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Re G (Children) (Residence: Same-Sex Partner)
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Re G (Children) (Residence: Same Sex Partner) [2006] UKHL 42:

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The Facts

G and W lived together in a lesbian relationship from 1995 to 2002. Wanting to have a family together, they arranged for G to be artificially inseminated, using sperm from an anonymous donor. She gave birth to two children, born in 1999 and 2001. In 2002 the relationship broke down, and the parties entered into relationships with new partners. In September 2003 W applied for an order for contact and a shared residence order, and an order was made for alternate weekend and holiday contact. The judge prohibited G from moving without W's consent or the court's leave, but rejected W's proposal for a shared residence order, largely because of hostility between the parties. The Court of Appeal allowed W's appeal against that refusal. Shortly afterwards, G moved secretly with her new partner and the children to Cornwall. W, who lived in Shropshire, applied for the children's primary home to be with her. The judge, who said that she had no confidence that if the children remained in Cornwall G would promote their essential close relationship with W and her family, ordered that the children should have their primary home with W. While the Court of Appeal dismissed G's appeal, she appealed, successfully, to the House of Lords and primary residence was restored to G, albeit with clear warnings that this was dependent on her adhering to contact arrangements with W.

In her leading judgment, Baroness Hale concluded that the lower courts had 'allowed the unusual context of this case to distract them from principles which are of universal application'[1] and asserted two key points. First, in accordance with section 1 of the Children Act 1989, the 'welfare of the child' is

[1] *Re G* para 44.

the paramount consideration of the courts. Consequently, while there was no presumption in favour of parent with a biological link with a child it is 'undoubtedly an important and significant factor'[2] in determining what is best for the child, and the failure of the lower courts to address it was critical to the judgment. Secondly, she held that changing children's living arrangements should only be contemplated when a parent is failing to promote the child's welfare, and not as a form of punishment for bad behaviour. The first point was emphasised in stronger terms by Lord Scott of Foscote who held that 'mothers are special'[3] and by Lord Nicholls of Birkenhead who held that, 'in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests . . . I decry any tendency to diminish the significance of this factor'[4].

The social, policy and legal context

In many respects the case is an every-day tale of a relationship breakdown and subsequent disagreement about the upbringing of the children. But it is one of the most important recent family law decisions and one that touches on a wide range of broader social developments.

1. *Lesbian and gay law reform*

The Civil Partnership Act 2004 (CPA) was enacted during the time that this case was working its way through the courts - a hugely symbolic social and legal moment for lesbians and gay men. By the time the Lords heard the case G had entered into a civil partnership with her new partner and W was about to do so with hers; an option that was not available to them during their seven year relationship. The CPA has given rise to supportive, ambivalent and critical commentary from within the lesbian and gay community.[5] For some it

[2] ibid.
[3] ibid para 3.
[4] ibid para 2.
[5] See, e.g., N Barker, 'Sex and the Civil Partnership Act: The Future of (Non) Conjugality?, (2006) 14(2) *Feminist Legal Studies* 241; Lisa Glennon, 'Strategizing for the Future through the Civil Partnership Act', (2006) *Journal of Law and Society* 33(2): 244; R Auchmuty, 'Same-Sex Marriage Revived: Feminist Critique and Legal Strategy', (2004) 14 *Feminism and Psychology* 101.

represents (almost) an end point in the process of law reform that began with the (partial) decriminalising of male homosexual acts by the Sexual Offences Act 1967. Oscar Wilde on being released from Reading Gaol is recorded as saying, 'Yes, we shall win in the end; but the road will be long and red with monstrous martyrdoms.'[6] In family law most of the 'martyrs' were lesbian mothers who frequently lost all contact with and, later, custody of their children solely on the basis of their sexuality.[7] This case seems worlds away from that, recent, past. But it is salutary to remember that the 'violence of law' in the old cases was a result of judicial interpretation of the 'welfare of the child' – the paramount consideration enshrined in the Children Act 1989 – the same principle that Baroness Hale defended, with some passion, in this case. It was not a high profile publicly debated Act of Parliament that radically changed the position of lesbian mothers but incremental judicial law making in the name of children, not women. Progress indeed, and unquestionably cause for celebration, but, almost, like so much about laws relationship with lesbians, an invisible one – shrouded from 'public' view and contingent on the rights of another.

But in this new age or The World We Have Won, as Jeffrey Weeks, the leading British historian of sexuality puts it,[8] the question that many critical and feminist commentators have asked is what does winning mean? At a moment when the principle of 'equality' dominated the mainstream discussion of lesbian and gay law reform, it is perhaps not surprising that it dominated the judgment of Baroness Hale. Yet as Herman commented 15 years ago, 'the extension of existing liberal categories to "new identities" not only "recognises", but regulates, contains, and constitutes them'.[9] This insight questions the progressive narrative and suggests that we need to continue to examine the discourses through which lesbian mothers are viewed. This

[6] Earl of Arran, Hansard, HL Deb 21 July 1967 vol 285 cc52.
[7] See H Reece, 'Subverting the Stigmatization Argument' (1996), 23 *Journal of Law and Society* 484 and S Beresford, Get over your (Legal) 'Self': A Brief History of Lesbians, Motherhood and the Law, (2008) 30(2) *Journal of Social Welfare and Family Law* 95.
[8] Jeffrey Weeks, *The World We Have Won* (London, Routledge, 2007)
[9] D Herman, 'The Politics of Law Reform: Lesbian and Gay Rights into the 1990s' (1993), in J Bristow and AR Wilson (eds), *Activiating Theory: Lesbian, Gay, Bisexual Politics* (London, Lawrence and Wishart, 1993) 250.

project requires a quite different form of political engagement with law. For whereas the explicit homophobia in the old cases positioned all lesbians and gays against the law; cases such as *Re G* demonstrate how the new era of legal recognition creates both winners and losers *within* the lesbian and gay community. And this shift from a juridical prohibition to a more complex legal narrative might test the very political notion of a community. Indeed, it is significant that while lesbian and gay campaigns have been highly vocal in demanding equality of treatment in relation to *becoming* partners and parents (through civil partnership, adoption or reproductive technology) there is a notable silence about the possible meanings or application of the principle of equality in relation to separating lesbian and gay couples.[10]

2. *Family Law debates and Parenting*

The order made in the case is a shared residence order. As the feminist judgment explains, this order can be made for both symbolic and practical reasons. The context of recent debate about them has been attempts by certain parts of the fathers' rights movement to argue for an increase in their use in order to reflect a normative ideal of legal equality between parents.[11] This debate goes to the heart of divergent and frequently gendered perceptions of parenting, between those who see it as a status and those that view it as practice.[12]

This conceptual distinction is also critical in addressing the issue of enforcing contact. This issue has dominated recent debates in family law, is a major issue for the fathers' rights movement and has led to new initiatives in The Children and Adoption Act 2006. As in this case, the issue requires courts to consider the extent to which the primary carer's own interests and desires are intimately connected to the child's best interests. Feminist commentaries have highlighted how the courts' approach impacts on mothers and, in particular,

[10] For example the Stonewall website makes no reference to *Re G*.

[11] S Gilmore, 'Court decision-making in shared residence order cases: a critical examination' (2006) 18 *Child and Family Law Quarterly* 478; F Kaganas, 'Domestic Violence, Men's Groups and the Equivalence Argument' in A Diduck and K O'Donovan (eds) *Feminist Perspectives on Family Law* (London, RoutledgeCavendish, 2006).

[12] C Smart, B Neale and A Wade, 'The Changing experience of childhood: Families and Divorce (Cambridge, Polity Press, 2001).

have critiqued the construction of women resisting contact as 'implacably hostile'. It could be argued that these debates and concerns inform Baroness Hale's judgment and even those critical of the judgment acknowledge that that the case will be useful for mothers in dispute with fathers.[13]

Specific questions relating to lesbian parenting have occurred in the context of debates about reproductive technology. In this case G and W used sperm from an anonymous donor and Baroness Hale commented that for both safety reasons and to avoid potential conflict with a known sperm donor, 'many might see this as the more responsible choice'[14]. Where conflicts with a sperm donor have arisen, the parental claims of the biological father can be a threat to the lesbian parents' family unit.[15] Since the case was decided, the Human Fertilisation and Embryology Act 2008 now enables both members of a lesbian couple who use the services of a licensed clinic to be accorded the status of legal parents, in exactly the same way as heterosexual couples. The Act, however, describes the lesbian co-parent who does not give birth to the child as 'the second female parent'; the refusal to call her a mother reflecting what Herring describes as 'law's obsession with a child only having one mother and one father'.[16]

How the decision was received

The central focus of responses to *Re G* has been the significance of the biological link between a parent and child. Some commentators support the decision. Bainham, for example, argues that the 'recognition given to the value of natural parenthood and the significance attached to the beginnings of life are much to be applauded'.[17] By contrast, Woodcraft argues that the reason for Bracewell J not having given sufficient indication of having

[13] eg, E Woodcraft, '*Re G*: A Missed Opportunity' January Fam Law [2007] 53.
[14] *Re G* para 8.
[15] See *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* [2006] EWHC 2 (Fam) and *Re B (role of the biological father)* [2007] EWHC 1952 (Fam).
[16] J Herring, *Family Law*, (Harlow, Longman, 2009, 4th edn) 339.
[17] A Bainham, 'Who or What is a Parent?', *The Cambridge Law Journal* [2007] 30, 32. See also A Bainham, 'Arguments about parentage' *The Cambridge Law Journal* [2008] 322; D Coombes and L Whitesmith, *Fam Law* 2006 36 (nov) 953-956, *Natural born children: the House of Lords and the blood tie*' 955.

considered the issue of the birth mother's role, 'may well have been because she was treating the two women as equals, *which is how, as Thorpe LJ said, they will appear to the children*.'[18] Beresford notes in relation to W, that 'nowhere is she referred to as the children's mother' and in the only commentary that draws on queer theory argues, that 'As a lesbian mother, her non-conformity with heterosexuality continues to threaten the dominant legal discourse'[19].

Critics of the decision, nevertheless, all note with approval the fact that Baroness Hale explicitly includes the social and psychological parent within the category of 'natural parenthood'.[20] Their criticisms focus on the lack of clarity and/or the unfairness to the non-biological parent. For example, Woodcraft argues that the decision undercuts 'any suggestion that the different forms of parenthood might be regarded as of equal importance', and 'taken overall' says that 'genetic and gestational parenthood trump psychological parenthood and birth mothers trump them all'.[21]

The language in the commentaries of hierarchies and 'trumps' to describe the relationship between the competing forms of parenthoods, overshadows Baroness Hale's insistence on the paramountcy of the welfare principle and the rejection of any legal presumption. But lawyers as well as academics have drawn the same conclusions – the headline in the *Solicitors Journal* boldly stated that 'Lords back Biological parents' rights.'[22] That this is the dominant message drawn from the decision may have important implications in practice. A crude 'truth' has been established which can function as a powerful form of law.[23] It is too early to know the full impact of the case but, as Bennett notes, 'It makes the decision as to who biologically parents a child within a same sex relationship a crucial and potentially difficult

[18] E Woodcraft, 'Madonna Complex' (2006) Solicitors Journal, 150(33), 1095-1096 at 1096 (emphasis added).
[19] S Beresford, above n 7 at 103.
[20] See, eg K Norrie, 'Lesbian families, parenthood and contact' (2006) 51(10) JLSS 24 http://www.journalonline.co.uk/Magazine/51-10/1003497.aspx.
[21] Woodcraft above n 18, at 1095. See also Beresford above n 7; Norrie above n 20.
[22] SJ 2006 150(29) 958. Only in the text is a more nuanced interpretation provided.
[23] See A Diduck, 'Solicitors and Legal Subjects', in J Bridgeman and D Monk (eds), *Feminist Perspectives on Child Law* (London, Cavendish, 2000).

question'.[24] Coombes and Whitesmith suggest the possibility that some lesbian couples 'will review how they choose to go about having children' and that 'there may be more children born as a result of one partner carrying the other's egg or more couples choosing to have one child each.'[25]

The application of *Re G* in subsequent cases has also focused on the significance of biological connection. In *Re R (A Child) (residence Order)* [2009] EWCA Civ 358, the Court of Appeal upheld the appeal of a mother against a decision to award residence to the paternal grandparents, with Wall LJ stating that the judge had not 'grappled with the fundamental proposition that children have a right to be brought up by their natural parents unless their welfare positively demands the replacement of that right'.[26] In *Re B (A Child)* [2009] EWCA Civ 545, however, Wall LJ conceded that he 'went too far'[27] in *Re R*, and held that the idea of there being any presumption in favour of a biological parent is 'plainly inconsistent with *Re G'*. Rather, the test . . is welfare alone, and that it is wrong to talk in terms of "rights"'.[28]

Terminology also remains uncertain. For example In *Re A (a child) (joint residence: parental responsibility)* [2008] EWCA 867 Potter P cited *Re G* to emphasise the importance of psychological parenting but at the same time used the expressions 'natural' and 'biological' interchangeably[29] to the extent that, despite Baroness Hale's definition, social parenthood is effectively excluded from the privileged category of 'natural'

The feminist judgment

In important respects, the feminist judgment is in substantial agreement with that of Baroness Hale. Diduck not only concurs that the appeal should be allowed but agrees that the overriding principle is the welfare of the child and not parental rights. And applying the welfare principle, after a critical appraisal of the uses and recent history of shared residence orders and conditional

[24] A Bennett, www.familylawweek.co.uk 17/3/09.
[25] Coombes and Whitesmith, above n 17 at 956.
[26] *Re R* para 85. See also *B v D and another* [2006] All ER (D) 408.
[27] *Re B* para 41.
[28] ibid paras 60, 40.
[29] *Re A* at paras 73, 91.

residence orders, she agrees that the Court of Appeal placed too much attention on the bad behaviour of G. That there should be substantial areas of agreement is not surprising – Baroness Hale is after all a feminist judge. Moreover the differences in the judgments of Hale and Diduck go to the heart of long-standing debates within feminism about sameness and difference and the tension between formal equality and the social realties of family life and relationships of care.

The most critical difference is Diduck's rejection of the attempt by Hale to treat W and G in the same way - in the name of equality - as she would a heterosexual couple. And she does this for two distinct reasons. The first reason arises from an awareness of the lack of equality that same sex parents face in society. In other words, she recognises that formal legal equality too often assumes a level playing field and in doing so further exacerbates unfair treatment. The second ground for treating them differently would apply even if it could be established that social discrimination were no longer experienced by same-sex parents. Here Diduck argues that 'formal equality of treatment obscures what is different about same sex parents' [7].

This approach is critical for Diduck's subsequent and key argument: that the House of Lords were wrong to attach as much significance as they did to the biological connection in determining both the fact of parenthood and child welfare [4]. For the emphasis on biology both presumes a heterosexual context and in doing so places a lesbian co-parent in a uniquely vulnerable position as, 'only one can be genetically related and that fact should not become a legal disability for either the other parent or the child' [16].

The reference to the child here is significant. For while expressing sympathy with the position of the co-parent, she does not go as far as to claim rights for this parent. This is important, for the father's rights' movement also challenges the notion that biological mothers have automatic claims resulting from their privileged status, while asserting that fathers have equal rights to spend time with their children. Diduck's approach carefully demonstrates how the vulnerability of the lesbian co-parent can be addressed without weakening the position of women in heterosexual relationships. She achieves this by emphasising the importance of making welfare judgments in a non-presumptive way on the basis of the realities of care rather than 'abstract and

possibly equivocal principles and . . . claims to rights of the formal equality of parents.' [29]

As a result, by neither equating it with heterosexual parenting, nor emphasising a difference between biological and non-biological parenting, Diduck's judgment makes lesbian parenthood visible – an important political move. But this is achieved within a flexible framework that creates space for and recognises the social, cultural and individual contingencies of both children and parents' lived experiences. In other words it is good for lesbian parents because it is good for families.