 20 years' experience of domestic violence cases, has drawn up a report reflecting the judges' views for the President.

He told The Times that he estimated that the number of [mostly] women seeking non-molestation orders had fallen by between 25 and 30 per cent since July 2007.

In 2006 there had been 20,000 such applications — so a 25 per cent drop meant 5,000 women had not come forward to ask for the courts' protection. "Obviously this is a very worrying figure. Either offenders have changed their behaviour — which seems extremely unlikely — or the victims do not want to criminalise the perpetrators.""

From The Times April 14, 2008