



10 Park Square, Leeds, LS1 2LH  
DX 26412 Leeds Park Square  
Tel: 0113 245 5438  
[MAllman@zenithchambers.co.uk](mailto:MAllman@zenithchambers.co.uk)

## **Calder Valley Lesbian Parents' Group Annual Conference 17.11.12**

**Marisa Allman**

**A. Making choices:**

1. Who will be the legal parent(s) of your child(ren)?
2. Anonymous donor or known donor?
3. Who will have parental responsibility for your child(ren)?
4. Who will care for your child(ren) if the birth mother<sup>1</sup> / both parents should die?

**B. Issues which may arise:**

1. Is the biological father of your child(ren) known to them?
2. Does he have as much involvement in your child(ren)'s life / lives as you would like?
3. Does he put pressure on you to allow him more time with the child(ren)?
4. Does he put pressure on you to involve him more in important decisions such as which school your child will attend?
5. Does he try to marginalise the child's non-birth mother?
6. Do third parties recognise the child's non-birth mother as a parent?
7. Do your extended families recognise the child's non-birth mother as a parent? Would they support that parent if the birth mother died?
8. Would anyone have parental responsibility for your child if the birth mother died? Or would the child's father be the only person with parental responsibility?

**Parents:** There is a difference between a 'legal parent', i.e. someone recognised in law as a parent, and a social or psychological parent, or a person with parental responsibility. Having parental responsibility does not make a person a 'parent' as a matter of law. Sometimes the distinction between legal parents and other parents is important. It also affects who has parental responsibility for a child.

---

<sup>1</sup> In this paper the term 'birth mother' is used to describe the woman who gave birth to the child, not the genetic mother of the child. Genetics makes no difference to who the legal mother of a child is.

**Children born before 2009<sup>2</sup>:**

- a) **Child conceived through anonymous donor in a clinic: the birth mother will be the only legal parent of the child.**
- b) **Child conceived through known donor - whether in a clinic or at home: birth mother and biological father will be the legal parents of the child.**
- c) **Child adopted: adoptive parent(s) will be the legal parent(s) of the child.**

**Child born after April 2009:**

- a) **Child was adopted: adoptive parent(s) will be the legal parent(s).**
- b) **Two women were in a civil partnership at the time of conception, and conception was via artificial reproductive means, at home or in a clinic: both women will be the child(ren)'s only legal parents<sup>3</sup>.**
- c) **Child was conceived at a UK clinic using anonymous donor sperm, and only the birth mother was treated by the clinic: birth mother will be the only legal parent of the child.**
- d) **Child was conceived at a UK clinic using known donor sperm, and only the birth mother was treated by the clinic: birth mother and genetic father will be the legal parents of the child.**
- e) **Child was conceived at a UK clinic and the 'agreed female parenthood conditions' were met - both women were offered appropriate counselling, signed specific forms agreeing to both women being the child's legal parents: both women will be the child's only legal parents.**
- f) **Child was conceived at a UK clinic using donor sperm and the 'agreed fatherhood' conditions were met - the man and woman were offered appropriate counselling, signed specific forms agreeing to both man and woman being the child's legal parents: the man and woman will be the child's only legal parents<sup>4</sup>.**

---

<sup>2</sup> It is assumed for this paper that the birth mother is not married. Some same sex families cases have been reported where the birth mother is married, either because she had a prior heterosexual relationship, or because the marriage was entered into without there being a marital relationship because of family pressure. The fact of the birth mother being married means that her husband is usually the father, save for specific defined circumstances.

<sup>3</sup> Unless it is shown that the civil partner did not consent to the artificial insemination or implantation of gametes / embryo in the birth mother

<sup>4</sup> This method could enable a lesbian woman and a gay man to have a child together using donor sperm, if they wanted to raise a child together (not necessarily in the same house).

### Parentage and parental responsibility:

- Do you want the biological father of your child(ren) to have parental responsibility for your child?
- If you do not, can you take steps to prevent this?
- Do you want both women bringing up the child to have parental responsibility for him / her?
- If so, what can you do to achieve this? Does it matter whether the father also has parental responsibility when you are trying to achieve this?
- If the biological father has parental responsibility, but the child(ren)'s non-birth mother does not, what are the implications of this for you and your child(ren)?

### Who has parental responsibility?

1. Any legal parents will have parental responsibility from birth if, either, they are civilly partnered at the time of the child's conception<sup>5</sup>, or, they are named on the child's birth certificate.
2. If the genetic father is a legal father, or the co-mother is a legal parent, but they are not named on the birth certificate, they will not automatically have parental responsibility, but they can be added at a later date and acquire parental responsibility. If the birth mother doesn't agree to this the court can (not necessarily will) order it.
  - Note: if the genetic father is a legal father, or a known donor even if not a legal parent, you can never completely exclude the possibility that the court will order that he should have parental responsibility.
3. If the co-mother is not a legal parent, she can acquire parental responsibility by
  - (a) Entering into a civil partnership with the birth mother and acquiring step-parent parental responsibility
  - (b) Having a joint residence order with the birth mother and acquiring parental responsibility
  - (c) Adoption

---

<sup>5</sup> Note married parents always both have parental responsibility, even if they weren't married when the child was conceived or born.

- Note: If the co-mother is not a legal parent, but the genetic father is, and he has parental responsibility - perhaps because you have named him on the birth certificate - he will have a say in whether the co-mother should have parental responsibility / joint residence order / adopt the child: when completing your child's birth certificate it's worth thinking about this.
  - Note: entering into a civil partnership does not automatically give the civil partner parental responsibility: you also have to have a step parental responsibility agreement or order
4. There is no limit on the number of people who can share parental responsibility
  5. There is no limit on the number of people who can share residence

**Why do you need to ensure that both women bringing up a child have parental responsibility, and that you appoint a guardian in the event of the birth mother's death?**

1. Same sex relationships / legal parents of the same sex are not given legal recognition throughout Europe/ the wider world. Parental responsibility is however respected throughout Europe and in Hague Convention countries<sup>6</sup>, however that is arrived at. Being able to demonstrate you have parental responsibility may be particularly important when travelling abroad, or if you are an 'international family'.
2. Same sex families break down. Parental responsibility ensures that schools, doctors, other persons in authority are obliged to give you information about the child you hold parental responsibility for, and allows you to make day to day decisions for them whilst you they are in your care: it is a signifier of status to the outside world.
3. Your relationship with the birth father may break down, and he may seek an order for contact, residence or parental responsibility: it is important that the co-mother does not become marginalised in that situation.
4. If your child was conceived with an anonymous donor, and the birth mother dies, unless the co-mother has parental responsibility your child will be left without anyone having the right to make decisions for them.

---

<sup>6</sup> The Hague Convention is an international treaty governing child abduction, which is the removal of a child from their country of habitual residence without the consent of a person, body or authority holding parental responsibility

5. If the child's father is the legal father / known donor / has parental responsibility / is named on the birth certificate and if the birth mother dies or is incapacitated the father may be the only person left with parental responsibility (e.g. you are on a family holiday and the birth mother is injured and unconscious, especially abroad, and you may not be allowed to consent to medical treatment for the child, or leave the country without the permission of the genetic father).
6. If the child's father is the legal father / known donor / has parental responsibility / is named on the birth certificate and if the birth mother dies the father may apply to the court for a residence order and wish to care for the child. Other family members may also seek residence orders, particularly if they are not supportive of the co-mother's relationship with the birth mother. Holding parental responsibility and being a legal guardian enables the child's stable home to be maintained whilst decisions are being taken by the court, and enables the co-mother to be able to make immediate day to day decisions for the child whilst decisions are taken by the court. It also sends out a strong message to the court about what the birth mother would have wanted.
7. It is also important to make a will appointing a guardian in the event that you both die, particularly if the father is the only other person with parental responsibility, and you would not wish him to bring up the child in the event of your deaths.

### Parenting agreements

Parenting agreements are agreements reached between the people involved in bringing up a child in respect of the significant matters in that child's life. They can also be an agreement about the role which each of the significant adults in a child's life will have.

- They do not have any legal force, are not binding, and cannot be enforced.

It is often difficult to reach agreement, particularly where relationships have become tense. You might be assisted by a neutral third party, or mediator, or collaborative lawyer to reach agreement.

Why are parenting agreements important?

- (i) If there is more than one adult who feels they are a significant person in that child's life, then making decisions jointly reduces conflict.

- (ii) It is beneficial for the child to see the people who are important to them agreeing with each other, and reduces the likelihood that the child will feel a conflict of loyalties.
- (iii) Having the discussions that lead to agreement improves communication: most cases which reach court are attributable to lack of communication - keep talking.
- (iv) Having the discussions that lead to agreement before a new situation is embarked upon helps everyone to identify potential flash points before they become a problem. It may even mean that you realise that a potential genetic father is not the right person to be conceiving a child with before the conception takes place.
- (v) Court proceedings are horrible and expensive: if you can't agree then the alternative is often court. The court process will inevitably damage the adult relationships further, and is harmful to the children concerned.
- (vi) Agreeing something you can live with is always better than having a solution imposed by a random third party (a judge): agreement = retaining control and input into outcomes.
- (vii) Agreements can be flexible, if it's not working you can always agree something else. The child's needs will change as they grow up and agreements can evolve and develop with them.

**What might a parenting agreement include?**

Anything you like, but key issues to consider might be;

#### **Pre-conception**

- Who are to be the legal parents?
- Who is to have parental responsibility?
- Who is to have a parenting role?
- Who will the child live with?
- Which country will the child live in?
- What will the child be called?
- What day to day role will all of the significant adults for the child have?
- Do all concerned understand the significance of these decisions?

**At any time:**

- What contact will adults not living with the child have? - including extended family members?
- Who will the child live with and where, including what area of the country, what country?
- Which school / nursery will the child attend?
- What religious education / what religion will the child have?
- Will the child visit countries abroad, and if so which, and with whom?
- How will important decisions in the child's life be made, and who will be involved in that? What constitutes an 'important decision'?

## What is the current approach of the courts to the role of the genetic father?

### Key recent decisions which will guide local courts and the High court:

The case of T v T in 2010 concerned children aged 10 and 7 being brought up by two women in a civil partnership. Their genetic and legal father was a man who the women met when he advertised that he would like to become a father, but by the time the matter came before the court the reality for the children was that they genuinely regarded the father as a parent and he had had parental responsibility for some time and regular overnight contact.

The judge granted a shared residence order in favour of the biological mother and father, and the women appealed, but the order was upheld on appeal, and did not include in the shared residence order mother's civil partner who was co-parenting the child.

During the appeal process the co-mother was then included in the shared residence order, by agreement, as a third person with whom the child was to live, but the court indicated that if it hadn't been for the agreement reached, they wouldn't have felt it necessary to include her in the residence order, even to provide for the circumstances where the mother died.

The court was keen to emphasise in this case, that the child's perception of the importance of the particular adults involved to them was more important than the labels, which were essentially adult issues.

### A v B & C March 2012

In this case the mother and father were in fact married, although both of them were in same sex relationships with other people, and as good friends they had married for reasons relating to the mother's family's cultural expectations and difficulty accepting the mother's sexuality.

The consequence of the marriage however, was that the father was indeed a legal father sharing parental responsibility, whilst the child was being parented by the mother and her partner, (the co-mother, who was not a legal parent), and it had always been intended that this should be so.

The mother, father and co-mother were agreed that father should have a role in the child's life, but had differing expectations of the extent of that role. When the relationship between the adults broke down when the child was about 18 months old, the father applied to the court for a shared residence order. The women were particularly concerned about the marginalisation of the co-mother and what should happen if the birth mother died.

The court made a contact order in favour of the father. The father appealed, not particularly because of the terms of the contact order, but because in the course of his judgment the judge indicated that the father's role in the child's life for any foreseeable future should be secondary; enough for the child to know who his father was but not so much as to fracture the nuclear family.



The Court of Appeal disagreed with the judge that the genetic father's role where the child was being brought up by two mothers should be regarded as 'secondary', or that the extent of his involvement in the child's life for the foreseeable future should be governed by a need to protect the child's nuclear family unit.

One judge in the Court of Appeal said:

"It is generally accepted that a child gains by having two parents. It does not follow from that that the addition of a third is necessarily disadvantageous"

And:

"Human emotions are powerful and inconstant. What the adults look forward to before undertaking the hazards of conception, birth and the first experience of parenting may prove to be illusion or fantasy. **[The mothers] may have had the desire to create a two parent lesbian nuclear family completely intact and free from fracture resulting from contact with the third parent. But such desires may be essentially selfish and may later insufficiently weigh the welfare and developing rights of the child that they have created.** No doubt they saw the advantages of A as first an ideal known father and later as a husband to ease problems in the maternal extended family. It would have been naïve not to foresee that the long term consequences held disadvantages that had to be balanced against the immediate advantages."

Another judge said;

"Plainly it is sensible for people who are intending to enter into an arrangement such as this one to consider and spell out in as much detail as they can what they contemplate will be the arrangements for the care and upbringing of their child. But no matter how detailed their agreement, no matter what formalities they adopt, this is not a dry legal contract. Biology, human nature and the hand of fate are liable to undermine it and to confound their expectations. Circumstances change and adjustments must be made. And above all, what must dictate is the welfare of the child and not the interests of the adults."

- Both of these decisions were made in circumstances where the biological mother and father were the child's legal parents, not situations where the two mothers were the legal parents, but I do not believe that the outcome would necessarily have been different even if the father had not legally been a parent. Certainly both decisions were made after the law changed to allow for 2 female parents, and the Court of Appeal would have been aware of that fact when reaching their conclusions.

The approach which the Australian court has taken where there are 2 female parents, and where the father is not legally a parent is similar to that in the cases above. The law is not exactly the same in Australia, but I think it gives some indication of the way the wind is blowing.

### Where does this leave lesbian families?

1. The only way to guarantee the extent of the involvement which the genetic father has in your child's life is not to have a known father - i.e an anonymous donor.
2. Provide the non-biological mother with as much protection as you can for her significance to the child by ensuring she has parental responsibility and is appointed guardian in the event of the birth mother's death.
3. If your child's father is known to them and you, and for many women this as a positive choice, then be prepared to work with the father to try and reach agreements where possible: agreement means retaining control, communication and flexibility.
4. It is possible to have 3 or 4 parent families and to make that work, and ensure that all significant adults share residence and parental responsibility. If you regard this as a positive then the court is likely to as well and endorse your approach.
5. If you can't reach agreement, then the court may have to become involved, and co-parenting women need to be aware that having the protection of being the only legal parents or the only holders of parental responsibility or having reached an agreement at the time of the child's birth will not protect them from the court imposing an unwanted order as to contact, joint residence or parental responsibility in favour of the father where there is a dispute.
6. The child's welfare is always paramount, and the court will not place a child in circumstances of risk with a father if there are demonstrated welfare concerns, but nor will it infer too readily that the child's wellbeing will be threatened if the nuclear family feels under threat from the father.

If you have any concerns arising from the issues raised today, then do feel free to ask questions. If you'd like specific legal advice on family law issues, then do please contact me on the email address provided so that we can discuss how I may be able to help.

Marisa Allman

Zenith chambers

17<sup>th</sup> November 2012.