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# Sex and the erasure of legal parenthood: *P v Q and F (child: legal parentage)* [2024] EWCA civ 878

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Imagine a scenario in which a same sex female married couple, P and Q, decide to become parents together. They find a sperm donor (F) online, and after two unsuccessful attempts at insemination, P conceives and gives birth to a daughter, X. Happily for P and Q, the law in the UK was changed in 2008 in order to enable both of them to be registered as X's parents on her birth certificate, P as her mother and Q as her second legal parent. Three years later, P and Q's relationship breaks down. While we are used to the law stepping in to resolve questions about money and the child's living arrangements, in relation to a same sex female couple, UK law also does something completely extraordinary. It enables the mother to have the second legal parent's name removed from the birth certificate, and replaced with that of the sperm donor.

As the Court of Appeal explained in *P v Q and F (Child: Legal Parentage)* [2024] EWCA Civ 878, this is because section 42 of the Human Fertilisation and Embryology Act 2008 (which enabled Q to be registered as X's second legal parent), only applies if X was conceived through artificial insemination (AI). In this case, P had been trying to conceive through AI, but without Q's knowledge P had also been having sex with the sperm donor at the relevant time. It was impossible to know whether X had been conceived through AI or sexual intercourse. Since Q could not prove that X was conceived through AI, section 42 did not apply. Q's name therefore had to be erased from X's birth certificate, and replaced with that of the sperm donor, who became X's legal father.

As the Court of Appeal acknowledged, this hands mothers in known sperm donor cases a nuclear option if they subsequently fall out with their child's second legal parent. Here, there wasn't any doubt that P was having sex with F at the same time as attempting to conceive artificially with his sperm. But – provided the sperm donor doesn't contradict her evidence – it will generally be impossible to prove one way or the other whether the mother had had sex with the sperm donor around the time of conception. Thus, a second parent's legal parenthood can be removed by something as simple (and potentially falsifiable) as a claim to have had sex.

X was six years old, but the judgment does not confine the supplanting of one legal parent with another – grounded in the mother's claim to have had sex with him – to cases where the child is too young to understand. A similar case could therefore arise involving

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a teenager or young adult (and as Knowles J acknowledged at first instance [2024] EWFC 85, in due course X 'will need an age-appropriate explanation of what happened when she was conceived and why it is that she now has a different birth certificate' [1]).

Imagine a similar scenario, but where $P_2$ and $Q_2$'s daughter is 15 and struggling with identity issues. If $P_2$ and $Q_2$ split up acrimoniously and $P_2$ were to make the same claim as P did here, with the same outcome, their daughter would have to come to terms with the law rewriting her birth certificate and removing $Q_2$ as her legal parent. Even more disconcertingly, for a 15-year-old with identity issues, the whole case turns on her mother's extramarital sexual encounters.

Section 55A(5) of the Family Law Act 1986 gives the court the power to refuse to hear an application for a declaration of parenthood 'if it considers that the determination of the application would not be in the best interests of the child'. At first instance, Knowles J was satisfied that she should not invoke section 55A(5) to refuse to hear P's application, and the Court of Appeal refused to grant permission for appeal on this ground, because 'the judge was correct to hear the application for the reasons she gave' [30]. First, relying upon Black LJ's judgment in *Re S (A Child) (Declaration of Parentage)* [2012] EWCA Civ 1160, Knowles J established that the court should only refuse to hear an application in extremis (the examples Black LJ gave were a suicidal teenager and a child conceived through rape), and this case did not fall into any 'comparably serious category' [55]. Secondly, Knowles J maintained that a declaration 'will provide clarity as to X's legal parentage which will be to her benefit throughout childhood and adulthood' [53]. Knowles J acknowledged that X knew that F was her biological father, and that X's 'lived reality' was that Q was 'also her parent, psychologically and emotionally speaking' [53]. Nevertheless, even though 'it will be unlikely to change her lived experience', the declaration would 'be of benefit to X's identity legally speaking' [53].

Knowles J is right that '[c]ase law is replete with statements attesting to the lifelong significance of accurate knowledge about a person's parentage' [53]. These decisions – commonly about disputed paternity – often turn on the importance of establishing 'the truth', and rely upon the idea that 'knowing one's origins' is important for a person's sense of identity, even if it might be unsettling in the short term.

If, as here, the child already knows 'the truth' about her genetic parentage, what does it mean to say that rewriting her birth certificate would 'be of benefit to X's identity *legally* speaking' [my emphasis]? Presumably, the claim is that P and Q's misplaced reliance upon section 42 when registering her birth has significance for X's *legal* identity. However, this cannot amount to the claim that X's legal identity – as the legal offspring of either F or Q – depends upon whether she was conceived through AI or sex, because the judgment does not clear this up. Rather the means of conception remain unknown (and unknowable), and the child's legal identity turns only on the inability of her second legal parent to *prove* that X's conception was through AI.

Section 55A(5) was not at issue in the Court of Appeal, which had granted permission to appeal only on the ground that Knowles J had 'misdirected herself as to the party upon whom the burden of proof lay in an application for a declaration of non-parentage and/or a declaration of parentage' [29]. Before the Court of Appeal, Counsel for Q had argued that the burden of proof should lie with 'those who assert, and accordingly it was for P to prove that X was conceived by NI [natural insemination]' [32]. This was rejected by Peter Jackson LJ, with whom Nicola Davies and Arnold LJJ agreed, on the grounds that section 42 –

which provides for a female spouse to 'to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)' – only applies if the child was conceived through IVF or AI. Since Q could not establish that X was conceived by AI, 'section 42 is simply not engaged' [48]. Instead X's parentage is determined at common law, which would recognise the genetic father as the legal father of any child conceived through sex. It is not the point of this note to criticise the Court of Appeal's decision about where the burden of proof should lie. Regardless of who has – or should have – the burden of proof in such cases, it seems blindingly obvious that this is not a sensible way to determine legal parenthood.

When summing up why 'the law needs to identify who a child's legal parents are', Peter Jackson LJ said that this is 'because legal parenthood brings many rights and responsibilities and creates legal relationships across generations' [1]. For the existence of these 'rights and responsibilities' and 'legal relationships' to depend upon who has the burden of proof when claiming that conception was via sex or AI seems odd, to say the least. Indeed, Peter Jackson LJ is clear that 'X exists because P and Q wanted her', and admits that it 'may therefore seem strange that her parentage should be determined by the way in which she was conceived'[6]. But, he went on to say, 'a line must be drawn somewhere' [6]. Of course there needs to be clarity about the identity of a child's legal parents, but 'drawing the line' here – where 'mischievous' but unprovable assertions could prove devastating for children and second parents – seems self-evidently problematic.

If people embark on a joint 'parental project', in which they intend to be the child's legal parents when conception takes place, and they evidence this by registering the child's birth together, surely there is a good argument for saying that they should be the child's legal parents?

Of course, there might be times when a birth certificate has to be rewritten; perhaps, if the people registering the birth lied about the mother's identity. But it is hard to see what is gained by replacing Q's name with F's. A separate welfare hearing determined that P, Q and F would each continue to have parental responsibility for X [50], so all that changes as a result of this case is X's birth certificate, as well as the 'rights and responsibilities' of legal parenthood, and the 'legal relationships across generations', which supplant Q's wider family with F's.

In addition to making the intention to be a legal parent at the time of conception, evidenced by birth registration, the qualifying criterion for legal parenthood, it would be sensible to acknowledge that children like X have three parents. This is the practical reality of P, Q and F sharing parental responsibility for X, but legally a binary choice had to be made between Q and F. Recognising F's legal parenthood is possible only by removing Q's, and vice versa. If the law enabled children to have more than two legal parents, second legal parents *and known sperm donors* could be registered on the child's birth certificate, where the intention was that all three should be the child's legal parents, and where all three register the birth together.

If the new government takes forward the planned review of the Human Fertilisation and Embryology Act, it is to be hoped that it will inject some child-focussed good sense into the identification of a child's legal parents.