

The changing face of parenthood

Louisa Ghevaert considers how the law has tried to keep pace with increasingly complex notions of family



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Parenthood is an increasingly complex concept which has evolved dramatically over the last fifty years, the result of greater social acceptance of relationships and families outside heterosexual marriage, rapid developments in fertility treatment, and changes in the law. To understand parenthood today requires an in-depth knowledge of the law and the behaviour and attitude of society at grass-roots level. Parenthood is no longer defined just by biology, and it can now be acquired and practised in a number of different ways.

Legal parenthood

Historically, legal parenthood was relatively easy to define. It was governed by biology and marriage. A birth mother and her husband were the legal parents of a child born within marriage. Any child born out of wedlock was an illegitimate child of their birth mother. Legally adopted children became the legal children of their adopted married parents.

Today, a child can still only have a maximum of two legal parents. However, legal parenthood can now be acquired by lesbian parents conceiving through a licensed fertility clinic (or even at home in certain circumstances). This follows changes to the law which took effect on 6 April 2009 as part of the staged implementation of the Human Fertilisation and Embryology Act (HFEA) 2008. Legal parenthood can also be acquired by a step-parent adoption order (which is no longer dependent on marriage), following the introduction of the Adoption and Children Act 2002, or by a parental order following a surrogacy arrangement (under s30 HFEA 1990, to be replaced next year by s54 HFEA 2008).

The complexity of modern law can also result in individuals unwittingly acquiring or not acquiring legal parenthood for a child in certain circumstances, and this can give rise to all manner of legal and practical difficulties. Individuals are vulnerable to unintended and often unforeseen legal difficulties surrounding parenthood, particularly if they conceive a child outside a UK licensed fertility clinic or commission a child through international surrogacy.

Case study one

Alice and Lucy have been in a same-sex relationship for three years but have not entered into a civil partnership. Alice is now aged 38 and has become increasingly concerned about her biological ability to conceive, having focused until now on her career. Lucy is 49 and has ruled out having her own biological children, but is fully supportive of Alice's desire to start a family. Alice and Lucy mention to Greg (who is gay and in a long-standing relationship with Mark) their wish to have a baby. Both couples wish to have a child and they subsequently decide to conceive by artificial methods at home as soon as possible, rather than undergo a formal process through a UK licensed fertility clinic. As Alice's pregnancy progresses, Lucy becomes increasingly concerned about her prospective role as a parent following differences of opinion with Greg and Mark, and the parties seek independent legal advice as their relationship comes under strain.

As Alice conceived at home using Greg's sperm and Alice and Lucy are not civil partners, Greg will be the child's legal father at birth. Lucy has no automatic legal rights for the child and must take legal steps to acquire these.

She can obtain legal parenthood only by adoption, which would extinguish all of Greg's legal rights for the child. She cannot apply for a free-standing parental responsibility order, although she could apply to court for a residence order, which would confer parental responsibility on her. Greg expresses concern on learning that he will be treated as the legal father, as it had always been his intention to take a more back-seat role and be an 'uncle figure' in the child's life. Greg is even more concerned to learn that, as legal father, he is financially responsible for the child.

The legal position would have been very different if Alice had conceived at a UK licensed fertility clinic using Greg's sperm in a known-donor capacity. Alice and Lucy could, in respect of a conception on or after 6 April 2009, have signed consent forms electing to make Lucy the second legal parent. Greg would then have acquired no legal rights, nor would he have been financially responsible for the child. His role would then have been simply that of an uncle figure with no direct entitlement to play a hands-on role in the child's life. Had Alice conceived

through a licensed clinic using Greg's sperm in a known-donor capacity before 6 April 2009, it may have been possible to exclude Greg's legal parenthood status, but Lucy could not have become the child's second legal parent at birth by

Terry's sperm. While surfing the web, Sue and Terry realise that the legal position might not be straightforward and seek specialist advice.

Although this is a fast-developing area of law, the present position under

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election. This is a new right introduced by HFEA 2008 to reflect the increasing numbers of same-sex parents.

Case study two

Sue and Terry, having undergone numerous unsuccessful cycles of fertility treatment in England, decide to enter into a commercial surrogacy arrangement with a Californian surrogate called Trinny. Trinny is married and has two children of her own and she's keen to help Sue and Terry to experience the joys of parenthood. Trinny conceives using donor eggs and

English law is that Trinny is treated as the legal mother. As Trinny is married, and notwithstanding Terry's biological fatherhood, Trinny's husband is treated as the child's legal father. The net result is that neither Sue nor Terry are legal parents for English legal purposes. They risk experiencing immigration difficulties when they return home to the UK with their surrogate-born child, as their child has no automatic right to enter or reside in the UK. Sue and Terry cannot automatically confer British citizenship on their surrogate child, nor do they have legal authority under English law to care for their child on a day-to-day basis. To reassign legal parenthood and resolve the situation, Sue and Terry should apply to the English court for a parental order to become the legal parents of their surrogate child. However, having offended public policy by entering into a commercial surrogacy arrangement, which is prohibited under English law, this is likely to be a complex court application. Any application for a parental order is time-limited up to a maximum of six months after the surrogate child's birth, and if the deadline is missed the opportunity is lost forever.

Parental responsibility

Parental responsibility forms part of the broader parenthood picture and grants an individual all the rights, responsibilities and duties of a parent for a child. The exercise of parental responsibility, including decision-making about a child's health, education and finances, plays an important part in the day-to-day parenting arrangements for a child. It is, however, possible to acquire parental responsibility without obtaining legal parenthood and without having a biological connection to the child.

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Certain categories of people have parental responsibility automatically when a child is born. A mother who gives birth (including a mother with no biological connection, having used donor eggs following fertility treatment) automatically obtains legal parental responsibility in addition to legal parenthood. A biological father automatically acquires parental responsibility (as well as legal parenthood) if he is married to the mother at the time of the child's birth, or subsequently marries her. In assisted reproduction cases involving donor sperm, a mother's husband (who is not the biological father) will be treated at law as the legal father and will acquire parental responsibility automatically at birth, provided he consented to the

can obtain parental responsibility by agreement or by court order. The legislative thinking behind this was to provide an alternative to adoption for those looking to unify their new family unit. Adoption, in contrast, confers legal parenthood as well as parental responsibility but extinguishes everybody else's parental responsibility, including that of the birth parents. A step-parent parental responsibility order operates alongside and in conjunction with the exercise of parental responsibility by anybody else for the child.

Parental responsibility for a child can also be indirectly obtained by obtaining a residence order from the English court (to be exercised together with anybody else who has parental responsibility for

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donor conception. The same now applies to lesbian civil partners in respect of children conceived after 6 April 2009.

Other categories of people have to take further steps to acquire parental responsibility. Since 1 December 2003, an unmarried biological father can obtain parental responsibility by being named as the father on his child's birth certificate. In the absence of this, he can acquire parental responsibility by entering into a formal parental responsibility agreement with the mother or by court order. By virtue of HFEA 2008, similar rules now apply to lesbian partners who are not in a civil partnership, where the birth mother has conceived at a UK licensed clinic after 6 April 2009 and both partners have signed forms electing for the non-birth mother to be treated as the child's second parent. In such cases, the non-birth mother (like an unmarried father) will only have parental responsibility if named on the birth certificate or if she enters into an agreement or obtains a court order.

From 30 December 2005 a step-parent (which includes a person who is married to or in a civil partnership with a parent with parental responsibility for a child)

the child). The introduction of special guardianship orders, which confer parental responsibility on the special guardian and allow them to exercise day-to-day parental responsibility for the child, to the exclusion of anyone else who has parental responsibility, offers a further alternative to adoption. Residence and special guardianship orders do not, however, confer legal parenthood on an individual.

The introduction of staged sections of HFEA 2008 means that many lesbian partners conceiving together either at home or through a UK licensed fertility clinic no longer need to take further legal steps to obtain legal parenthood and parental responsibility (which previously typically involved either an application to court for an adoption or a residence order). Particular care, however, should be taken if the prospective birth mother is married or in a civil partnership at conception, or if the same-sex relationship breaks down between conception and birth, and the biological mother forms another relationship: the legal consequences can lead to unforeseen difficulties. The new rules also apply only in respect of children conceived after 6 April 2009.

Emotional and social parenthood

It is increasingly common for individuals to parent children both emotionally and socially. Grandparents are a typical example of significant adults in a child's life, who often provide care, emotional support and guidance, but who are generally not legal parents and usually lack legal parental responsibility for their grandchildren. Grandparents can provide an invaluable parenting resource for time-pressed parents juggling busy jobs and the demands of domesticity.

However, emotional and social parenting does not stop there. Former partners who have no biological connection to a child, but who have perhaps formed a close relationship with a child while cohabiting with their mother or father, can find themselves emotionally attached to a child or perhaps represent a *de facto* parent despite a lack of formal legal status. A child can, in turn, feel a profound sense of loss if a parent's relationship ends and they lose touch or see much less of the former partner who has latterly played a significant part in the child's life from a parenting perspective.

The law does not grant automatic recognition to such significant adults, but it is of course open to the individuals involved, with the leave of the court, to apply for a residence order to acquire parental responsibility or to apply for other orders which might solidify contact arrangements without granting any formal status.

Conclusion

Parenthood is changing rapidly into a multi-faceted concept. It can be acquired and practised in a variety of ways and it is no longer simply governed by biology and marriage. Modern relationships, same-sex parenting and greater access to foreign and domestic fertility treatment are generating an increasingly complex minefield of potential legal problems, notwithstanding recent changes to bring the law up to date.

Parenthood today would probably be unrecognisable from the perspective of an ordinary person fifty years ago. As society continues to change and develop, the law will have to continue grappling with the complex and evolving face of parenthood. ■