Alternative family structures: an overview

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Since joining specialist fertility and family law firm Natalie Gamble Associates earlier this year, I have found the ways in which I think about family law constantly being challenged. Having been practising for four years as a family solicitor, my experience had been centred mainly on what you could call "traditional" family law disputes, such as divorce, financial remedy applications and private children law disputes. As with all family law, this work was always challenging and varied, but since joining the firm I have discovered a new set of fascinating challenges.

The number of families created non-traditionally is on the rise, and they include same-sex couples (whether in a civil partnership or not) who may have donor-conceived children, heterosexual couples who may have conceived through fertility treatment, co-parenting situations involving two sets of parents, and parents (gay and straight) who have conceived through surrogacy.

The law is ever-evolving in this area and untangling how it works and understanding how to apply it to a specific set of facts and circumstances is not always straightforward. I still deal with the traditional family law work within our team but my work encompasses a wide range of issues involving families created through assisted reproduction. This article explores some of the issues that can arise when handling relationship breakdown or children cases which have an assisted reproduction context. In order to gain an understanding of how these issues can crop up in practice, it is important to start with an overview of the law in this area.

Who is a parent?

In a disputed case involving children who have been conceived as a result of assisted reproduction, the best place to begin is to determine who the legal parents are and, to an extent, who has parental responsibility. In most traditional family law cases it will be clear who the legal parents are from the outset, as typically there will be a mother and a father and no one else. However, when dealing with a case involving assisted reproduction, the answer is rarely as clear cut.

It is important to remember that legal parenthood and parental responsibility are two separate legal concepts, which confer entirely different rights on those who have acquired either or both. Irrespective of a biological connection with a child, it is still possible to be a legal parent of a child. A legal parent will be financially responsible for their child, they can pass on their nationality, and the child will be able to inherit from them. Someone who has parental responsibility but is not a legal parent does not share these same rights.

In addition – and importantly – if a dispute ever arose a legal parent has the automatic right to apply to the court for a section 8 order under the Children Act 1989 without leave, whereas someone who is not a legal parent may not.

For couples who have conceived through assisted reproduction, the rules on legal parenthood are set out in the Human Fertility and Embryology Acts 1990 and 2008.

Birth mother

The legislation provides that the birth mother of a child is always the legal mother (and as a result has parental responsibility) irrespective of her biological connection with the child. A perfect example of this can be seen with surrogacy arrangements where the surrogate mother (and her husband if she is married) will automatically be the legal parents of the child and will have parental responsibility.

Married couples conceiving with donated gametes

The law has for over 20 years protected heterosexual couples conceiving with donated eggs or sperm (or both) to ensure that both partners are full and equal parents, and treated in just the same way as biological parents. A husband who is not the biological father but who consents to the conception (whether by artificial insemination or through IVF) will automatically be the second legal parent. The question of whether the husband consents is fact-specific to each case and the position will need to be considered extremely carefully in cases where the couple were separated at the time of conception.

Lesbian couples

For children conceived after 6 April 2009, lesbian couples who are in a civil partnership will both be the legal parents of a child conceived through assisted reproduction (IVF or artificial insemination). For couples who are not in a civil partnership the non-birth mother will be a legal parent if conception takes place after 6 April 2009 and at a licensed UK clinic (which must follow strict procedures, such as offering adequate counselling) and the parenthood election forms are signed (forms WP and PP).

For lesbian couples who have children conceived prior to 6 April 2009, the non-biological mother will not be a legal parent unless she has adopted.

Unmarried heterosexual couples

The rules are the same as described above for unmarried partners as for same-sex couples who are not in a civil partnership. The conception must take place at a licensed UK clinic and the parents must sign the parenthood election forms prior to conception, with the clinic following the correct procedures. There are slightly different rules protecting heterosexual couples if their child was conceived before 6 April 2009.

Biological father

If there is no second parent in any of the scenarios above then the biological father will be the second legal parent unless he has donated his sperm through a UK licensed clinic.

If things break down

Lesbian couples

In cases where lesbian couples have separated and children are involved, the distinctions in the law can have a significant impact. From a purely legal perspective it is critical to establish who the legal parents are in order to be able to correctly advise from the outset as to the options available. Practically speaking, a party who is not a legal parent of a child may need leave to apply to the court for a section 8 order such as contact or residence.

Often in disputes of this nature, the importance of a biological connection can be a very sensitive issue. Whilst legally the parents may be on the same footing, the biological parent may try to assert an enhanced status over the other and may try to use this to their advantage in a dispute. Non-birth parents can feel vulnerable in these situations. A lesbian non-birth mother who is a legal parent has the same rights as a separated father but she does not have the genetic link to the child. In contact disputes this creates an interesting question over the dynamics of a relationship between a child and their parents.

With a heterosexual relationship breakdown it is usually the case that the children will reside primarily with the mother and have regular contact with the father (of course each case is determined on what is in the child's best interests and this is not always the position). However, with a lesbian couple the courts will not necessarily approach a case in the same way. Will it be presumed that a child should primarily reside with their biological parent? If so, the justification for this would need to be very carefully considered and Cafcass and the courts may have to approach cases in a different way.

The concept of the family unit is constantly being challenged in these cases, in particular those where a third party is involved, such as known donor. Known donor disputes raise a whole new set of challenges which will be explored in a further article.

Financial matters

It is also necessary to consider the potential financial implications these issues can have in these circumstances. As a legal parent the law is clear that you will be held financially responsible for your child, irrespective of biological connection. However, in those cases where a couple have raised children together but have separated and one is not a legal parent, there may be no financial responsibility, which may seem unfair or create an unequal balance.

For couples in a civil partnership the position could well be different. It is established that the court can exercise its discretionary power under Schedule 5 to the Civil Partnership Act 2004 when dealing with an application to deal with finances, in the same way as it would under s25 of the Matrimonial Causes Act 1973, applying the same criteria, and there is discretion to hold step-parents financially responsible under Schedule 1 to the Children Act 1989. So it is conceivable that a judge may consider that a non-legal parent should remain responsible for a child who could be considered as a child of the family and make appropriate orders in respect of maintenance or adjustment of capital to provide for the child.

Embryos or donor gametes in storage

Nor is the position straightforward for heterosexual couples who have undergone fertility treatment and who may have had children through assisted reproduction. Fertility treatment will often leave couples (whether same-sex or heterosexual) with embryos in storage. These embryos may have been created using a couple's own eggs and sperm, or perhaps with donated gametes. These embryos may be stored in the UK or abroad. It is also not uncommon for couples to store donor sperm for future treatment to create a genetically matched sibling for an existing child conceived through assisted reproduction.

For couples who remain together, this will not pose a problem, but what does it mean for couples who separate? There are a number of scenarios that could arise. One example could be that of a woman in her early 40s whose biological clock is ticking, who does not have children, but who still would like to do so. The couple may have split up during treatment and have different views on how the embryos in storage should be used. Embryos are not considered assets in the same way as a house or a pension as they cannot be owned. It is therefore not possible for possession of the embryo to be transferred from one party to the other during divorce, and the use of embryos will remain subject to agreement after the couple are no longer married.

In the UK a genetic provider can ask for their embryo to be destroyed and the storing clinic has to follow strict procedures when doing so. It is easy to see how this could cause increased friction between separating parties. For example, a husband may not want to be financially liable for a child who is genetically his. Perhaps surprisingly, it is not uncommon for separated couples who are on more amicable terms to consent to use of the embryos. This may be out of a wish to help their former partner or for many other reasons, but the legal implications can be greater than perhaps expected and it is critical to be up to speed with these sensitive issues when advising clients.

Conclusion

The above is a snapshot of the types of issues that can arise when dealing with alternative family structures and/or an assisted reproduction element. What is clear is that there are an increasing number of couples undergoing treatment for infertility, which can be incredibly stressful, and as a result some relationships sadly do not survive. Additionally, in recent years there has been an increasing number of children born to same-sex parents and through surrogacy for heterosexual couples and gay couples alike.

For couples who are in this position there may be additional issues to consider if they do end up in a position of dispute, and it is important that their family lawyer is sure of the legal position. Due to the growing trend of alternative family structures, the way in which we think about the concept of the family is constantly being challenged. The creative way in which families are being created for the most part can be incredibly positive for those involved, but as practitioners it is important to be prepared to handle these at times challenging concepts, so that we provide the right support and advice if things break down.

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IAML launches new prize

The European Chapter of the International Academy of Matrimonial Lawyers (IAML) has recently launched its prestigious Young Lawyers Award 2014 and is inviting qualified practising family lawyers with up to 10 years' qualification or experience from across Europe to enter.

The Young Lawyers Award is an essay writing competition aimed at promoting research and excellence among young family lawyers and increasing awareness of the work and objectives of the IAML. This year's topic is:

"Should applicable law rules about division of assets in Europe be replaced with lex fori? Discuss in general or with reference to the law and practical experience in your country."

The winning entry will receive €1,000, as well as a travel bursary of up to €2,000 to allow them to attend the next Annual Meeting of the European Chapter of IAML in Bordeaux in March 2014 to collect the award. The two runners up will each receive €500.

Further details of the competition can be found at www.iaml.org/newsletters/archive/iaml_award_for_young_family_lawyers_2014/index.html. The deadline for submissions is 15 November 2013. Please do feel free to get in touch with Elizabeth Hicks, Fellow of the IAML and Partner and Head of the London family team of Irwin Mitchell LLP, with any questions.