

Alternative Families: Recent developments regarding the position of sperm donors

The introduction of the Human Fertilisation and Embryology Act 2008 ('HFEA') put in place new provisions in relation to who would be considered to be the legal parent of a child conceived through artificial reproduction, including through sperm donation. This change in the law considerably strengthened the position of same sex couples looking to start a family, ensuring that they were on an equal footing with heterosexual couples in the same situation where certain pre-requisites are met.

The current law was heralded as a step forward since it allowed legal parenthood to be vested in a lesbian couple without the need for the non-biological mother to go through the adoption process as long as certain conditions are met. Depending upon the circumstances, the couple will be recognised as legal parents to that child, with all the incumbent rights and responsibilities that come with this status, to the exclusion of the biological father. In such a situation, the biological father will have no legal status in relation to any child conceived. Consequently, he will have no financial responsibility for the child, no parental responsibility for the child and no right to apply to the court for orders in respect of that child without the court's prior permission.

Against this background, the recent High Court decision in the case of [Re G and Re Z](#) has generated much publicity, with headlines suggesting that the courts have given increased recognition to the rights of donor parents. In these linked cases, the children were conceived through known donor arrangements involving a gay couple and two separate lesbian couples, each of whom was in a civil partnership. Consequently the law conferred the status of legal parenthood on the biological mothers and their civil partners, not on the donor fathers who each had no legal status in relation to their biological children. The donor fathers were nevertheless granted permission by the court to apply for contact, against the wishes of the mothers.

The following facts were key in reaching the decision that permission should be granted for the court to consider whether to allow contact between the donor fathers and the children:

- No written agreement was entered into by either of the couples and the donors prior to conception, setting out their individual expectations in terms of the donor's involvement and future role in the child's life. Instead those involved relied upon informal discussions. In each case the couples and the donors gave significantly differing accounts to the court as to what they had agreed to.
- The donor fathers were known to both couples. In one case, the donor was an old friend of the biological mother and had already fathered a child by artificial insemination to her. He lived 100 yards from the couple's house and was involved in

the preparations for the birth. In the other case, the couple acknowledged that they selected the donor intending for him to be a role model for their child.

- From birth, the donors enjoyed regular and frequent contact with their respective children, until the arrangement broke down. In general, contact took place weekly or fortnightly and during this time the donors were allowed to form a connection with the children, which the court considered to be significant.

In considering whether to grant permission to the donor fathers to apply for contact, the court considered the nature of what was being proposed, each donor's relationship with the child, and the risk that the proposed application might be disruptive to the child's life. The court felt that the application by one of the donors for leave to apply for joint residence, which would have conferred upon him parental responsibility and the right to be involved in important decisions about the child's upbringing, was a step too far and would undermine the autonomy of the existing family unit created by the legal parents. In both cases, permission to apply to the court was confined to an application for contact only.

The judgment is noteworthy since it is the first case to come before the courts testing the rights of same sex parents under the HFEA. However caution should be exercised for two reasons. Firstly the case is highly fact-specific and regard must be had to the individual circumstances when considering the significance of the court's decision. Secondly, at this stage the court has only given the donor fathers permission to apply for contact with the children, it has not yet determined whether it is appropriate for such contact to take place. This will be considered in a separate court hearing where the welfare of the children will be the paramount consideration. The court has pre-emptively emphasised the importance at such a hearing of weighing up the rights of the legal parents (the mothers) to a family life, acknowledging the stress and disruption that the proceedings are likely to have upon their lives and the potential for this to be harmful to the children. The court acknowledged the vulnerability likely to be felt by the mothers, and the need to protect their position as the 'primary family unit'. The court has also acknowledged that the level of contact sought by the donor fathers in these cases may be wholly unrealistic, but that this should nevertheless not prevent the court from considering the application.

This case highlights the importance for anyone considering becoming involved in a known donor arrangement to consider carefully at the outset what their expectations are and to discuss this with everyone involved, to avoid problems arising in the future. Having said this, it is an emotional area of law and judges are sounding a note of caution about being too definite about what each person may want in the future. As one judge recently commented, where unconventional means are involved in creating a family, "depths of emotion are engaged and feelings released that come as a surprise and shock, not only to others, but in particular to the participants themselves." In view of this, it is not always possible to plan with absolute certainty what each person involved may want to happen in the future. As Lady Justice Black noted in one of the leading cases in this area:

"No matter how detailed their agreement, no matter what formalities they adopt, this is not a dry legal contract. Biology, human nature and the hand of fate are liable to undermine it and to confound their expectations. Circumstances change, and adjustments must be made. And above all, what must dictate is the welfare of the child and not the interests of the adults."

It is nevertheless recommended that the participants in such an arrangement do enter into a written donor agreement, also known as a family creation agreement or co-parenting agreement, setting out key points on which they all agree in terms of future roles in the child's life. Our team of specialist family lawyers can assist you in drafting such an agreement. These agreements are not legally binding and it is not possible to contract out of the legal position as governed by the HFEA, however having such an agreement could be a significant factor if there is a later dispute. More importantly it may allow all involved to

identify whether they are going into this arrangement with the same objectives and, if not, to determine whether it would be better to take a different course of action, such as proceeding with an unknown donor instead or in the case of a father who wants greater involvement, to consider a surrogacy arrangement as an alternative.

This is a complex area of law, and surrogacy and other alternative family arrangements are outside the scope of this article but if you would like advice upon your particular situation you can contact one of the specialist family lawyers at Russell-Cooke.

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