

# Re G (Children) (2014)

[2014] EWCA Civ 336

25/03/2014

## Barristers

Rebecca Foulkes

## Court

Court of Appeal Civil Division

## Practice Areas

Private Children Law

## Summary

The court reviewed the legal framework concerning parental responsibility in relation to same-sex partners and biological parents. It concluded that a judge had failed to take all of the relevant factors into account concerning a biological mother's application for parental responsibility in respect of twins born to her female partner, their gestational mother.

## Facts

The court was required to determine whether a shared residence order should be made in respect of twin girls.

The appellant (X) and respondent (M) had entered into a same-sex relationship. X had donated her eggs to M and, using an anonymous sperm donor, M gave birth to twins. A few years later, using the same donor, X had a daughter (D). X was therefore the genetic mother of all three children, but lawfully only the mother of D. By virtue of the Human Fertilisation and Embryology Act 1990 s.27(1) M was the mother of the twins. M returned to work and X took voluntary redundancy and remained at home with the twins. The parties separated when the twins were aged four. The twins lived with M and her new civil partner. M granted her new partner parental responsibility in respect of the twins. By the time of the first hearing, the parties had agreed contact arrangements and X had abandoned a claim for a sole residence order. The judge was invited to determine, on the basis of submissions only, whether a shared residence order should be granted to X so that she could obtain parental responsibility.

X maintained that she was the twins' genetic and psychological parent and should therefore have parental responsibility.

## Held

(1) It was helpful to consider the changing legal framework of parenthood including the following factors:  
(a) the Human Fertilisation and Embryology Act 2008 s.42 provided that if a woman was party to a civil partnership at the time of the placing of the embryo into her, then her civil partner was to be treated as a

parent of the child unless she did not consent to the process. Similarly, where two women agreed that both should be parents but they were not in a civil partnership, under s.43 the other woman could be treated as a parent; (b) it was clear that “parental responsibility” under the Children Act 1989 s.3 included taking decisions about aspects of the child’s upbringing such as education, religion, medical treatment and holidays abroad. Where those with parental responsibility were in dispute over decisions about a child, the court could regulate the situation under s.8 of the 1989 Act; (c) the categories of those who could acquire parental responsibility had broadened to include unmarried fathers, a woman who was a parent by virtue of s.43 of the 2008 Act and step-parents or civil partners; (d) the 1989 Act gave no guidance on when a court should make a parental responsibility order save that the child’s welfare was the paramount consideration. Three particular features were important, namely the degree of commitment the parent had shown to the child, the degree of attachment between them and the motivation behind the application, H (Minors) (Local Authority: Parental Rights) (No.3), Re [1991] Fam. 151 applied; (e) parental responsibility could be refused where it was feared that it would be misused, M (A Child) (Parental Responsibility Order), Re [2013] EWCA Civ 969, [2014] 1 F.L.R. 339 considered; (f) parental responsibility acquired through a shared residence order was not the same as free-standing parental responsibility. It lasted only as long as the share residence order remained in force, G (Children) (Residence: Same Sex Partner), Re [2005] EWCA Civ 462, [2005] 2 F.L.R. 957 considered; (g) the plans made for future relationships between the child and the relevant adults could be a relevant factor but they were not determinative. In deciding what was in the child’s best interests, it was important to identify the source of the child’s nurture, stability and security, A v B (Contact: Alternative Families) [2012] EWCA Civ 285, [2012] 1 W.L.R. 3456 considered (see paras 31-36, 40-41, 45 of judgment). (2) The likely attitude of M and X to the other’s role in the twins’ lives was of central importance in the judge’s decision. Whilst weight needed to be given to the fact that M was the gestational parent, and cared for the twins day-to-day, that could not be considered in isolation of X’s position. The judge had concluded that X would interfere with the care of the twins if she had parental responsibility, but without articulating what had led her to that conclusion. She had failed to give weight to the fact that X was the twins’ biological mother. Consideration also had to be given to X’s importance as the mother of the twins’ full sibling, D, with whom they would form a relationship through contact. X had played a large part in the twins’ early day-to-day care. Whether she was the twins’ “psychological parent” or not, what mattered was her past and future involvement and whether the twins saw her as a parent. Another factor was that M’s new partner had parental responsibility. Whilst that was an understandable decision, some consideration might need to be given to whether it was in the twins’ best interests to have a non-biological parent with parental responsibility and a biological parent without it. The judge had not taken into account all of the relevant factors and had given disproportionate weight to some factors. Her decision was therefore set aside. Factual findings had to be made before X’s application for shared residence could be properly determined. The case was therefore remitted for a fresh hearing (paras 50-57).

## Permission

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