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LOSING (AND RESTORING) THE BIG PICTURE: ASSISTED CONCEPTION AND LEGAL PARENTHOOD

RE S (Children: Parentage and Jurisdiction) [2023] EWCA Civ 897 (King, Moylan and Peter Jackson L.JJ.) raised two important unrelated issues: legal parenthood in cases of assisted conception; and the scope of the jurisdiction of the Family court. The former is the focus of this comment. The question for the court was whether the appellant, CP (who at the material time was the children's mother's civil partner) was the legal parent of children who were the subject of court applications. The children were conceived by fertility treatment (in vitro fertilisation) in the US and born in the UK in 2011 and 2013. CP was involved in the choice of sperm donor. She was present at the birth in 2011, and, although not present at the birth in 2013 as her father was dying, she visited the mother in hospital each day. CP was not named on the children's birth certificates, although the children had CP's surname as their last middle name, and she was recorded on the children's baptism certificates as their guardian. The mother claimed that, after discovery in 2009 that CP had had an affair, the relationship broke down irretrievably, "albeit that CP still sometimes lived in her home and they resumed their intimacy from time to time" (at [7]). CP maintained that the relationship continued for a further five years, living with the mother and the family. The issue of legal parenthood turned on interpretation of section 42(1) of the Human Fertilisation and Embryology Act 2008 (HFEA 2008), which provides:

> If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership with another woman or a marriage with another woman, then . . . , the other party to the civil partnership or marriage is to be treated as a parent of the child unless it is shown that she did not consent to the [treatment].

Interpretation of this seemingly straightforward provision and its counterpart in section 35 (and its predecessor in section 28(2) of the Human Fertilisation and Embryology Act 1990), particularly the words "it is shown that she [or he] did not consent", has tasked the courts in a series of cases: *In re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [2008] 1 F.L.R. 1047 (McFarlane J.); *M v F (Legal Paternity)* [2013] EWHC 1901 (Fam), [2014] 1 F.L.R. 352 (Peter Jackson J.); and *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12, [2016] 1 F.L.R. 41 (Theis J.).

In *Re G (Human Fertilisation and Embryology Act 2008)* [2016] EWHC 729 (Fam), [2016] 4 W.L.R. 65, Sir James Munby P. (at [26]), adopting counsel's interpretation of the authorities, had described section 42 as creating "a rebuttable presumption that consent exists in the case of marriage or a civil partnership". For him, "[o]nce evidence to counter the presumption has been led, the presumption cannot be used as a

'makeweight'. So even weak evidence against consent having been given must prevail if there is no other evidence to counterbalance it". This statement on how the presumption works drew on a dictum of Lord Reid in *S v McC (orse S) and M (DS intervening)* [1972] A.C. 24, 41, in the different context of the courts' approach to rebuttal of the presumption of legitimacy in section 26 of the Family Law Reform Act 1969. Munby P. added that "a general 'awareness' that treatment is taking place, or acquiescence in that fact, is not sufficient. What is needed is 'consent', and this involves a deliberate exercise of choice".

Understandably heavily influenced by Munby P.'s judgment, the deputy high court judge in this case found that CP was not the legal parent of the children, concluding that there was evidence that the applicant did not consent; in the judge's view there had been no "deliberate exercise of choice" by the applicant, only an awareness of and acquiescence in the decision taken by the respondent to undergo assisted reproduction. The judge held that the applicant "effectively played the role of a step-parent" but was not a parent (at [136] of his judgment, cited at [26]).

On CP's appeal, the Court of Appeal, reviewing the authorities, clarified that, contrary to Munby P.'s view, section 42 (or its counterpart in section 35) does not create a presumption of consent, but rather a presumption of legal parenthood (*Re S*, at [30], [36]). Moreover, unlike in the case of the common law presumption of legitimacy, the "presumption and the means of rebutting it are ... not symmetrical" in section 42. This provision should not be construed "as if the presumption of parentage falls away as soon as any evidence of absence of consent, however weak, is led" (at [36]). The Court of Appeal held that the "true position is that the presumption of parentage under section 42 will prevail unless and until it is proved the spouse or civil partner did not consent to the procedure undertaken" (at [36]). This means that when an issue is raised the court must ask: "Has it been shown on the balance of probabilities that the spouse or civil partner did not consent to the assisted reproduction that was undertaken?" (at [44]).

The court made several further observations (at [45]). The answer to the above question is a matter of fact, taking account of all the circumstances of the individual case. There is no prescribed form in which consent must be given (at [45](3)) nor does consent or lack of consent need to be communicated (at [45](4)). Lack of consent is not equated with "an objection or stated withholding of consent" (at [45](5)). Consent need not be "limited to a specific form of assisted reproduction or to a specific time or place" and could be broad enough to encompass a range of circumstances (at [45](6)). Awareness of a procedure is a precondition to the possibility of consent, but awareness and consent are not the same. Consent may be, but need not be, in the form of a deliberative choice and "in some cases its presence or absence may be inferred from the circumstances" (at [45](3), (10)). The court emphasised the relationship context, observing that "the assessment will by definition be taking place in the presence of a marriage or civil partnership

and will inevitably take account of the nature of the adults' relationship" (at [45](3)). In some circumstances, therefore "the absence of written or express consent may not be a strong indicator that a person did not consent" (at [45](3)). The court "will be careful to distinguish acquiescence from consent that has not been expressly stated" (at [45](8)). While the assessment of lack of consent is an objective exercise, the account of the state of mind of the civil partner or spouse will be of great importance (at [45](9)).

The Court of Appeal found that the judge's conclusion on legal parenthood was not sustainable (at [50]). The judge had placed "undue reliance on several matters which were of no or limited relevance" (at [53]) (such as the birth registration), and had erred in law by narrowing the statutory test so as to frame it as only being whether CP had exercised a deliberate choice (at [51]). He had failed to consider whether consent could be inferred from the circumstances. As the court explained, the "big picture here was that these were parties to a civil partnership who wanted children and created a family" (at [52]), the whole history giving rise to the inference that CP had not merely acquiesced in the mother's treatment but consented to it. Accordingly, the Court of Appeal held that it had not been shown that CP did not consent, and in fact substituted a finding that she had consented (at [54]).

Re S is a welcome decision, clarifying the nature of the presumptions in sections 35 and 42 of the HFEA 2008 and their rebuttal, and overturning an erroneous interpretation of the statute which had been based on a false analogy with the operation of the common law presumption of legitimacy. The Court of Appeal has now usefully set out just one question for the court when applying these provisions and provided several further useful observations derived from its examination of the legislation and case law. The court has emphasised that whether there is a consent or lack of consent to fertility treatment must be assessed by reference to all the circumstances of a case, which inevitably will involve taking account of the nature of the adults' relationship. The result in practice of application of this guidance will be that, in most cases in the absence a spouse or civil partner's own claim that they did not consent to their partner's fertility treatment, the conclusion that a child born to a mother in an intact formal relationship has two legal parents will be difficult to resist. Of course, that only reflects what Parliament must have intended when enacting the HFEA 2008.

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