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T v B

Case No: LS07P05714

High Court of Justice Family Division

16 June 2010

[2010] EWHC 1444 (Fam)

2010 WL 2469146

Before: Mr Justice Moylan

Date: 16/06/2010

Hearing dates: 18th March 2010

Representation

Mr Goldrein QC and Mr Switalski (instructed by Taylor & Emmet LLP) for the Applicant.

Mr Hyde QC and Miss Allman (instructed by Stewarts Law LLP) for the Respondent.

Approved Judgment

Mr Justice Moylan

This judgment is being handed down in private on 16 June 2010. It consists of 19 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

1 The issue which I have to determine is whether the Respondent is a parent under Schedule 1 of the Children Act 1989 so that the court has jurisdiction to make an order against her for financial relief. The Applicant has made an application for financial relief for the benefit of a child and this preliminary issue has been listed for determination prior to the court considering the merits of this application.

2 The Applicant has been represented at this hearing by Mr Goldrein QC and Mr Switalski with an earlier skeleton argument having been prepared by Mr Hayden QC. The Respondent is represented by Mr Hyde QC and Ms Allman.

3 The Respondent contends that she is not a parent for the purposes of Schedule 1 because it is confined to those who have the status of parent or are within the extended definition contained within paragraph 16. The Applicant contends that Schedule 1 is not confined to those who have the status of parent but permits the application of a fact sensitive, welfare informed, approach to the determination of who is a parent within the scope of Schedule 1 . On the application of such an approach, the Applicant submits that the Respondent is a parent.

History

4 I take the history from the Respondent's written submissions.

5 The Applicant and the Respondent, who are both female, began a relationship in 1994. They lived together from 1994 until 2007. They have not entered into a civil partnership. The Applicant

became pregnant by artificial insemination from an unknown donor through an authorised clinic. This followed a joint application by the Applicant and the Respondent for the Applicant to receive treatment by way of artificial insemination. A child was born to the Applicant in 2000 as a result of this treatment.

6 Following the end of the relationship and their separation, the Respondent issued an application for residence and contact. On 14 January 2009 the court made a shared residence order. In the course of his judgment District Judge Saffman said:

> "… The decision for (the Applicant) to become pregnant was a decision which both acknowledge was ultimately reached jointly by the parties … Both took on the role of … parents after (the child's birth) …"

The Children Act

7 The financial application is made under section 15 and Schedule 1 of the Children Act 1989 . As section 15 states, Schedule 1 "consists primarily of the re-enactment, with consequential amendments and minor modifications" of a number of previous statutory provisions. It was not, specifically, intended itself to effect any significant legislative changes.

8 Schedule 1 paragraph 1 provides:

> (1) On an application made by a parent, guardian or special guardian of a child, or by any person in whose favour a residence order is in force with respect to a child, the court may—
>
> (a) in the case of an application to the High Court or a county court, make one or more of the orders mentioned in sub-paragraph (2);
>
> (b) in the case of an application to a magistrates' court, make one or both of the orders mentioned in paragraphs (a) and (c) of that sub-paragraph.
>
> (2) The orders referred to in sub-paragraph (1) are —
>
> (a) an order requiring either or both parents of a child—
>
> (i) to make to the applicant for the benefit of the child; or
>
> (ii) to make to the child himself,
>
> such periodical payments, for such term, as may be specified in the order;
>
> (b) an order requiring either or both parents of a child—
>
> (i) to secure to the applicant for the benefit of the child; or
>
> (ii) to secure to the child himself,
>
> such periodical payments, for such term, as may be so specified;
>
> (c) an order requiring either or both parents of a child—
>
> (i) to pay to the applicant for the benefit of the child; or
>
> (ii) to pay to the child himself,
>
> such lump sum as may be so specified;

(d) an order requiring a settlement to be made for the benefit of the child, and to the satisfaction of the court, of property—

(i) to which either parent is entitled (either in possession or in reversion); and

(ii) which is specified in the order;

(e) an order requiring either or both parents of a child—

(i) to transfer to the applicant, for the benefit of the child; or

(ii) to transfer to the child himself,

such property to which the parent is, or the parents are, entitled (either in possession or in reversion) as may be specified in the order.

9 It can be seen that substantive orders can only be made against a "parent". Paragraph 16 defines parent for the purposes of the Schedule (save for paragraphs 2 and 15):

"'parent' includes –

(a) any party to a marriage (whether or not subsisting) in relation to whom the child concerned is a child of the family, and

(b) any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child concerned is a child of the family …".

Paragraph 2 gives the court power, in certain circumstances, to make an order for financial relief against a parent on an application by a child who has reached the age of 18. Accordingly, the court cannot make an order under paragraph 2 against a party to a marriage or a civil partner in a civil partnership in relation to whom the child has been a child of the family but only against a parent.

10 Paragraph 4 of Schedule 1 contains the matters to which the court is required to have regard when exercising the jurisdiction to make orders for financial relief. Paragraph 4(1) sets out the matters to which the court must have regard when deciding whether to exercise its powers under paragraph 1 or 2. By paragraph 4(2), the court in addition, when deciding whether to exercise its powers under paragraph 1 against a person who is not the mother or father of the child, is required to have regard to a number of further matters including whether that person has assumed financial responsibility for the child. This is focused on the exercise by the court of its powers against those who come within the extended definition of parent as provided by paragraph 16.

11 There is no definition of the word "parent" in the Children Act other than that contained in Schedule 1 . It is though, of course, a word that appears in other provisions including, for example, section 1(3)(f) of the welfare checklist which requires the court to have regard to "how capable each of his parents … is of meeting his needs" and section 10(4)(a) which gives "any parent" the right to apply for any section 8 order.

12 Under section 10(2) the court has power to make a section 8 order on the application of a person (a) who is entitled to apply or (b) who has obtained leave to apply. Those who are entitled to apply for any section 8 order are set out in section 10(4) and include any "parent", any person who has parental responsibility by virtue of section 4A and any person in whose favour a residence order is in force in respect to the child. Section 4A contains provisions whereby a step-parent can acquire parental responsibility. Section 10(5) additionally defines those who are entitled to apply for a residence or contact order and they include any party to a marriage in relation to whom the child is a child of the family, any civil partner in a civil partnership in relation to whom the child is a child of a family and any person with whom the child has lived for a period of at least three years.

13 Section 4ZA of the Children Act (inserted by the Human Fertilisation and Embryology Act 2008) contains provisions whereby a "second female parent" can acquire parental responsibility.

These provisions apply when a child has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 , which I refer to later in this judgment.

Other Legislation

14 In 1979 the Law Commission published a Working Paper (No. 74) entitled *Family Law, Illegitimacy* . This contained a comprehensive review of this subject and addressed, among other issues, the issue of the paternity of children conceived by artificial insemination by a third party donor. The proposal in the Working Paper in respect of such children was limited to proposing that "where a married woman has received AID treatment with her husband's consent, the husband rather than the donor should, for all legal purposes, be regarded as the father of a child conceived as a result". The 1982 Report (*Illegitimacy* , Law Com No 118) summarised the legal position as being that: "the donor, not the mother's husband, is the legal father of an AID child" (para. 12.1). The Report recommended that the legal position should change as proposed in the Working Paper.

15 The Warnock Committee of Inquiry into Human Fertilisation and Embryology reported in July 1984. The report covered a wide range of issues. One of its recommendations repeated that of the Law Commission Report, namely that a child conceived by AID should be treated in law as the child of its mother and her husband when they had both consented to the treatment.

16 In 1986 the Law Commission produced a second report on illegitimacy (*Illegitimacy* Law Com. No. 157) which annexed a draft bill which became the Family Law Reform Act 1987 .

17 Section 27 of the Family Law Reform Act 1987 ("the FLRA 1987") implemented the Law Commission's recommendation (as endorsed by the Warnock Committee) and provided:

> "Where after the coming into force of this section a child is born in England and Wales as the result of the artificial insemination of a woman who –
>
> (a) was at the time of the insemination a party to a marriage …; and
>
> (b) was artificially inseminated with the semen of some person other than the other party to the marriage,
>
> then, unless it is proved to the satisfaction of any court … that the other party to that marriage did not consent to the insemination, the child shall be treated in law as the child of the parties to that marriage and shall not be treated as the child of any person other than the parties to the marriage".

This was the limited extent to which the parents of a child born by AID were defined to be different from those of other children.

18 The Human Fertilisation and Embryology Act 1990 ("the HFEA 1990") implemented many of the recommendations of the Warnock Committee's Report. As the preamble states, it was an Act in part "to make provision about the persons who in certain circumstances are to be treated in law as the parents of a child". The Act deals specifically with the issue of status and artificial insemination in sections 27 to 30 :

> Section 27 defines "mother" as meaning:

"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 eggs, and no other woman, is to be treated as the mother of the child."

> The meaning of "father" is defined in section 28:

"(1) This section applies in the case of a child who is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination.

(2) If—

(a) at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was a party to a marriage, and

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,

then, subject to subsection (5) below, the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).

(3) If no man is treated, by virtue of subsection (2) above, as the father of the child but—

(a) the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services provided for her and a man together by a person to whom a licence applies, and

(b) the creation of the embryo carried by her was not brought about with the sperm of that man,

then, subject to subsection (5) below, that man shall be treated as the father of the child.

(4) Where a person is treated as the father of the child by virtue of subsection (2) or (3) above, no other person is to be treated as the father of the child.

(5) Subsections (2) and (3) above do not apply—

(a) in relation to England and Wales and Northern Ireland, to any child who, by virtue of the rules of common law, is treated as the legitimate child of the parties to a marriage,

(b) in relation to Scotland, to any child who, by virtue of any enactment or other rule of law, is treated as the child of the parties to a marriage, or

(c) to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters.

(6) Where—

(a) the sperm of a man who had given such consent as is required by paragraph 5 of Schedule 3 to this Act was used for a purpose for which such consent was required, or

(b) the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death,

he is not to be treated as the father of the child.

19 The effect of sections 27 and 28 is confirmed in section 29 , namely that:

> “Where by virtue of section 27 or 28 of this Act a person is to be treated as the mother or father of a child, that person is to be treated in law as the mother or, as the case may be, father of the child for all purposes.”

As Butler-Sloss P. said in *Leeds Teaching Hospitals NHS Trust v A [2003] 1 FLR 1091* at [8]:

> “A clear purpose of this aspect of the 1990 Act is to make provision for certain persons

to be treated as parents".

20 It can be seen from this brief summary that the legislative provisions under the HFEA 1990 , in force when the child in present case was born, do not apply to the circumstances of this case. The familial situation in this case was not dealt with by legislation until the implementation of the Human Embryology and Fertilisation Act 2008 ("the HFEA 2008"). This Act deals for the first time with same sex couples and parenthood in cases involving assisted reproduction.

21 Under the heading " *Cases in which woman to be other parent* ", the HFEA 2008 provides, in sections 42 to 47 , who is to be treated as the "other parent" both when the mother is a party to a civil partnership and when she is not. Section 43 addresses the latter situation and defines the requirements which must be fulfilled for the "other woman … to be treated as a parent of the child". In the event that, pursuant to these provisions, a woman is treated as the (other) parent of a child, "no man is to be treated as the father of the child" (section 45). Further, where by virtue of these provisions, she is treated as the parent of a child, she is to be treated as the parent for all purposes (section 48).

22 It can also be seen from this brief summary that the term "parent", when used in the other legislation to which I have referred, has been used as a specific legal term meaning a child's biological parent or some other person specifically given the status of parent by express statutory provision.

Authorities

23 I have been referred to a number of authorities.

24 In *J v J (A Minor: Property Transfer) [1993] 2 FLR 56* , a mother applied under Schedule 1 of the Children Act for a financial relief order against a man with whom she had been living as husband and wife for 10 years and since her daughter, by another man, was aged 6 months. Eastham J decided that the man with whom the mother had been living was not the child's parent for the purposes of Schedule 1 :

> "Under the plain meaning of the word 'parent', I am satisfied … that by no stretch of the imagination can the respondent be described as a 'parent' because in the natural and plain meaning of the word, he would have to be the father of the child just as the applicant is the mother of the child" (p. 59).

Accordingly, as the respondent was not a parent of the child, "on any basis" (p. 60), the court had no jurisdiction to make any order against him under Schedule 1 .

25 In *M v C and Calderdale Metropolitan Borough Council [1993] 1 FLR 505, the Court of Appeal considered* the meaning of "parent" under section 10(4)(a) of the Children Act for the purposes of determining whether a father did or did not require leave to make a section 8 application. Johnson J had decided that the term "parent" only applied to parents with parental responsibility and, accordingly, that the father required leave. The Court of Appeal disagreed and decided that the term "parent" has a wider meaning than "parent with parental responsibility" and was a word "signifying a relationship" (p. 508). Giving the judgment of the court, Butler-Sloss LJ (as she then was) said (p. 509):

> "The term "parent" must be given its natural and ordinary meaning. It does not follow, however, that that meaning will always include the natural parents. The natural and ordinary meaning is not fixed, but changes according to the context in which the word is used. Thus the meaning of "parent" in a school prospectus will include a person with de facto parental responsibility even if not a natural parent but exclude a natural parent who has no contact with the child. On the other hand, the meaning of "parent" in a work on genetics will be the biological parents, including a father who has no more connection than the initial act of fertilisation. The question is therefore whether the natural and ordinary meaning of a "parent" in the Children Act can include a natural parent whose child has been freed for adoption".

26 The Court of Appeal then went on to determine whether a person, who would be a parent by application of the natural and ordinary meaning of that word, ceased to be such, for the purposes of section 10 of the Children Act , as a result of the court having made an order freeing their child for adoption. The Court of Appeal decided that a freeing order had the same effect as an adoption order, namely that consequent on such an order a natural parent ceased to be a parent or ceased to be treated as a parent, at least for the purposes of section 10 of the Children Act .

27 In *Re M (Child Support Act: Parentage) [1997] 2 FLR 90* , the Child Support Agency applied for a declaration of parentage pursuant to section 27 of the Child Support Act 1991 alleging that the respondent was the father of two children within the meaning of the term "parent" under section 54 of the 1991 Act. This latter section defines parent as "any person who is in law the mother or father of the child". The children had been born through AID. The mother and the respondent had been married at the time the children were born. Bracewell J decided that, as the respondent was not the biological father, "he can only become the father by operation of law" (p.92). It was common ground that the respondent had not become a parent under the FLRA 1987 or the HFEA 1990 because the children had been born before both these Acts had come into effect and neither Act was retrospective.

28 The Child Support Agency contended that the respondent was the father by application of the doctrine of estoppel because he had consented to the mother's impregnation by AID. In her judgment Bracewell J said (p. 92):

> "The Child Support Agency is forced into that argument because it is conceded that the Law Commission, in the Report on Family Law, Illegitimacy, … correctly set out the law prevailing at the date of the birth of each of these children at para 12(1) which reads as follows: 'A child conceived as a result of artificial insemination of the mother with sperm provided by a third party donor is, as the law now stands, illegitimate … Likewise, the donor, not the mother's husband, is the legal father of an AID child".

Bracewell J rejected the Agency's argument (p. 94):

> "In my judgment a father is a parent if he is either the biological father or he becomes the father by operation of law. That may involve the common law doctrine of displacement of the presumption of legitimacy within a marriage or it may be by Act of Parliament such as the Adoption Act or the Human Fertilisation and Embryology Act. In my judgment there is no other way in which … (the respondent) … can be held to be the parent within the meaning of the Child Support Act ".

29 In *Re R (IVF: Paternity of Child) [2005] 2 FLR 843 the House of Lords considered* the effect of the HFEA 1990 . The decision emphasises the importance attached to status including parentage. Lord Hope said:

> "[5] … The law has always attached a special significance to a person's status … [he then quotes Lord Wilberforce in *The Ampthill Peerage [1977] AC 547]* …
>
> [6] Lord Wilberforce was describing there the status of legitimacy under the then current law in the context of a disputed peerage claim. But a similar view, with appropriate modifications, may be taken of the significance of the status of parentage in view of the legal consequences that flow from that relationship. The conferring of the status of father on a man who is not related to the child by blood or by marriage to the child's mother is a very serious matter …".

30 Lord Walker (with whom the rest of the House agreed) expressed concern about the code of practice produced by the Human Fertilisation and Embryology Authority given that:

> "[35] … If an unmarried man is to become the legal father of a child of which he is not the biological father, that is a momentous matter for both father and child …".

He considered that: "more reliable safeguards are needed in a matter directly affecting a child's

legal parentage" [26]. One specific concern was:

> "[36] … the rather half-hearted advice on attempting to obtain an acknowledgement [that the man and woman are being treated together and that donated sperm is to be used] is an inadequate recognition of the importance of establishing whether or not a child born as a result of licensed treatment has a father and whether the mother's male partner is to have the legal responsibility of fatherhood".

31 The next case to which I propose to refer is *J v C (Void Marriage: Status of Children) [2006] 2 FLR 1098* . This case concerned a child who had been born by AID. The relevant issue determined by the Court of Appeal was whether the applicant was a parent for the purposes of section 10 of the Children Act and so did not need leave to make an application for a section 8 order. In his judgment Wall LJ (as he then was) notes that the Children Act does not define the term parent as used in section 10 .

> " CA 1989 does not define the term "parent" as used in section 10(4)(a) . There is also no definition of "father" in the CA 1989 . We therefore have to look elsewhere for an applicable statutory definition. In this context, I respectfully agree … with the observations of Butler-Sloss LJ, as she then was, in a quite different context in M v C and Calderdale MBC … that the natural and ordinary meaning of the word "parent" is not fixed, but changes according to the context in which it is used … [*The applicant*] is manifestly not E's natural parent. It is therefore necessary to see if he comes with the relevant statutory definition of parent contained in the relevant Act …" [17].

32 In order to answer this question, Wall LJ considered the effect of the two "Acts of Parliament which define parenthood in the context of AID", namely the FLRA 1987 and the HFEA 1990 . The latter was not in force at the relevant date so that the applicable provisions were those of the FLRA 1987 . Applying these provisions, the Court of Appeal decided that the applicant was not a parent within the meaning of the FLRA 1987 because he was not a party to a marriage at the relevant time. As referred to earlier in this judgment, section 27 of the FLRA prescribed the circumstances in which a child born by AID was to be "treated in law as the child of the parties to" a marriage. The Court of Appeal decided that there was no marriage for the purposes of section 27 because, at the date of the ceremony of marriage, the applicant was in fact a female, as was the other party to the ceremony. Accordingly, it was held that the terms of the FLRA 1987 "exclude" the applicant from being a parent of the child.

33 In *Re G (Children) [2006] 2 FLR 629* the parties (CG and CW) had lived together in a lesbian relationship during the course of which two children were born to CG by means of AID. CW made an application for contact and residence. She was entitled to do so in respect of one of the children as that child had lived with her for more than three years (section 10(5)(b)). However, she applied for (and was granted) leave to make her applications in respect of the other child. Although this was not an issue before the House of Lords, in the course of her speech Baroness Hale said:

> "[11] Proceedings began in September 2003, when CW applied for a contact and residence order. She was entitled to make such an application in relation to child A, who had lived with her for more than three years: see Children Act 1989, s 10(5)(b) . But she required leave to apply in relation to child B, who was then only two years old".

Although this is only a passing reference, it is directly relevant because CW would not have required leave if she was a parent or treated as a parent for the purposes of section 10(4)(a) (which, as I have said, gives a "parent" the right to apply for any section 8 order).

34 In the course of her speech, Baroness Hale addresses the meaning and significance of parenthood in the context of welfare:

> "[32] So what is the significance of the fact of parenthood? It is worthwhile picking apart what we mean by 'natural parent' in this context. There is a difference between natural and legal parents. Thus, the father of a child born to unmarried parents was not legally a

'parent' until the Family Law Reform Act 1987 but he was always a natural parent. The anonymous donor who donates his sperm or her egg under the terms of the Human Fertilisation and Embryology Act 1990 is the natural progenitor of the child but not his legal parent: see ss 27 and 28 of the 1990 Act. The husband or unmarried partner of a mother who gives birth as a result of donor insemination in a licensed clinic in this country is for virtually all purposes a legal parent, but may not be any kind of natural parent: see s 28 of the 1990 Act. To be the legal parent of a child gives a person legal standing to bring and defend proceedings about the child and makes the child a member of that person's family, but it does not necessarily tell us much about the importance of that person to the child's welfare.

[33] There are at least three ways in which a person may be or become a natural parent of a child, each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case. The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels. For the parent, perhaps particularly for a father, the knowledge that this is 'his' child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child (see, for example, the psychiatric evidence in *Re C (MA) (an infant) [1966] 1 WLR 646*). For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may also be an important (although certainly not an essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain.

[34] The second is gestational parenthood: the conceiving and bearing of the child. The mother who bears the child is legally the child's mother, whereas the mother who provided the egg is not: 1990 Act, s 27 . While this may be partly for reasons of certainty and convenience, it also recognises a deeper truth: that the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other.

[35] The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting. The phrase 'psychological parent' gained most currency from the influential work of Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* (Free Press, 1973), who defined it thus:

'A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent.'

[36] Of course, in the great majority of cases, the natural mother combines all three. She is the genetic, gestational and psychological parent. Her contribution to the welfare of the child is unique. The natural father combines genetic and psychological parenthood. His contribution is also unique. In these days when more parents share the tasks of child rearing and breadwinning, his contribution is often much closer to that of the mother than it used to be; but there are still families which divide their tasks on more traditional lines, in which case his contribution will be different and its importance will often increase with the age of the child.

[37] But there are also parents who are neither genetic nor gestational, but who have become the psychological parents of the child and thus have an important contribution to make to their welfare. Adoptive parents are the most obvious example, but there are many others. This is the position of CW in this case. Whatever may have been the mother's stance in the past, Mr Jackson on her behalf has not in any way sought to

> diminish the importance of CW's place in these children's lives or to challenge the legal arrangements put in place as a result of the first proceedings. Indeed, he asks us to restore those orders.
>
> [38] What Mr Jackson challenges is the reversal in the parties' positions in response to the mother's removal of the children to Cornwall. He points out that, with one exception at the beginning of Bracewell J's judgment, there was no reference to the important fact that CG is these children's mother. While CW is their psychological parent, CG is, as Hallett LJ pointed out, both their biological and their psychological parent."

35 In *Re A (Joint Residence: Parental Responsibility) [2008] 2 FLR 1593* , a mother appealed against a joint residence and parental responsibility order. The order had been made in favour of a man with whom the mother and child had been living since the date of the child's birth and who had been assumed to be the child's father. During the course of the proceedings it was established that he was not the father. During the course of his judgment Potter P. said:

> "[3] Once it was established that Mr A was not in fact the father or parent of H, nor was he H's step-parent or guardian … that meant that the only route by which he could acquire parental responsibility for H was via the provisions of s.12(2) of the Act …".

Later in his judgment Potter P said:

> "[70] … it is also clear the making of a residence order is a legitimate means by which to confer parental responsibility on an individual who would otherwise not be able to apply for a free-standing parental responsibility order, as in the case of someone who is not the natural parent, but a step-parent … or same sex partner …".

36 During the course of the first instance judgment, the judge had said that "for all purposes" Mr A was to be regarded as the child's father and should be referred to as the father in the order. Potter P referred to this as "an unfortunate passage";

> "[96] … The fact is, Mr A is not H's father or parent either in common parlance or under any definition contained in the Children Act 1989 or other legislation (cf *J v J (A Minor: Property Transfer [1993] 2 FLR 56)* . He is not a father by biological paternity or adoption, nor a stepfather by marriage. He is a person entitled, by reason of the role he has played and should continue to play in H's life, to an order conferring parental responsibility upon him. He is thus a person who, jointly with the mother, enjoys the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to that child … but he does not thereby become the father of the child.".

37 Since the conclusion of the hearing, I have also considered *Re B (Parentage) [1996] 2 FLR 15* . In that case Bracewell J determined that the biological father of children born by AID was the legal father of the children, and therefore a parent under Schedule 1 of the Children Act , (a) pursuant to the provisions of the HFEA 1990 and (b) if she was wrong about (a), then because he was the genetic father of the children. Bracewell J determined that:

> "… if Parliament had intended to alter or amend the general principles as to parenthood, specific enactment would have been made in the 1990 Act … I find fatherhood concerns genetics … unless either there is a presumption of legitimacy which affects the situation or there is a statutory intervention such as, for example, the change of status afforded by adoption or freeing for adoption." (p.21D/E).

38 Counsel have also referred, very briefly, to the effect of the European Convention on Human Rights . In this context, the only decision referred to during the course of the hearing was *Treharne v Secretary of State for Work and Pensions [2009] 1 FLR 853* in which Cranston J said [29]:

> "Perhaps it is not surprising that Art 8 cannot be used in this way to found a right to economic benefit when, as Baroness Hale explained, the European Convention is concerned with civil, not economic, rights".

The Parties' Submissions

39 This case has been determined on submissions only and I have been referred to no evidence. Both parties have made substantial written and oral submissions.

40 Mr Goldrein submits that the issue in this case is not that of the Respondent's status but is focused on the manner in which financial provision should be made for a child. He submits that the decision of whether the Respondent is a parent for the purposes of Schedule 1 is a fact sensitive decision and one in which welfare should inform what he calls the discretionary process. He submits that, by application of this process to the very special circumstances of this case, the Respondent is a parent for the purposes of Schedule 1 . He relies on the fact that the parties to this application agreed to participate jointly in the child's birth and that they both then took on the role of the child's parents, roles which they continue to exercise.

41 In written submissions prepared by the Applicant's previous Leading Counsel, Mr Hayden QC, it is argued that the "philosophy which underpins Schedule 1 is to require those who have jointly brought a child into the world to provide proper financial provision for its welfare". He relies on the passages from Baroness Hale's speech in Re G (cited above) in which she identifies the ways in which a person may become a natural parent. Mr Hayden submits that it would be "nonsense" for the definition of parent to be given a broad construction for the purposes of welfare decisions but a narrow construction for the purposes of financial relief under Schedule 1 . As the child's psychological parent he submits that the Respondent is "morally, practically, psychologically and legally a parent for the purposes of these provisions".

42 Mr Goldrein puts his submissions on a broader basis. He submits that the meaning of the word "parent" is not fixed but that, relying on M v C and Calderdale MBC , its meaning "changes according to the context in which the word is used". Turning to Schedule 1, paragraph 16 , the paragraph in which the word "parent" is defined, he relies on the use of the word "includes" as demonstrating that this definition cannot have been intended to be exclusive. It is a floor not a ceiling and the question of whether someone is a parent is to be determined by reference to the factual matrix underpinning the relationship between adult and child – it is a discretionary decision. Mr Goldrein submits that the context of Schedule 1 embraces welfare which is part of and informs the determination of whether a person is or is not a parent within its provisions.

43 Further, Mr Goldrein relies on the fact that the Respondent has acquired parental responsibility, as a result of her application for and obtaining an order for shared residence. He submits that the comments of Potter P in Re A are not relevant to the issue in the present case because the context is not the same. He also submits that J v J no longer applies because of subsequent changes in society such that the natural and plain meaning of "parent" in 1992 is not the same as its meaning now. Rather, he submits, if the word parent in Schedule 1 could not include a person who "fact-sensitively had justified a parental responsibility order in his or her favour, a nonsense would be made of the welfare provision in s.1 ".

44 In addition, Mr Goldrein submits that the Respondent should be estopped from contending that she is not a parent within Schedule 1 . "She cannot on the one hand fight for parental responsibility and then seek to dissociate herself from the financial obligation of someone with the responsibility of a parent. Any interpretation of the law accommodating such a position would, it is submitted, be grotesque".

45 Based on these submissions, Mr Goldrein contends that paragraph 16(2) should be interpreted as having the following additional words:

> "Any person in respect of whom a parental responsibility order [or an order conferring parental responsibility] has been made in relation to the child; and
>
> Any person who on a continuous day to day basis, through interaction, companionship,

> interplay and mutuality, fulfils the child's psychological needs for a parent as well as the child's physical needs. The psychological parent may be biological, adoptive, foster or a common law parent".

46 Mr Hyde submits that the Respondent is not a parent within the meaning of Schedule 1 and that, accordingly, the court has no power to make an order for financial relief against her. He challenges the Applicant's contention that it is a fact specific decision and relies on a number of strands in support of his argument that, subject to the provisions of paragraph 16, the only people against whom financial orders can be made under Schedule 1 are a child's legal parents being the biological parents or, for example, by operation of the HFEA 2008 .

47 Mr Hyde starts by relying on J v J which, he submits, establishes the scope of Schedule 1 and which has been applied without challenge for the last 18 years.

48 Next Mr Hyde seeks to derive support from the terms of the Children Act including Schedule 1 which, he submits, demonstrate the existence of a clear statutory divide around the definition of those who are parents.

49 Paragraph 16 expressly extends the meaning of parent to include a party to a marriage because, Mr Hyde submits, such a person would not otherwise come within the meaning of "parent". This would not have been necessary if the Applicant's case was correct. There would have been no need for this provision because any person who had acted as a parent would or could be included within the scope of the Schedule if it was appropriate for them to be included.

50 In addition, section 10 of the Children Act specifies those who are entitled to apply for section 8 orders as "any parent", any person who has parental responsibility by virtue of section 4A and any person in whose favour a residence order is in force. Mr Hyde relies on the manner in which the word parent in section 10 has been interpreted and applied. He relies on the passage I have quoted earlier in this judgment from Re G [11], in which Baroness Hale referred to the applicant requiring leave to apply for a section 8 order (which she would not have done if she was a parent) despite being in a very similar factual position to the Respondent in this case. Additionally he relies on the passages from Re A in which, despite the applicant having been the child's only father figure throughout its life, Potter P said the applicant was not the child's "father or parent … under any definition contained in" the 1989 Act. Mr Hyde relies on these authorities as making it clear that the Respondent would not be a parent within section 10 . It would, he submits, be extraordinary, when both are addressing issues of jurisdiction, if the word parent was used to mean one thing under section 10 and a different thing under Schedule 1 .

51 Section 4A provides the means by which a step-parent can acquire parental responsibility and, as a result, be placed in the same position as a parent for the purposes of applying for any section 8 order. Mr Hyde submits that the acquisition of parental responsibility does not make a person, who would not otherwise be a parent, a parent. In this context he relies on M v C and Calderdale MBC . There are, he submits, distinct categories namely parents, parents with parental responsibility (a sub-set of parents) and others with parental responsibility. He points to the existence of a wide group of people who might have parental responsibility as a result of section 12(2) (which provides that for the duration of any residence order, the person in whose favour the order has been made shall have parental responsibility) but who would not as a result become parents. They are in many respects placed in the position of a parent but they are not a "parent" for the purposes of the Children Act . Otherwise, he submits that, for example, grandparents in whose favour there was a residence order, would become parents for the purposes of Schedule 1 . Put simply, he submits that the acquisition of parental responsibility by a person does not result in them becoming a "parent". They are in the position of a parent – as defined by section 3(1) of the Children Act – but they do not thereby become a parent as that term is used in section 10 and Schedule 1 of the Act.

52 Mr Hyde submits that estoppel does not in any event apply to the issue I am determining. In addition, he submits that the Respondent cannot be estopped from contending she is not a parent, merely as a result of her applying for and obtaining a shared residence order, because the acquisition of parental responsibility through this order does not itself make the Respondent a parent.

53 Accordingly, Mr Hyde submits the applicant's argument fails to surmount a number of hurdles in its path. He additionally submits that the discretionary test proposed by the applicant would be

an arbitrary test without clear definition or boundaries. How would the court determine whether a person should be treated as a parent? At what date was the test to be applied? Mr Hyde submits that the application of such a broad test cannot have been the legislative intent. Further, he points to the fact that the Respondent would have become a parent if she and the Applicant had entered into a civil partnership.

Conclusion

54 It is clear to me that the Respondent is a parent of the child in this case in the third way identified by Baroness Hale in Re G , namely as a social and psychological parent. She is a social and psychological parent as a result of her relationship with the child and the child's relationship with her. However, as Baroness Hale also notes, there is a difference between a “natural” parent, as defined by her, and a legal parent.

55 The question I have to answer is whether, as a matter of statutory interpretation, a parent against whom an order for financial provision for a child can be made under Schedule 1 is:

> (a) confined to legal parents – i.e. biological parents and those who have become a parent by operation of law such as by adoption, under the HFEA 1990 or under the HFEA 2008 – and those otherwise included by paragraph 16; or,
>
> (b) whether it extends, as submitted by Mr Goldrein, to include any person who has acquired parental responsibility (by virtue of an order) or who is a social and psychological parent, a “natural parent” as described by Baroness Hale in Re G .

56 There are clearly advantages to each outcome. As Mr Goldrein submits, a broader interpretation would enable the court to require those who objectively should contribute financially for a child to contribute. On the other hand, as Mr Hyde submits, this would create considerable uncertainty because the boundaries of such a determination would be unclear and essentially discretionary.

57 I have come to the clear conclusion that those against whom orders can be made under Schedule 1 are confined to those who are a parent in the legal meaning of that word. I have come to that conclusion because in my view, as a matter of statutory interpretation, Schedule 1 is confined to those who have the status of parent (as expressly extended by paragraph 16). It is not in my view a discretionary welfare informed decision, as submitted by Mr Goldrein, but a matter of status. I have been persuaded that this is the correct interpretation largely because I have been persuaded that Mr Hyde's submissions are correct.

58 First, I am not aware of, and I have not been referred to, any criticism of the decision of J v J which was referred to by Potter P in Re A and which clearly supports the Respondent's case. I accept Mr Goldrein's submission that there have been significant social advances since 1992 but these do not in my view undermine the effect of this decision. The attribution of legal parentage has not changed since 1992 save as a result of statutory reform.

59 Secondly, whilst Mr Goldrein can rely on references to the meaning of the word parent changing according to the context, in the context of jurisdiction under the Children Act , namely under section 10 , it has been decided that parent means biological parent (or other persons who are parents by operation of law). This is the clear effect of Re A and, although a passing reference, is supported by Baroness Hale's comments in Re G [11]. The applicant in Re G was in the same factual position as the Respondent in the present case but, per Baroness Hale, she *required* leave to apply for a section 8 order which she would not have done if she was a “parent” by virtue of section 10(4)(a) .

60 In my judgment the interpretation of parent in section 10 gives a better guide to the likely meaning of parent in Schedule 1 than the broader analysis of the meaning of “natural parent” given by Baroness Hale when considering this issue in the context of welfare. I agree with Mr Goldrein that in some contexts it is appropriate to give the word parent a broader definition and include a social and psychological parent. But in my view Schedule 1 is not using the word “parent” in a broad welfare informed sense but is confined to legal parent. I agree with Bracewell J, when she said in Re B , that if Parliament had intended to alter or amend the general principles

as to parenthood, specific enactment would have been made.

61 This conclusion is supported by the approach taken by the Court of Appeal to the determination of the issue of parenthood in J v C . The issue was determined by reference to the statutes which define parenthood in the context of AID, not by a broad factual analysis as proposed by Mr Goldrein in the present case. In order to determine whether the applicant was a parent for the purposes of section 10 of the Children Act , Wall LJ determined whether he was within the relevant statutory definition of parent as contained in the "Two Acts of Parliament which define parenthood in the context of AID" [18]. In my view, I should apply the same approach to the determination of whether the Respondent in this case is a parent within the meaning of Schedule 1 . Adopting this approach, it is not contended that the Respondent is a parent.

62 Further, in my view, this conclusion is supported by the structure of Schedule 1 . If Mr Goldrein's submissions were correct, a person could be a parent by the application of his extended definition as well as by application of the extended definition within paragraph 16. The former would make the latter unnecessary but it would also cause potential difficulties in the application of paragraph 2, to which the extended definition under paragraph 16 does not apply.

63 What is the effect of the Respondent's obtaining an order for shared residence? As a result she has acquired parental responsibility which is defined by section 3 of the Children Act as meaning – "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". This might appear a persuasive point save for the fact that the mere obtaining of parental responsibility is clearly not intended to make someone a legal parent when they would not otherwise be such. As identified in M v C and Calderdale MDC parents with parental responsibility are a sub-set of parents. And, as stated in Re A , a person who acquires parental responsibility "does not thereby become" a parent. Otherwise many people (I have already given the example of grandparents) would become a parent when plainly they are not.

64 Further, I do not see how the doctrine of estoppel can assist the Applicant. To adapt Bracewell J's conclusion in Re M — a person is a parent if they are either a biological parent or if they become a parent by operation of law. If someone acquiring parental responsibility does not thereby become a parent, the doctrine of estoppel cannot, in my view, assist the Applicant to procure this result on the same factual basis by an alternative route.

65 In some respects the outcome in this case may seem objectively surprising. However, in my view it is for the legislature to determine who should be financially responsible for children if it is to extend beyond those who are legal parents or are otherwise within Schedule 1, paragraph 16 . If I were to extend the definition to include anyone who has acted *as* a parent, I do not see how I could properly define the limits of such an extended definition in a way which would provide sufficient legal certainty. The potential breadth is demonstrated by Mr Goldrein's inclusion of foster parents and "common law" parents in his proposed definition.

66 I do not consider that article 8 of the European Convention on Human Rights has any relevance to the issue which I have to determine. The meaning of "parent" for the purposes of determining the court's jurisdiction to make financial orders for the benefit of children is not, in my view, an issue which engages article 8 at all.

67 In conclusion, in my view, the word "parent" in Schedule 1 means legal parent. As I have just said, it is also my view that it is for the legislature to determine who should be liable to financial claims for the benefit of children and in particular the extent to which it includes those who are not the legal parents of children but are either to be treated as parents or are otherwise to be made liable. It is not for the courts to determine, by reference to an essentially discretionary test, that a person should in the circumstances of the particular case be treated as a parent and thereby potentially have the financial obligations imposed by Schedule 1 .


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