

Child Law

Parental Responsibility (Hypothetical Scenario)

Simon has asked his ex-wife Jane if she will allow their six-year old son Dylan to live with him, given that she has since entered into a civil partnership and Simon's work life allows them to spend time quality time together. After filing for child arrangement and specific issue orders following Jane's protestation, Simon has been told that he is not the boy's father therefore parental responsibility (PR) must be established if his applications are to be successful.

In the eyes of the law and in accordance with statute a mother is clearly defined as 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 eggs¹ which means Jane has nothing more to prove given that she gave birth to Dylan. Unfortunately fathers face many more obstacles in order to prove their qualification, so for Simon it would first require reliance upon the presumption of *pater est quem nuptial demonstrant* or 'the father is he to whom marriage points' (also known as the presumption of legitimacy) in order to help prove paternity before discussing PR; (it would also be prudent to establish if his name has been included on the birth certificate, as absence from that would greatly compromise his efforts to maintain a relationship with Dylan, coupled with the fact that Simon and Jane are now divorced). While this presumption still remains credible it is also vulnerable to legislative rebuttal which states that:

Any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that the person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond a reasonable doubt in order to rebut the presumption.²

However in mitigation of this caveat should it be later discovered that Jane allowed Simon's name to be entered on to the birth certificate while harbouring doubts as to his paternal rights, such non-disclosure could warrant an act of perjury.³

With those concerns established s.2(1) of the Children Act 1989 provides that where the mother and father were married to each other at the time of the child's birth they are both conferred PR, therefore it would seem that Simon and Jane have equal PR over Dylan; yet while Natalie is not herself a biological parent, she could still apply for PR under s.51(2) of the Adoption and Children Act 2002 which provides that as the civil partner of Jane she can submit a sole adoption order application as supported in s.4(a) of the CA 1989 and if needed, apply for a residence order under s.8 of the CA 1989 in order to determine where Dylan would live.

When considering both residential and contact elements of Simon's child arrangements order (CAO) the court would give weight to the (again rebuttable) presumption that a child is naturally predisposed to live with its mother, as expressed by Lord Jauncey in *Brixey v Lynas*⁴ who said:

...the advantage to a very young child of being with its mother is a consideration which must be taken into account in deciding where lie its best interest in custody proceedings in which the mother is involved...where...there is no criticism of her ability to care for the child *only the strongest* competing advantages are likely to prevail.

And that the parent who takes on responsibility of the child when the relationship breaks down is typically afforded advantage when residency is disputed. In addition to those overriding benefits held by the mother the welfare principles of s.1(3) of the CA 1989 come into effect through a seven-point checklist detailing consideration of:

¹ Human Fertilisation and Embryology Act 2008, s 33(1)

² The Family Law Reform Act 1969, s 26

³ Perjury Act 1911, s 4

⁴ [1996] 2 FLR 499 (emphasis added).

- (1) The child's (age-dependant) hopes and emotions: which is similar to the mature minor test in *Gillick v West Norfolk and Wisbech Area Health Authority*⁵ and well explained in art.12 of the United Nations Convention on the Rights of the Child (UNCRC).⁶
- (2) The child's physical and educational needs as per *Stephenson v Stephenson*⁷ and *Re A (A Minor) (Custody)*.⁸
- (3) The consequential effects of a change in circumstance; also known as the 'status quo principle' as per *F (A Child)*⁹ where the appeal judge refused to grant removal of the children from extended residence with their father following the breakdown of the parental relationship; this consideration was also evident in *Re H (Residence)*¹⁰ where the daughter threatened suicide if denied the right to live with her father.
- (4) The child's age, sex, background and personal characteristics; as well defined in *Re M (Child's Upbringing)*¹¹ where a young zulu boy was returned to his birth parents in South Africa despite having been cared for by a white Afrikaner woman in England for several years prior.
- (5) Any exposure to harm both current and in the future; a principle judged as a parental failure and furthermore intrinsically linked to contact issues while sometimes subject to investigation under s.37 of the CA 1989 and or Part IV of the Family Law Act 1996.
- (6) The capabilities of the parents (and any other person deemed relevant by the court); an area that embraces numerous limitations ranging from working hours, sexual orientation¹², the capacity to provide specialist care¹³ and material disadvantages.¹⁴
- (7) The scope of statutory powers afforded the court; in addition to evaluation of parental applications the courts themselves are able to rely upon new and existing statute in order to best serve the child's needs. With two recent amendments from the Children and Families Act 2014 (s.11(2) and s.11(3)) the scope for welfare examination has widened further with the former dealing with direct or indirect parental involvement (albeit free of time restraints) and the latter that such involvement does not induce risk of abuse or harm to the child as explained in (5) above.

With regard to contact the courts view is that non-residential contact between a parent and child is not only the preferred outcome in CAO applications but a court will inevitably prefer where appropriate, to make a residence order in favour of one party and a contact order in favour of the other in preference to an order for shared residence.¹⁵ While application of the above welfare principle is a prerequisite, there also exists a number of criteria underpinning the award of such orders as expounded in *Re C (Direct Contact: Suspension)*¹⁶:

⁵ [1986] 1 AC 112.

⁶ Unicef, 'Fact Sheet: A summary of the rights under the Convention on the Rights of the Child' <www.unicef.org/crc/files/rights_overview.pdf> accessed 15 March 2016

⁷ [1985] FLR 1140.

⁸ [1991] 2 FLR 394.

⁹ [2009] EWCA Civ 313.

¹⁰ [2011] EWCA Civ 762.

¹¹ [1996] 2 FLR 441.

¹² *Re D (An Infant) (Adoption: A Parent's Consent)* [1977] AC 602; *C v C (A Minor) (Custody: Appeal)* [1991] 1 FLR 223.

¹³ *Re M (Handicapped Child: Parental Responsibility)* [2001] 3 FCR 454.

¹⁴ *Re DW (A Minor) (Custody)* [1984] Fam Law 17.

¹⁵ Lyn Ayrton, Michael Horton, 'Residence and Contact: A Practical Guide' (1st edn, Sweet & Maxwell 2009) 170

¹⁶ [2011] EWCA Civ 521.

- (1) Parent and child contact is predominantly in the best interests of the child and remains a fundamental facet of family life.¹⁷
- (2) Such contact should only be terminated in exceptional circumstances¹⁸ and where evidently damaging to the child's health and well-being.
- (3) All judges are conferred a positive obligation to preserve and promote contact where possible and all alternatives need to be *thoroughly* explored before termination is considered.¹⁹
- (4) The courts must adopt and adhere to medium and long-term potential possibilities over any temptation to succumb to immediate setbacks.²⁰
- (5) The welfare of the child must remain paramount when factoring any and all of the issues above.

Following claims made by fathers rights campaigners citing corruption and bias in favour of mothers, extensive research²¹ revealed that only a minority of those fathers (10%) were given limited access and for reasons stemming from non-cooperation and an abject failure to respect the legal process. In fact with exacerbating issues such as domestic violence, substance abuse, mental illness and welfare concerns considered, a majority of the cases researched (70%) ended with contact order awards; so despite such disparate data it would seem that provided Simon follows the legal requirements while exercising his best efforts and intentions, his chances of a successful CAO would remain reasonably high.

As part of his application Simon has requested that Dylan be circumcised in accordance with his fathers beliefs, despite Jane's opposition to such an act. In order for this request to be considered by the court a specific issue order (SIO) will need to be submitted. Existing precedent can be found in *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)*²² where after allowing appeal Thorpe LJ cited Wall LJ's earlier words:

The disadvantages are that despite the father's passionate defence of the procedure, J may be traumatised by it; he will, moreover, be living in the household of his mother, who disagrees with the procedure, and will find great difficulty presenting it to J in a positive light.²³

Before reiterating that in his learned opinion:

...the strength of his bond with his father - viewed from his perspective rather than the father's - is unlikely to be weakened if he is *not* circumcised unless the father chooses to allow in the absence of circumcision to work to weaken it.²⁴

Further referring to s.2(7) of the CA 1989, art.9 of ECHR and art.24.3 of UNCRC it was agreed that when the welfare of the child is held in question there could be no defensible support of a desire to have a child circumcised regardless of any inference of prejudice offered by the appellants. This appeal case outcome would indicate that the chances of Simon's request being upheld are very low and so on appearance would offer no likelihood of success.

¹⁷ *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124.

¹⁸ *Re M (Contact: Supervision)* [1998] 1 FLR 727; *Re H (Minors) (Access)* [1992] 1 FLR 148.

¹⁹ *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18.

²⁰ *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124.

²¹ Joan Hunt, Alison Macleod, 'Outcomes of applications to court for contact orders after parental separation or divorce'(2008) Ministry of Justice <<http://dera.ioe.ac.uk/9145/1/outcomes-applications-contact-orders.pdf>> accessed 21 March 2016.

²² [2000] 1 FLR 571.

²³ *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* [2000] 1 FLR 571.

²⁴ *ibid.* [11] (emphasis added).

When examining the courts approach to the uncertainty of Dylan's paternity and as was briefly touched upon when discussing PR, the early presumption of parentage relied upon the sexual activity of the mother around the time of conception, along with any supporting evidence which could be relied upon in court; however advancements in scientific research has seen a move from limited presuppositions and physical testimony to both blood sampling²⁵ and the now highly effective DNA test.

Historic legal preference also dictated that the delicate preservation of the family unit shared equal relevance with the welfare of the child when parentage is in dispute, yet where once proof beyond a reasonable doubt was the governing criteria for male paternity, the less strict balance of probabilities²⁶ became suffice to establish a fathers identity.

With twenty-first century culture reshaping the family unit to one of a transient nature, the courts are adopting a more flexible view to the prioritisation of facts. While the welfare of the child remains paramount, the truth of parental identity has become as, if not *more* relevant in line with the thinking that cogent and self-directing adults cannot emerge from confusion and in some cases prolonged obstruction²⁷ from a right to know who *both* parents are. This principle was also given much earlier emphasis by Lord Denning in *W v W*²⁸ when he remarked:

Whenever there is a question mark to the parentage of the child, the one thing a child will want to know as he grows up is: who is my father? He will be torn apart unless he knows. It is better for him, as for everyone else, that the truth should out.

In Simon and Dylan's case, the facts are such that Dylan was born at the time Simon and Jane were married and that Dylan has enjoyed a happy and nurturing six-year relationship with a man he believes to be his father. It has only been through the disclosure of Jane that any knowledge of another possible father has emerged, however the man's identity is unknown and remains in firm dispute without conclusive testimony or data.

This ambiguity could almost certainly lead the courts to propose DNA profiling through s.23 (1) of the Family Law Reform Act 1987²⁹, however s.20 (3)(a) of the Family Law Reform Act 1969 provides that no child under sixteen can provide samples without the consent of those assigned his care and control, which on this occasion is Jane. However recent amendments³⁰ have since allowed the courts to override such objections with a grounding based upon the position taken in *S v S: W v Official Solicitor*³¹ where the best interests of the child needed to be offset against their immediate welfare when determining that such tests were needed; as was later proven correct in *Re L (A Child)*.³² Therefore despite Simon's desire to remain ignorant of Dylan's paternity and Jane's recent revelation, it would seem reasonable and likely that in order to provide clarity around the question of paternity a DNA test would prove the right option for the court to both suggest and enforce.

Artificial Insemination (Hypothetical Scenario)

Jane's partner Natalie had agreed to act as a surrogate for her cousin Rachel and husband Nabil whereupon she was artificially inseminated as part of a private arrangement. As part of this process all three parties signed a contractual agreement (downloaded from an internet website) that stipulated that upon birth of the

²⁵ *Re G (Parentage: Blood Sample)* [1997] 1 FLR 360; *Re H (Paternity: Blood Test)* [1996] 2 FLR 65.

²⁶ The Family Law Reform Act 1969, s 26

²⁷ *Re J (Paternity: Welfare of the Child)* [2007] 1 FLR 1064.

²⁸ [1970] 1 All ER 1157 at 1159.

²⁹ (Commencement No.3) Order 2001, SI 2001/777

³⁰ Family Law Reform Act 1969, s 21(3)(a)

³¹ [1972] AC 24.

³² [2009] EWCA Civ 1239.

child a sum of £20,000 would be given in exchange for the baby in question. Two months have passed since the birth of Saffron and the child remains in residence with Jane and Natalie, who still plan to honour their part of the surrogacy agreement.

The question of legal parentage and PR are established through the existing position held with common law to date, however it must also be noted that because the surrogacy occurred peripheral to an approved fertility clinic it falls subject to s.1 (a) of the Surrogacy Arrangements Act 1985 which is itself pursuant to s.36 (1) of the HFE Act 1990.

With regard to legal parentage the maxims *mater est quam gestatio demonstrat*³³ (by gestation the mother is demonstrated) and *mater semper certa est* (the mother is always certain) there is little doubt as to whom the legal mother of Saffron is (as was also mentioned earlier when discussing PR); however when it comes to the father things are again very different. S.28 (2) (a) (b) of the HFE Act 1990 provides that if Natalie is married at the time of the insemination the other party to the marriage is the father, except that common law also states that the genetic father is also the legal father, which would suggest that in this instance Nabil is the legal father of Saffron; this sentiment is also supported in *Re B (Parentage)*³⁴ where Bracewell J commented that 'sexual intercourse is not a prerequisite to fatherhood.'

Until the courts grant approval for a parental order under s. 54 of the HFE Act 2008 then full PR rests with the mother while the genetic father traditionally applied under s.4 of the CA 1989 (although in *Re W (Minors) (Surrogacy)*³⁵ it was decided that a parental order was sufficient to establish PR for the father). PR for both the commissioning parents (Rachel and Nabil) must be obtained as soon as is possible as per Theis J in *J v G (Parental Orders)*³⁶ while s.30 (2) of the HFE Act 1990 provides that the application must also be made within six months of the birth of the child, while remaining subject to s.30 (3) (a) of the HFE Act 1990 which requires that the child must be in residence with the commissioning parents at the time. S.7 of the HFE Act 1990 also states that no money must have been handed over at the time the parental order is requested, however in some circumstances payment has been allowed for as per *Re C (Application by Mr and Mrs X Under s.30 of the Human Fertilisation Act 1990)*³⁷ while it must be further considered that transference of PR cannot occur unless the child has been handed over.³⁸

The question of unlawfulness surrounding payment for surrogacy remains open to continued debate (although s.57(3) of the Adoption Act 1976 explains that any payment or reward for adoption of a child is unlawful); yet with recommendations first put forward in the Warnock Report³⁹, the Brazier Committee Report 1998⁴⁰ further outlined that:

- (1) Payments to surrogate mothers should cover only genuine expenses associated with the pregnancy and that the surrogate should be required to provide documentary evidence of the expenses incurred.
- (2) Any additional payments should be prohibited in order to prevent surrogacy arrangements being entered into for financial benefit and:
- (3) That legislation should define such expenses in terms of broad principle.

³³ *Amphill Peerage Case* [1977] AC 547.

³⁴ [1996] 2 FLR 15 [21].

³⁵ [1991] 1 FLR 385.

³⁶ [2013] EWHC 1432 (Fam) [30].

³⁷ [2002] 1 FLR 909.

³⁸ The Children Act 1989, s 2(a)

³⁹ DHSS, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* <http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf> accessed 5 May 2016

⁴⁰ M Brazier, A Campbell, S Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* <http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4014373.pdf> accessed 5 May 2016

However there have been a handful of cases that suggest substantial payments are not necessarily viewed as unlawful when subject to the qualifying criteria (also known as the taint approach) laid down by Hedley J in *Re X and Y (Foreign Surrogacy)*⁴¹ whereupon three questions arising from policy requirements were used as a means of legal determination. Those being:

- (1) Was the amount paid disproportionate to what are considered reasonable expenses?
- (2) Were the applicants acting in good faith and without ‘moral taint’ in their dealings with the surrogate mother?
- (3) Were the applicants party to any attempt to defraud the authorities?

On this occasion the payment provided was enough to cover a deposit on a new home in addition to expenses and associated loss of earnings, yet was not found ‘disproportionate enough to “expenses reasonably incurred” that the granting of an order would be an unacceptable affront to public policy.’⁴² Other cases including *Re S (Parental Order)*⁴³ which allowed surrogate payment of \$23,000 and also *X and Y (Children)*⁴⁴ where £27,500 was paid for dual surrogates with court approval, similarly demonstrate a reluctance to outlaw payments for surrogacy entirely.

This degree of discretionary leniency was earlier exercised in *In the Matter of C (A Child)*⁴⁵ where a £12,000 payment was considered higher than the threshold applied by COTS⁴⁶ yet with the application of five similar questions, Wall J allowed the parental order on the finding that any fraudulent behaviour was that of the surrogate and that the child’s best interests were supported through residency with, and parentage of, the commissioning parents. In light of this judicial reluctance to extinguish private surrogacy arrangements it would seem reasonable to advise that the payment of £20,000 by Rachel and Nabil would stand a good chance of being accepted by the courts provided that their claim withstands the above criteria.

⁴¹ [2008] EWHC 3030 (Fam).

⁴² *ibid.* [22].

⁴³ [2009] EWHC 3030 (Fam).

⁴⁴ [2011] EWHC 3147 (Fam).

⁴⁵ [2002] EWHC 157 (Fam).

⁴⁶ Childlessness Overcome Through Surrogacy

Bibliography

Books

- Ayrton L, Horton M, *Residence and Contact: A Practical Guide* (1st edn, Sweet & Maxwell 2009)
 Bainham A, Gilmore S, *Children: The Modern Law* (Family Law 2013)
 Bainham A, Sclater SD, Richards M (eds), *What is a Parent? A Socio-Legal Analysis* (Hart 2004)
 Blackmore S, Thomas J, *Reforming Family Justice* (Family Law 2014)
 Burns S, *The Law of Assisted Reproduction* (Bloomsbury 2012)
 Collier R, Sheldon S, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart 2008)
 Deduck A, Kaganas F, *Family Law, Gender and The State* (3rd edn, Hart 2012)
 Dodds M, *Family Law* (4th edn, Old Bailey 2004)
 Dunn V, Lachovic V, *Family Law in Practice* (11th edn, OUP 2015)
 Ekeelaar J, *Family Law and Personal Life* (OUP 2006)
 Fortin J, *Children's Rights and the Developing Law* (3rd edn, CUP 2009)
 Gilmore S, Glennon L, Haye's & Williams' Family Law (4th edn, OUP 014)
 Goldthorpe L, Monro P, *Child Law Handbook: Guide to Good Practice* (Law Society 2005)
 Hale B, Pearl D, Cooke E, Monk D, *The Family Law & Society Cases & Materials* (6th edn, OUP 2009)
 Herring J, *Family Law* (7th edn, Pearson 2015)
 Lee R, Morgan D, *Human Fertilisation & Embryology* (Blackstone 2001)
 Lowe N, Douglas G, *Bromley's Family Law* (11th edn, OUP 2015)
 Masson J, Bailey-Harris R, Probert R, *Principles of Family Law* (8th edn, Sweet & Maxwell 2008)
 McFarlane A, Reardon M, *Child Care and Adoption Law* (Jordan 2012)
 Prest C, Wildblood S, *Children Law: An Interdisciplinary Handbook* (Jordan 2005)
 Probert R, Harding M, *Cretney and Probert's Family Law* (9th edn, Sweet & Maxwell 2015)
 Probert R, Gilmore S, Herring J (eds), *Responsible Parents & Parental Responsibility* (Hart 2009)
 Harper M, Chilean S, Downs M, Landells K, Wilson G, *Same Sex Marriage and Civil Partnerships* (Family Law 2014)

Cases

- Amphill Peerage Case [1977] AC 547
 Brixey v Lynas [1996] 2 FLR 499
 C v C (A Minor) (Custody Appeal) [1991] 1 FLR
 F (A Child) [2009] EWCA Civ 313
 Gillick v West Norfolk and Wisbech Area Health Authority [1986] 1 AC 112
 J v G (Parental Orders) [2013] EWHC 1432 (Fam)
 Re A (A Minor) (Custody) [1991] 2 FLR 394
 Re B (Parentage) [1996] 2 FLR 15
 Re C (Application by Mr and Mrs X Under s.30 of the Human Fertilisation Act 1990) [2002] 1 FLR 909
 Re C (Direct Contact: Suspension) [2011] EWCA Civ 521
 Re D (An Infant) (Adoption: A Parent's Consent) [1977] AC 602
 Re DW (A Minor) (Custody) [1984] Fam Law 17
 Re G (Parentage: Blood Sample) [1997] 1 FLR 360
 Re H (Paternity: Blood Test) [1996] 2 FLR 65
 Re H (Minors) (Access) [1992] 1 FLR 148
 Re H (Residence) [2011] EWCA Civ 762
 Re J (Paternity: Welfare of the Child) [2007] 1 FLR 1064
 Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision) [2000] 1 FLR 571
 Re L (A Child) [2009] EWCA Civ 1239
 Re M (Child's Upbringing) [1996] 2 FLR 441
 Re M (Contact: Supervision) [1998] 1 FLR 727
 Re M (Handicapped Child: Parental Responsibility) [2001] 3 FCR 454
 Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124
 Re S (Contact: Promoting Relationship with Absent Parent) [2004] EWCA Civ 18
 Re S (Parental Order) [2009] EWHC 2977 (Fam)
 Re X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)
 S v S: W v Official Solicitor [1972] AC 24
 Stephenson v Stephenson [1985] FLR 1140
 W v W [1970] 1 All ER 1157
 X and Y (Children) [2011] EWHC 3147 (Fam)

Command Papers and Law Commission Reports

Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (Cm 4068, 1998)

Warnock Committee, Report of the Committee of Inquiry into Human Fertilisation and Embryology (Cm 9314, 1984)

Legislation

Adoption Act 1976

Adoption and Children Act 2002

Children and Families Act 2014

Children Act 1989

Family Law Act 1996

Family Law Reform Act 1969

Family Law Reform Act 1987

Human Fertilisation and Embryology Act 2008

Perjury Act 1911

Surrogacy Arrangements Act 1985

Online Articles

Brazier, M, Campbell, A, Golombok, S, 'Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation' <http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4014373.pdf> accessed 5 May 2016

DHSS, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* <http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf> accessed 5 May 2016

Hunt J, Macleod A, 'Outcomes of applications to court for contact orders after parental separation or divorce' (2008) Ministry of Justice <<http://dera.ioe.ac.uk/9145/1/outcomes-applications-contact-orders.pdf>> accessed 21 March 2016

Hunt J, Macleod A, 'Outcomes of applications to court for contact orders after parental separation or divorce' (2008) Ministry of Justice <<http://dera.ioe.ac.uk/9145/1/outcomes-applications-contact-orders.pdf>> accessed 21 March 2016

Unicef, 'Fact Sheet: A summary of the rights under the Convention on the Rights of the Child' <www.unicef.org/crc/files/rights_overview.pdf> accessed 15 March 2016

Statutory Instruments

(Commencement No.3) Order 2001, SI 2001/777