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CASE COMMENTARY

THE BRAVE NEW TERRITORY OF GAY PARENTING

(A v B and C (Lesbian Co-Parents: Role of Father) [2012] 2 FLR 607)

Mary Welstead[*]

1. INTRODUCTION

Many couples in same-sex relationships are as enthusiastic in their desire to become parents as those who are in heterosexual relationships. Adoption, surrogacy, sperm donation, have all enabled same-sex couples to achieve their parental ambitions and create families. For the most part, they have done so without any interference by, or involvement with, the biological parents after the birth of their children.

Whilst the majority of lesbian parents tend to use sperm which has been obtained from an anonymous donor, some women have shown a preference to use a sperm donor who is known to them to become the biological father of their children. This may be because they want to know the background, personality and medical history of a potential father before embarking on the procreative process. In some cases, it may also be because some women want their children to have a male role model in their life. Using a known sperm donor can, however, involve risks for would-be-mothers if they do not want him to play a significant role in the child's life. Their dreams of creating an autonomous nuclear family may be destroyed and replaced with a new form of extended family, consisting of three or even four parents if the biological father has a partner.[1]

The tale recounted in the Appeal Court judgment in *A v B and C (Lesbian co-parents: role of father)* (2012**)** is a cautionary one for lesbian would-be-parents and one of hope for potential biological fathers who are known to them. The Court of Appeal emphasised the paramountcy of the welfare principle, contained in s 1(1) of the Children Act 1989 in resolving all child

[*] Dr Mary Welstead, CAP Fellow, Harvard Law School, Visiting Professor of Family Law, University of Buckingham.

[1] *Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders)* [2013] 1 FLR 1334.

contact disputes. It declined to elicit any further principles in these difficult fact specific cases and stated that the sexual orientation of the parents and their pre-conceptual agreements, or understandings, spoken or unspoken are either irrelevant (per Thorpe LJ) or relevant but not determinative (per Black LJ).

2. THE FACTS

The facts of the case are somewhat unusual in that the biological gay father, A, and the lesbian mother, B, married each other in July 2007. The couple, who were in their mid-thirties, had been close friends since they were at university together. Neither of them wished to live together as husband and wife after the marriage. They viewed it merely as a marriage of convenience which would have benefits for both of them. At the time of the marriage, B was living with her same-sex partner, C, whom she had met not long after leaving university. She introduced C to A, and they too became good friends; the trio socialised regularly together.

By marrying A, B hoped that she could mollify her parents, who were Middle Eastern Orthodox Christians. They were unable to accept B's sexual orientation and her relationship with C. Marriage to A would disguise B's relationship with C. It would also have a further advantage because B wanted to have a child whose care she would share with C and she needed to placate her parents who disapproved of the birth of children outside of marriage. Both B and C thought that A, as a longstanding and trusted friend, would be an ideal biological father who would happily help them to become parents. A also felt that he would benefit by marrying B because he too wanted to father a child, and one with whom he could be actively involved; he did not wish to be a mere progenitor. He very willingly agreed to donate his sperm to artificially inseminate B.

By virtue of his marriage, A would automatically acquire parental responsibility for any child he fathered with B.[2] He was, however, unaware that, in the event of any dispute with B about such a child, his parental responsibility might be limited by the court.[3] Had C and B been civil partners, C too would have acquired parental responsibility automatically for any child born to B;[4] however, such a status was not open to them given B's marriage to A.[5]

[2] Children Act 1989, s 2.
[3] Ibid s 4.
[4] Human Fertilisation and Embryology Act 2008, s 42.
[5] Civil Partnership Act 2004, s 3.

Both prior to, and after, A and B's marriage, the three friends engaged in discussions, often fraught, about the future parenting of any child born to A and B. Not surprisingly, there was a mismatch of the trio's perceptions of how the child's future would pan out. They all agreed that A would play a greater role in his child's life than that of a mere sperm donor but were unable to reconcile their differing hopes and expectations about the precise nature of A's role. These differences remained unresolved by the time medical help was sought to progress the procreative venture. Both A and C attended some of the medical consultations with B and, throughout this stressful time, A was supportive of the two women. He showed particular understanding and sensitivity towards C and her feelings of marginalisation because of the attitude of B's family towards her.

In December 2008, B became pregnant and, in September 2009, a baby boy, M, was born. At the time of the birth, A was at the hospital with his mother who had flown over from America to see her new grandson. A was registered on the birth certificate as M's father, the child was given his name as one of several others, and he was invited to attend M's Orthodox christening. C was not allowed to attend because of the presence of B's family.

M lived with B and C in their home where he was cared for by a nanny which allowed both his mothers to continue in their high-powered careers. A visited M but was not permitted to have the child to stay with him in his home which was close by.

The relationship between the three friends soon broke down. B and C were very stressed, partly because of their work commitments and partly because C continued to feel insecure about her situation *vis a vis* B's family. She could not accompany B and M on visits to them or be present at any event which involved them. C was also very concerned that, although she was M's psychological mother, her role in his life was an unstable one. In particular, she worried about her lack of parental responsibility which meant that that she had no legal authority to make any decisions relating to M if B were absent or worse still were to die.[6] Her stress, she felt had an adverse effect on her relationship with B, and consequently also on M's welfare. A was equally concerned about his position *vis a vis* M. He was unable to exercise his parental responsibility in the way that he wanted and could not build a satisfactory relationship with M unless the child could stay with him on a regular basis.

[6] Children Act 1989, s 3.

The Interlocutory Hearing (2010)

In 2010, soon after M's first birthday, A applied for a defined contact order to enable him to spend more time with his son.[7] B and C responded promptly and applied for a joint residence order for M and a specific issue order to limit the exercise of A's parental responsibility.[8] Mrs Justice Hogg made an interim order which permitted A to spend five hours at a time, once a fortnight, with M, in B and C's home. This was, of course, far less than A had wanted.

3. THE HIGH COURT (2011)[9]

The final hearing to decide M's future took place in the High Court before HHJ Jenkins. A argued that his position was analogous to that of a divorced father whose relationship with his child had been established prior to the breakdown of his marriage. Such fathers would normally be allowed staying contact with their children which would increase in frequency and duration as the children grew older. B and C objected to any increase in A's contact with M over and above that given in the interim order.

HHJ Jenkins rejected A's argument. He stressed the importance of the paramountcy of the child's welfare in s 1(1), and the importance of the checklist in s 1(3), of the Children Act 1989 in determining M's future. In spite of this emphasis, he appeared to show considerable concern about the needs of the adults in M's life and particularly the needs of his two mothers. He acknowledged that B and C:

- experienced stress and anxiety over and above that normally experienced in litigation over children. To a great extent this was because of C's rejection by B's family. It was exacerbated still further because of the uncertainty of C's position *vis a vis* M were B to be away from home, become incapacitated, or die;
- viewed A's desire to play a greater role in M's life as a threat to their autonomy and their dream of a nuclear family in which M would be nurtured in a secure and loving home, and a threat to their relationship with each other;
- had a desire to have more children, and by an anonymous sperm donor, which would complicate and change the family dynamics.

[7] Ibid s 8.
[8] Ibid.
[9] [2013] 1 FLR 149.

A, he noted:

- clearly loved M and took great pleasure in their relationship and wanted to play a full role in his development;
- had been supportive of C in her difficulties with B's family.

HHJ Jenkins accepted that the nature of the agreement between A and B to marry and the discussions between all three friends prior to M's conception were of importance in determining M's future and found that:

- A and B both accepted that their marriage was one of convenience because of B's family's objections to her sexual orientation and to her having a child outside of marriage;
- A had never received any assurance from B and C about what he perceived his role would be in M's life. He may, however, may have been encouraged by their conduct to believe that there might be room for change in the future. At times A heard what he wanted to hear;
- B and C were adamant that they had made clear to A that any child he fathered with B would be brought up in a nuclear family by them. However, they would consult A about important issues such as M's education, health, and religion;
- it was assumed that A would attend family events and special occasions;
- A was told that M would be able to visit A's family and friends abroad but it had not been specified whether M would also be accompanied by B or C.

The judge concluded that:

> "By agreement with the father, a child was conceived and born and on the basis of a relationship already created where the two mothers were to be the primary carers. The evidence is that they had prepared over a long period for parenthood on that basis, and the evidence is that they have established a regime of security and stability. It is plain that all three parties failed to get to grips with the nature of the relationship. The father never managed to establish an agreement to his satisfaction and he failed in the end to appreciate the way in which the mothers had thought through the stability of the relationship in the way that I have described."[10]

[10] [2013] 1 FLR 149[36].

He decided, therefore, to decline A's request for a joint residence order but to grant one to B and C. He thought that any benefit which M might gain from a joint residence order between his father and mother, and regular contact and shared holidays with him, would be outweighed by:

> "… confusion and disruption and the potential disruption of the relationship between the mothers and the child, and it is that relationship which provides the nurture, stability and security for M. That position is made more obvious by the particular anxieties which I have highlighted in this case, in particular the background of B and her family."[11]

HHJ Jenkins shared the view of Black LJ in *T v T (Shared and Joint Residence Orders*)(2010)[12] that:

> "What is profoundly disappointing is to see how, in practice, instead of bringing greater benefits for children, shared joint residence can simply serve as a battlefield for the adults in the children's lives, so that even when the practicalities of how child's time should be split are agreed or determined by the court they continue to fight over what label is to be put on the arrangement. This can never have been intended when shared/joint residence orders were commended by the courts as a useful tool."[13]

Although HHJ Jenkins declined to restrict A's parental responsibility, in reality, the grant of a joint residence order in favour of C did diminish it. A was, left to play a minimal role in M's life. According to the judge, M had a right to know that A was his father and he should be allowed to develop a limited relationship with him appropriate to the circumstances surrounding his conception. Two homes and three parents for M would be an inappropriate response; that had never been contemplated by B and C. The father's contact with M should, therefore, be limited to a five or six-hour visit once a fortnight in B and C's home.[14] Whilst the judge did not specifically prohibit A from making an application in the future to vary the contact arrangements, he stated clearly that:

[11] Ibid [37].
[12] [2010] EWCA Civ 1366.
[13] Ibid [27].
[14] This was a very slight increase over the contact time contained in the order given by Hogg J at the interlocutory hearing.

> "Both parties have essentially invited the court to provide for the future, but it is not really possible to do so. There is the question of the power to vary for I do not see the basis for the staying contact changing very much in the near future."[15]

4. THE COURT OF APPEAL (2012)[16]

The father appealed on the ground that HHJ Jenkins' negative statement relating to variation of the contact arrangements was both unfounded and unprincipled.

The two mothers maintained that:

- the judge's order did not exclude the possibility of what might happen in the long term;
- it was inappropriate to apply the principles relating to contact where a heterosexual couple had cared for their child, prior to living apart, to circumstances where the biological father had never shared a family life with his child. To do so would risk the viability of the relationship between the two mothers which would adversely affect M;
- if agreements between gay couples and prospective biological fathers, who were known to them, were to be ignored by the courts, they would be forced to abandon using such men as a means of safe procreation;
- agreements made between biological fathers known to lesbian mothers should not only be respected but should rank alongside a child's welfare in the determination of parental contact disputes.

Thorpe LJ gave the main judgment. He accepted that the decision of the High Court was challengeable, as the judge's comments relating to variation imposed, in effect, a bar on any application by A for variation of the contact order without the court's permission for some 3–4 years.[17]

His Lordship held that HHJ Jenkins had made a fundamental error in relying on a paper written in 2007 by Dr Claire Sturge, an expert in lesbian relationships,[18] and on a line of authority which had taken a similar approach

[15] [2013] 1 FLR 149 [42].

[16] [2012] 2 FLR 607.

[17] Had the judge wanted to make such a restriction he would have had to have made an order under the Children Act 1989 s 91(14) and the duration and the extent of the restriction would have been set out in that order which would then have been open to appellate review.

[18] Claire Sturge, 'Current Issues in Relation to Gay and Non-Biological Parenting', a paper presented at the 2007 Dartington Conferences and published in *Integrating Diversity* (Jordans Publishing 2008).

to that of Dr Sturge.[19] In her paper, Dr Sturge had described the stress and insecurity experienced by lesbian psychological mothers *vis a vis* biological fathers and its damaging effect on their relationships with biological mothers and their children. HHJ Jenkins had not considered the possibility that Dr Sturge's conclusion may have altered as a consequence of later research. Thorpe LJ suggested that a report specifically commissioned to consider the situation of A, B, C and M would have been more appropriate. He stressed that the only principle relevant in the determination of contact between a child and his or her parent is the paramountcy principle in s 1(1) of the Children Act 1989. The approach of the High Court meant that many aspects of the case were not considered.[20] Thorpe LJ, for instance, thought that A's involvement in the whole process of M's gestation and his commitment to M from birth should have been taken into account. He suggested that A:

> "… may be seeking to offer a relationship of considerable value. 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."[21]

Thorpe LJ also thought that consideration should possibly have been given to joining M as a party to the proceedings. An experienced team could then have properly evaluated his welfare and ensured that the concerns of all three parents did not assume a greater importance.

More particularly, Thorpe LJ was concerned about the mothers' argument that great weight should be attached to the agreement which they claimed to have reached with A prior to M's birth. He stressed the fact that:

> "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. B and C 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

[19] *Re D (contact and parental responsibility: lesbian mothers and known father)* [2006] 1FCR 556; *Re B (role of biological father)* [2008] 1 FLR 1015.

[20] Thorpe LJ suggested that, perhaps, this was because the judge had concluded that they were excluded by the general rule which he had extracted from the line of authorities on lesbian parenting which seemed to favour protecting the female parents from stress.

[21] [2012] 2 FLR 607 [24].

> 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."[22]

Thorpe LJ drew attention to the judgment of HHJ Hedley, which post dated the High Court decision, in which he had accepted that a new conceptual approach might be required to these less conventional parenting cases. The judge explained:

> "I have tried hard to see whether there are any other concepts than that of mother, father and primary carer, all conventional concepts in conventional family cases. The best I have achieved and I confess to having found it helpful in thinking about the case is to contemplate the concept of principal and secondary parenting ..."[23]

> "… Accordingly the only guidance that I feel able to give is threefold: first to stress the importance of agreeing the future roles of the parties before the child is born; secondly to warn against the use of stereotypes from traditional family models ... and thirdly to provide a level of contact whose primary purpose is to reflect the role that either has been agreed or has been discerned from the conduct of the parties ..."[24]

Thorpe LJ rejected HHJ Hedley's view that it was important to reflect the agreement of the parents prior to the child's birth in determining contact disputes. He also rejected the concept of principal and secondary parents. He thought that it might demean the position of a biological father who was known to the lesbian mothers and reduce him to the role of a mere sperm donor who left the stage once he had made his contribution. In some situations the biological father might have an important role to play in his child's life. It would be most unfair to A to categorise him as a mere secondary parent to M; he was not. Thorpe LJ preferred to employ the concept of primary and secondary carers and proceeded to rank the three parents in accordance with that concept. He accepted that the two mothers, B and C, were at present the primary carers whilst A was, currently, waiting in the wings to become a secondary carer. He was dependent on a court to determine whether he could actually become one.

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[22] Ibid [27].
[23] *ML and AR v RWB and SWB* [2011] EWHC 3431 (Fam) [5].
[24] Ibid [8].

Thorpe LJ concluded that the High Court should have considered whether the relationship between M and A was one which should be encouraged to flourish and develop and leave open the issue of future contact to be decided on the basis of the available evidence at that time There were too many unforeseeable factors to have, in effect, ruled out M having staying contact with A at some future date.

A's appeal was allowed and the case was remitted to a Family Division judge to consider all the factors relevant to M's welfare. This would not take place for another year and would allow the judge to assess future contact in the light of how the current contact arrangements had worked out. Thorpe LJ ended his judgment by implying that A's future contact with his son might depend on whether the current stress of the two mothers had lessened as a consequence of C having joint parental responsibility with B.

Black LJ, who has given a number of judgments relating to conflicts between lesbian mothers and biological fathers, added a short concurring judgment to that of Thorpe LJ.[25] Her ladyship accepted that there had been a distinct lack of precedent for her previous judgments. New forms of family life were evolving which had not yet crystallised. As yet there are no concepts or language designed to accommodated them. The courts have had to continue to struggle to develop a principled approach to fact specific cases.[26]

Black LJ reiterated the importance of the paramountcy of the child's welfare in determining these novel parenting issues. She accepted that the High Court had carefully considered s 1(3) of the Children Act 1989 and had found that certain specific factors were potentially relevant. However, her ladyship warned against giving those factors any greater intrinsic weight in future decisions than the other s 1(3) factors.

The intentions of A, B and C prior to M's conception were considered by Black LJ to be relevant but not determinative of A's parenting role once M was born. She acknowledged the tendency of individuals to change their plans over time when faced with the reality of the situation. Her ladyship accepted that it was right for those who contemplated entering into complex procreative arrangements:

> "…to 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

[25] See eg *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* [2006] 1 FCR 556.

[26] [2012] 2 FLR 607 [37].

> made. And above all, what must dictate is the welfare of the child and not the interests of the adults."[27]

Black LJ also drew attention to importance of taking into account the emotional state of all the adults involved, or wishing to be involved, in the parenting of the child and its effect on the child's welfare:

> "Disruptions to that security and stability, even if arising indirectly because one of the adults is distressed, will be relevant as potentially harmful to the child. Sometimes potential disruption will come from one of the parties to the proceedings, sometimes anxiety will be generated from outside, as where there is apprehension about society's response to the child's family arrangements (as there was here in the very early days in relation to M's school) or pressures from other family members (as in the case of B's family)."

In granting C a shared residence order, Black LJ thought that it might make her less anxious and more secure about her role towards, and responsibilities for, M. This could lead to the acceptance by B and C of more generous contact arrangements between A and M.

Finally, Black LJ suggested that it might be preferable not to label biological fathers in A's situation as sperm donors. The roles of these fathers may vary from one of a close, fulfilling, relationship with their children to a merely nominal one.

5. THE FUTURE ROLE OF PARENTAL AGREEMENTS

The Court of Appeal will be applauded by biological fathers for acknowledging that, regardless of any agreement made in advance of the child's birth, if they help their lesbian friends to procreate, they may be allowed to play an important role in the lives of their children. Given the difficulties in determining the precise nature of any agreements reached in these emotional situations,[28] and the fact that a biological father may change his mind once he encounters his child at birth, it may have been right for the Court to be wary of according importance to them.[29] However, the Court's

[27] Ibid [44]

[28] See Noel Arnold, 'Not Straight Forward: Parental Disputes within Same-Sex Families' [2012] Fam Law 1289.

[29] Courts may be reluctant to consider agreements or parental intentions in the context of procreation because they tend to be somewhat nebulous; in *Re B (Role of Biological Father)* [2008] 1 FLR 1015 [14] Hedley J found that: " … each [parent] heard exactly

decision in *A v B and C* does not entirely close the debate on the role of agreements in the resolution of parental contact disputes. Although Thorpe LJ totally rejected their relevance, Black LJ took a less rigid approach. She recognised that it was important for parents in these alternative family cases to specify in as much detail as possible the arrangements for their child's upbringing and held that their intentions could be a relevant factor even if not a decisive one. This approach suggests that, in the future, greater consideration may be given to agreements between lesbian couples and biological fathers who are known to them.

Whilst children are not commodities to be dealt with by rigid contracts, intention may well have an important part to play in determining a child's future without flouting the paramountcy of the child's welfare rule. Agreements and welfare may, in fact, be intimately related. There are biological fathers who, prior to parting with their sperm, may make very clear their intention, by words or conduct, their commitment to the welfare of their children and their proposals for fulfilling this commitment. It might be seen as contrary to the children's welfare to deny them contact with such a father. A's intention may not have been quite so explicit but by his conduct from the moment of M's gestation, he had implicitly shown his intention to be intimately involved with M. It is difficult to see how it would benefit M's welfare if this relationship were to be more limited after M's birth than it was during the period of gestation. A's request for staying contact with M, which would increase as M got older, would seem to be a natural consolidation of A's commitment to M's welfare.

Other biological fathers may make their intentions clear to lesbian mothers, when they hand over their sperm, that they do not wish to have any contact with their children. If they change their mind at a later date, they would perhaps have a harder task in convincing a court that they have the necessary commitment to the child's welfare to permit them to play a fatherly role in the child's life.

If the agreements between known biological fathers and lesbian mothers are not to be taken into account, comparisons will be made with heterosexual couples whose presumed agreements to bring up their children jointly are honoured after the couple's relationship breakdown. They are assumed to have been made for the benefit the child's welfare. Accusations will be made that children of lesbian parents and their known biological fathers are subject to a form of discrimination which may deprive them of a valuable male parental relationship. [30]

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what they wanted to hear and excluded everything that did not fit with their aspirations."

[30] See Duncan Ranton and Chris McIntosh, 'The Judicial Approach to Alternative Families: Discrimination or Vive la Difference?' [2012] Fam Law 1135.

6. MATERNAL BLACKMAIL

The Court of Appeal's judgment illustrates that no matter how caring and loving a biological father might prove himself to be towards his child, he may still face one significant obstacle to contact. Lesbian mothers, who wish to exclude fathers from contact with their children, are likely to centre their argument on Black LJ's statement about the connection between a child's security and the stability of the mothers' relationship with each other. It is all too easy for mothers who are insecure about their relationship to maintain that contact between the child and his biological father is destabilising for the family even when their insecurity stems from other factors.[31]

The mothers' argument may be difficult to challenge unless the courts are prepared to take a robust approach towards it. After all, a similar argument could equally be put forward by any mother who commences a new relationship with a man who assumes the role of stepfather to her children. It is unlikely that a court would deny the children staying contact with their biological father on the grounds that it might distress the stepfather and jeopardise his relationship with the mother which, in turn, would negatively affect the children.

Children have a right, wherever possible, to know, and enjoy a relationship with, their parents of both genders. The insecurity of their mothers should not deny them this right. To accept this argument without evidence that it is the biological father who is the cause of the destabilisation of the relationship is tantamount to acceding to the blackmail of mothers.

7. CONCLUSION

Family life and parenting in the 21st century have changed dramatically. These new family forms are foreign territory for parents, both biological and psychological, their children, and the judiciary. Many families, today, do not conform to the idealised model of the nuclear family so avidly desired by the lesbian mothers, B and C,[32] and they are likely to increase in number.[33] It is

[31] [2012] EWCA Civ 285,[45]. See also Claire Sturge, Alternative Families Seminar 24th May 2012, 4 Paper Buildings, 'The Kids Are All Right', A Psychological and Legal Perspective, http://www.4pb.com/media/publications/Seminar_Notes/Alternative_Familes_Seminar_2012.pdf

[32] See *Singh v Entry Clearance Officer, New Delhi* [2005] 1 FLR 308 [63]) in which Dyson LJ said: "The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what until comparatively recently would have been recognised as the typical nuclear family".

not only the courts who have to accept, and grapple with, the reality of these families in their search for principles which will ensure the children's welfare, it is also the parents who are responsible for their creation. To exclude known biological fathers, who wish to play a significant part in their children's lives, from contact with them is to indulge in the pretence that same-sex procreation is possible. As yet, it is not.[34] Until it does becomes feasible, lesbian would-be-mothers require male progenitors to help them create their longed for families. The sometimes selfish desires of these mothers to autonomy in their family life should not be allowed to prevail, in the absence of any contrary welfare indication, over the rights of children to have a relationship with their known biological fathers.

[33] In particular, the enactment of Civil Partnership legislation in 2004, the right to parental responsibility, under the HFEA 2008, for lesbian partners who are not biologically related to the child, and the pending legislation on same-sex marriage, are all likely to lead to an increase in the number of children born into same-sex families.

[34] Same-sex reproduction may not be such a long way away, see e.g http://www.newscientist.com/article/mg19726413.000-editorial-getting-ready-for-samesex-reproduction.html