In Practice

The Human Fertilisation and Embryology Act 2008: Revolution or Evolution?

NATALIE GAMBLE and LOUISA GHEVAERT Partners, Gamble and Ghevaert LLP

On its introduction to the House of Lords in November 2007, Lord Darzi of Denham declared that the overriding purpose of what was to become the Human Fertilisation and Embryology Act 2008 (the '2008 Act') was 'to update the regulation of assisted reproduction, ensuring that it is effective and reflective of modern society...and fit for purpose in the 21st century.' From a family law perspective, does the 2008 Act achieve this? This is an important question because, given that the object of all fertility treatment is to create a family, it is ultimately family lawyers who will be left to untangle the legal issues for families created through assisted reproduction (including families with same sex parents, donor conceived children and children born through surrogacy).

THE HISTORICAL BACKGROUND

The Human Fertilisation and Embryology Act 1990 (the '1990 Act') was the first legislation in the world to create a national system of regulation for fertility treatment. It followed the 1984 Warnock Report on Human Fertilisation and Embryology, a wide-ranging inquiry which grappled with the social, ethical and legal concerns raised by the birth of the first test tube baby in 1978. Following the Warnock Committee recommendations, the 1990 Act created a system of licensing and regulation for research and fertility treatment overseen by fertility watchdog the Human Fertilisation and Embryology Authority (HFEA). The 1990 Act also created the HFEA Register of Information, which has recorded details of all fertility treatments, donors and births as a result of fertility treatment in the UK since 1 August 1991.

From the family law perspective, the 1990 Act framed assisted reproduction law for heterosexual couples, aiming to shore up traditional family values and the institution of marriage and to discourage same sex and single parents. Following a bitter parliamentary debate about whether fertility treatment should be available only to married couples, as a compromise clinics were placed under an obligation to consider a child's 'need for a father' before offering treatment. In practice this meant that for many years licensed clinics treated heterosexual couples but were reluctant to treat single and lesbian women. Perhaps most importantly for family lawyers however, the 1990 Act created laws to determine the parenthood of children conceived through assisted reproduction. In particular, with IVF creating the possibility for one woman to donate her eggs to another, the law clarified that parenthood would go to the carrying rather than the biological mother.

Similarly, the 1990 Act conferred legal parenthood on fathers conceiving with donor sperm, setting formal parameters for both intended fathers and donors. There was concern in 1990 that couples who conceived with donor sperm could commit an offence if they named the intended father on the birth certificate and that the law should protect their right to have a family without having to broadcast the genetic origins of their child. The 1990 Act also clarified that donors would not be held financially or legally responsible for their (perhaps many) offspring.

It was recognised that the parenthood rules, designed to protect those conceiving through donation, would cause difficulty in surrogacy situations. The surrogate mother (as the carrying mother) would have sole legal motherhood, and her husband (as a result of the sperm donation rules and to recognise the sanctity of marriage) would be the sole legal father. The 1990 Act therefore created a remedy whereby intended parents in surrogacy situations could apply to court for a parental order to reassign parenthood after the birth, subject
to certain conditions. Following the theme of the law protecting traditional family values, only heterosexual married couples were eligible to apply.

**THE 2008 ACT**

Much has changed since 1990. Science has advanced exponentially: doctors and scientists can now vet embryos for genetic disorders, tissue-match embryos with sick siblings, choose the sex of a child and genetically manipulate embryos. The 2008 Act makes various changes with the aim of bringing the law up to date with these scientific advances, whilst setting ethical boundaries designed to maintain public confidence. The 2008 Act therefore prohibits sex selection for non-medical reasons, reflecting sensitivity about genetic engineering for social reasons. The Act also puts on a statutory footing the rules on embryo testing (including pre-implantation genetic diagnosis or ‘PGD’) and sets further legislative parameters for embryo research and storage.

But it is not just the science which has advanced; social attitudes have also changed significantly. With greater understanding of the benefits of openness for the long term well-being of children, donor conception is becoming less secretive. There is greater acceptance of families created outside marriage, and same sex relationships have been incorporated into the law, through civil partnership, equalities legislation and the widening of adoption law. The 2008 Act also aimed to respond to these social changes.

The Act therefore replaces the requirement of clinics to consider the child’s ‘need for a father’ with a requirement to consider the need for ‘supportive parenting’, making it clear that treatment should be available to single women and same sex couples. In practice, treatment has already become widely available due to increasingly liberal guidance from the HFEA as to how clinics should interpret the ‘need for a father’ provision, but the Act brings the law up to date. The 2008 Act also amends the information rights available in connection with donor conception, giving new rights to donor-conceived people to contact their genetic siblings. Donor anonymity was lifted in 2005 through regulations, allowing children conceived after this date to obtain identifying information about their donors upon reaching majority, and the 2008 Act does not alter this.

**THE NEW RULES ON PARENTHOOD**

Most significantly for family lawyers, the 2008 Act extends parenthood rules to include same sex couples. The rules are complex and they create a two tier system depending on whether a child is conceived artificially before or after 6 April 2009. For children conceived before 6 April 2009, the non-birth mother in a lesbian relationship (whether a civil partner or not) has no automatic recognition as a parent, nor does she automatically acquire parental responsibility. She can acquire parental status, either through an adoption order, a residence order, or (if the couple are civil partners) step-parent parental responsibility.

For children conceived after 6 April 2009, the position is very different. The non-birth mother will in many cases be treated as the child’s second legal parent, although family lawyers will need to investigate the circumstances carefully and be aware of the detail of the law. Broadly, if the couple are civil partners at the time of conception, the non-birth mother will be treated as the child’s second legal parent (unless it is demonstrated that she did not consent), irrespective of whether the artificial conception takes place at a clinic in the UK, at a foreign clinic, or at home. If the couple are not civil partners, the non-birth mother will only be the child’s second legal parent if the couple conceives at a licensed clinic in the UK and the relevant consent forms are properly completed and signed. Non-civil partnered lesbian partners who conceive outside the UK or at home and therefore do not qualify for automatic parenthood will have to apply for adoption or a residence order.

Following the policy of inclusion, the 2008 Act has also broadened the pool of people who are eligible to apply for parental orders after surrogacy, to include same sex couples and unmarried couples as from April 2010 (although not single men and women). From a family law perspective, the changes are complex and...
will require awareness, not just of the current legal position, but also of the historic law, when the changes came into force and the extent to which they apply retrospectively or prospectively.

**CASE STUDY: PHILIPPA AND JANE**

Take, for example, a family with two lesbian parents (Philippa and Jane) who have together conceived three children through anonymous donor insemination at a UK licensed clinic, a son Tom conceived in 2004, a daughter Isabel conceived in 2007 and a daughter Isabel conceived in 2010. How does the law apply to their family?

The fact that Philippa and Jane conceived with an unknown clinic donor means that the children have no legal father. The children do, however, have certain rights to find out information about their genetic heritage as they grow older. The lifting of donor anonymity in April 2005 came into force after Tom was conceived and does not apply retrospectively. This means that Tom is unlikely to ever have a legal right to find out the identity of his donor. Emily and Isabel were both conceived after the lifting of donor anonymity, and so will be able to find out the identity of their donor once they reach the age of 18 (although as a proviso to this, if the same donor was used to conceive all three children, he will retain his right to anonymity in respect of Emily and Isabel as well as Tom, even though the girls were conceived after April 2005). In addition, new rules allowing contact between donor-conceived genetic siblings are being introduced from 1 October 2009 and will allow all three children to make contact with any genetic half siblings in other families once they reach the age of 18.

Things are not much simpler when it comes to the mothers’ legal position. The law on parenthood was changed (prospectively only) from 6 April 2009 and as a result of these changes Jane, as the non-birth mother, is likely to be treated as a legal parent of the youngest child, Isabel, who was conceived in 2010. If Philippa and Jane were civil partners when Isabel was conceived, Jane will be treated as a full legal parent with parental responsibility, much like a married father. If they were not civil partners, Jane will still be treated as a legal parent (assuming she signed the right paperwork at the clinic) but, like an unmarried father, she will only have parental responsibility if she is named on the birth certificate or takes other steps to acquire parental responsibility.

The position with Emily and Tom (the two older children, both conceived before 6 April 2009) is different. Jane will not automatically have any recognition as a parent, nor parental responsibility, nor direct financial responsibility, although the children may be treated as children of the family if Jane and Philippa are civil partners. However, Jane may have taken steps to secure her position as a parent, including through adoption, a residence order, or (if the couple are civil partners) parental responsibility as a step-parent.

To understand the family’s position, their lawyer will therefore need to know the date the children were conceived, whether they have the same biological father, when (if at all) Jane and Philippa became civil partners, whether they conceived at a licensed clinic, and whether Jane has taken any legal steps to acquire status for the younger children. They will need to be thoroughly familiar with the new rules on parenthood introduced by the 2008 Act, as well as understanding the previous legal position and the extent to which the changes introduced in 2005 and 2008 apply retrospectively.

**THE WAY AHEAD**

So has the 2008 Act achieved its aim of making the law fit for the twenty-first century? There are undoubtedly some positive advances in recognising same sex parents, albeit that the application of the laws in practice is complex. But by tidying the existing law rather than taking a fresh perspective, there is a lot the Act has not done.

First, the 2008 Act retains a focus on two parent families. Increasing numbers of children are being born into situations which do not involve two parents, and such situations fit poorly within the current legal framework. For example, gay and lesbian parents involved in co-parenting arrangements (where a child may have up to four involved parents) get caught up in the parenthood laws in odd ways, and the new laws can actually reduce the ability of
the family, to achieve parental recognition for all those involved. Similarly, single parents remain poorly catered for, one example being their ineligibility to apply for a parental order to become the legal parent of a child born through surrogacy.

There is also a failure to recognise that assisted conception does not exclusively take place through licensed clinics in the UK. There is clear demand for informal assisted conception at home and for treatment at clinics abroad, giving rise to new legal problems for the families involved. With global information at everyone’s fingertips, these trends are likely to grow, but the 2008 Act, rather than grappling with the problem, has perpetuated patchwork fertility laws which focus predominantly on treatment at UK licensed fertility clinics.

The amendments to the law introduced by the 2008 Act therefore represent an evolution of the existing legal framework, rather than a revolutionary re-think of fertility and parenthood law. While the law has taken a step forward, it seems doubtful that the 2008 Act has really made the law fit to cater for the diverse realities of modern family creation.

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