Misconceived conceptions

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Leeds Teaching Hospitals NHS Trust *v* Mr & Mrs A & others

The decision of Dame Butler-Sloss in the case of *Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others*[1] has already achieved notoriety. The disturbing facts have received widespread media coverage and fuelled further legal and political debate surrounding the "reproductive revolution".[2] This short paper assesses the context and potential implications of the recent decision and, in particular, the nature and meaning of parenthood and the family.

THE CASE

Two couples, referred to Mr and Mrs A and Mr and Mrs B, were attending the assisted conception unit at Leeds General Infirmary to receive infertility treatment. Both couples understood that they were participating in a technique called intracytoplasmic sperm injection (ICSI), a technique which would use the eggs of the wife and the sperm of the husband in each case. Mrs A had consented to her eggs being mixed with her husband's sperm to create an embryo which would then be implanted in her, hopefully resulting in pregnancy. Mr A had consented to his wife's treatment. Mr and Mrs B gave their consent to similar IVF procedures, although Mr B had expressly refused to consent to his sperm being used in treating others.

Following a mix up at the unit, which Butler-Sloss referred to as "a 'mistake' … despite its inadequacy as a description of what occurred", Mr B's sperm was injected into Mrs A's eggs. She became pregnant and later gave birth to healthy twins. The mistake became apparent only on Mrs A's delivery of twins of mixed race; Mr and Mrs A are both white, Mr and Mrs B both black. DNA testing subsequently established that Mr B was the biological father of the children. He has had no subsequent contact with them and they have continued to live with Mr and Mrs A in a "loving" home where Mr A performs all the "social and psychological" functions of fatherhood. Indeed, all of the parties to the subsequent legal action agreed that the children should remain in the home they have known since birth. The High Court was asked to settle the issue of the legal paternity of the children, which would in essence involve a choice between biological and social parenthood.

LEGAL REASONING

Both couples had sought treatment within the provisions of the Human Fertilisation and Embryology Act 1990. The court had therefore to decide whether section 28 of that Act, addressing paternity, applied to these startling but by no means unique facts. That the case is not unique is demonstrated by a mix up in a Manhattan IVF clinic. This example concerns Donna Fasano and Deborah Rogers who attended clinic on the same day. Mrs Fasano became pregnant, with twins; Mrs Rogers did not. Mrs Fasano later discovered that she had been an unintentional host surrogate to Mrs Rogers' child when she gave birth to the babies; one was white, the other was black. Mrs Fasano is reported to have handed the black child to his biological parents and lawyers have been consulted (*Daily Telegraph*, 31 March 1999). Indeed the possibility that the issue might not be an entirely predictable consequence of the technology of assisted conception cannot, without more information, be excluded.

Of course, although tempting, it is not easily possible to describe the case as extraordinary or unusual because the audit data which would enable that conclusion to be drawn is not readily available. However if this initial question could be answered in the affirmative, Mr A could be declared the legal father. If the Act was held not to apply, the issue would be decided by reference to the common law presumption that paternity is determined by the genetic link.

Section 28 defines "father" for the purposes of the Act. Where a woman is married, section 28(2) provides that if she becomes pregnant after an embryo or gametes are placed in her, and the sperm is not those of her husband or the embryo has been created using the gametes of a man other than her husband, her husband is nonetheless to be treated as the father of any resulting child *unless*—and of course this was to be the crucial consideration here—it can be shown that he did not consent to the treatment in question. Section 28(3) makes a similar provision in respect of a couple having "treatment together". It provides that where an embryo or sperm and eggs are placed in a woman in the course of treatment provided for her and a man together, and the sperm used to create the embryo carried by her was not the sperm of that man, he is nevertheless to be treated as the legal father of any resulting child.

At first glance it seems that section 28(2) would apply, as Mr and Mrs A are married, and both gave their consent to the IVF procedure. However, that consent was limited to IVF using the gametes of Mr and Mrs A, whereas what in fact took place was the creation of an embryo using the eggs of Mrs A and sperm *not* from Mr A. In the view of the court, what occurred "was not within the contemplation of either family and was entirely contrary to the written consents given by Mr A"(*Leeds* at paragraph 29). Moreover, "[the] question whether the husband consented is a matter of fact which may be ascertained independently of the views of those involved in the process. On the clear evidence provided in the consent forms Mr A plainly did not consent to the sperm of a named or anonymous donor being mixed with his wife's eggs. This was clearly an embryo created without the consent of Mr and Mrs A" (at paragraph 28). This lack of consent meant that section 28(2) was inapplicable: "Mr A did not consent to the placing in his wife of the embryo which was actually placed. Accordingly, section 28(2) does not apply"(at paragraph 29).

Attention turned therefore to section 28(3), to examine whether this subsection could be held to apply to married as well as unmarried couples. In the case of *Re R (a child)*,[3] decided only a week previously, Hale LJ had considered the application of section 28(3) to the question of whether a man who had participated as the mother's partner during much of the treatment, but had separated from her by the time the embryo was placed within her, may be regarded as the legal father. In her judgment, Hale LJ states that "s28(3) … provides that a man who is neither the genetic father of a child nor married to the mother is nevertheless to be treated in law as the father in certain circumstances"(at paragraph 1). Later she goes on to say that "section 28(3) is an unusual provision, conferring the relationship of parent and child on people who are related neither by blood nor by marriage"(at paragraph 20) These dicta make clear that the subsection was there regarded as unequivocally *excluding* married couples.

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Dame Butler-Sloss endorses this interpretation in the current case, and goes on to say that, in any event "[a] fundamental error resulting in the use of sperm of another in place of the use of sperm of the man taking part in the treatment must vitiate the whole concept of 'treatment together' for the purposes of the 1990 Act. I am therefore satisfied, even if section 28(3) could be construed as applying to married couples as well as unmarried couples, that Mr and Mrs A were not being treated together within the meaning of the subsection. Accordingly, section 28(3) cannot cover the present facts"(*Leeds Teaching Hospitals* at paragraph 37).

Having decided that section 28 has no application to the facts of the case, the only possible outcome was to revert to the common law assumption that Mr B, who had been shown to be the genetic father, was also the legal father. The judge held that he had the same legal status as an "unmarried father", meaning that he would have no automatic parental rights in respect of the children.

ANALYSIS

The statutory framework, and in particular, the provisions in section 28, seem to reflect an awareness that in contemporary families—whether those created with or without the aid of assisted conception techniques—what is to be valued are *caring* relationships, not genetic relationships. This was reinforced by the decision in *Re CH (Contact: Parentage)*,[4] concerning a married couple who bore a child following assisted conception using donor sperm. The couple later separated and the mother sought to deny access on the basis that her former husband had no genetic link to the child. The court applied the rule that because he had consented to the assisted conception procedure the man was the legal father of the child within the terms of the Act and was accordingly entitled to access. That ruling seemed to uphold the primacy of "social and psychological" parenthood over mere genetics.

On the face of it the decision in this case appears to reverse that view. Rather than prioritise a more "social" view of parenthood as an activity, it favours a biological accident by declaring the gamete provider rather than the man with whom the children have a familial bond to be their legal father. However, a closer scrutiny of the language employed by Dame Butler-Sloss reveals that she too regards parenthood as a primarily social role. This is particularly evident where she considers the relevance of Article 8 of the 1998 Human Rights Act, a provision which guarantees the right to respect for one's private and family life. She reiterates her dictum in *Re H, Re G (Adoption: Disclosure)*[5] that "[n]ot every natural father has a right to respect for his family life with regard to every child of whom he may be the father … The application of Art 8(1) will depend upon the facts of each case"(at paragraph 38). And again, the importance of the social parenting role is acknowledged, albeit obliquely, where Butler-Sloss states that "I am certain that the truth in this case is more important to the rights of the twins and their welfare than a fictional certainty … To refuse to recognise Mr B as their biological father is to distort the truth about which some day the twins will have to learn through knowledge of their paternal identity. The requirement to preserve the truth will not adversely affect their immediate welfare nor their welfare throughout their childhood. It does not impede the cementing of the permanent relationship of each with Mr A who will act as their father throughout their childhood."(*Leeds Teaching Hospitals* at paragraph 57).

Nonetheless, the decision in A's case appears to swim against the tide of legal and cultural change, which has in recent years been moving towards an acknowledgement that "what really matters" about families is not genetic relationship, but bonds of care between people who may or may not be biologically related. Indeed, the 1990 Act continues the overturning of previous assumptions that genetic links were determinative of parentage, first inscribed by the Family Law Reform Act 1987, by allowing courts to override the common law rules and make determinations of legal parenthood *in spite of* genetics. In many cases, inscribing the secrecy—or deception,[6] twisting the double helix further—may be relatively easy and the genetic facts, if we may call them that, may be straightforwardly concealed. Indeed, the likelihood of a mundane error, albeit with extraordinary consequences for the families involved, must be almost an accepted part of embryology laboratory practice. But in this case, which comes to acknowledge the importance of the biological role, it is hardly conceivable that the children would not ask of their genetic background; full openness is really the only acceptable approach. But what are the children supposed to reply on being told that they were, after the manner of Lady Bracknell in *The Importance of Being Earnest*, born in a mistake?

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