Neutral Citation Number: [2024] EWCA Civ 878

Case No: CA-2024-001045

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mrs Justice Gwynneth Knowles
ZW23P01329

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2024

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE ARNOLD

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P v Q and F (Child: Legal Parentage)

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Professor Rob George, and **Karen Kabweru-Namulemu** (instructed by **Obaseki Solicitors**) for the **Appellant Mother**
James Turner KC, Naomi Wiseman, and **Joseph Landman** (instructed by **TV Edwards Solicitors**) for the **Respondent Mother**
Janet Bazley KC and **Luke Eaton** (instructed by **Creighton & Partners Solicitors**), all acting pro bono, for the **Respondent Father**
The **Respondent Child** by her Children's Guardian was not represented

Hearing date: 18 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Introduction

1. Few things in life are more important than parentage for a child and parenthood for a parent, with all the wider family relationships thereby created. Parenthood can be manifested in a number of ways: genetic, gestational and psychological, as explained in *Re G (Children) (Residence: Same-sex Partner)* [2006] UKHL 43, [2006] 1 WLR 2305 at [32-37]. However, at a more formal level the law needs to identify who a child's legal parents are, because legal parenthood brings many rights and responsibilities and creates legal relationships across generations.

2. This appeal concerns the legal parentage of X, who is aged six. Her genetic and gestational mother is P, and her genetic father, confirmed by scientific testing, is F. Her registered parents are P and Q, who is P's former wife. Until X was five, everyone believed that Q was her second legal parent, but on 19 April 2024 Mrs Justice Gwynneth Knowles declared that F is her legal father and in consequence he will replace Q on her birth certificate.

3. This painful situation arises from the informal conception arrangement that led to X's birth. P and Q agreed with F, then a stranger and now living abroad, that he would act as their sperm donor. On three occasions, F provided sperm that was used for the artificial insemination ('AI') of P. The statutory code contained in the Human Fertilisation and Embryology Act 2008 ('HFEA 2008') provides that this means of conception would confer legal parentage on Q.

4. However, unknown to Q, and at the same time as the AI was taking place, P and F engaged in sexual intercourse involving natural insemination ('NI'), also on three occasions. X was conceived during the third occasions of AI and NI, and it is impossible to know which method of insemination led to her conception.

5. When X was three, P and Q separated and later divorced. There were disagreements about the arrangements for X. At the end of 2022, P revealed that NI had taken place, and she applied to the court for a declaration under the Family Law Act 1986 ('FLA 1986') that F is X's legal father. There was an issue about whether NI had in fact occurred. The judge found that it had, and she concluded that, as Q could not show that X was born from AI, F is the legal father. Q now appeals from that reasoning. She argues that it was for P to show that X was not conceived as a result of AI. This is therefore a rare, and so far unique, case in which the burden of proof will be decisive.

6. X exists because P and Q wanted her, and F was at that time no more than a means to an end. It may therefore seem strange that her parentage should be determined by the way in which she was conceived, but in this area a line must be drawn somewhere.

7. In saying this, I note the brief obiter dicta in *R (On the Application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam), [2020] Fam 45, at [129], and on appeal in *R (McConnell and YY) v The Registrar General for England and Wales* [2020] EWCA Civ 559, [2021] Fam 77 at [26], that it would clearly be undesirable for the attribution of parental status to turn upon the method of conception and that the issues of law in that case "cannot turn on the happenstance of whether

conception took place naturally or by means of treatment under the HFEA 1990 and HFEA 2008". That case called for the interpretation of the Gender Recognition Act 2004 and the Human Rights Act 1998 to determine whether a transgender man who gave birth to a child should be registered as the child's mother, or as the child's father or parent. The statements do not shed light on the issue in the present case, where the legislation draws a deliberate distinction between assisted reproduction and reproduction by other means, here between AI and NI.

8. Similarly, the question of law that arises here cannot be determined by the deserts of the adults. As Hale LJ said in *Mrs U v Centre for Reproductive Medicine* [2002] EWCA Civ 565, [2002] Lloyd's Rep Med 259, at [24]:

> "Parliament has devised a legislative scheme and a statutory authority for regulating assisted reproduction in a way which tries to strike a fair balance between the various interests and concerns. Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught up in it."

9. The identification of X's parentage does not of course determine the welfare decisions that remain to be made by the judge. These include the question of whether Q should be granted parental responsibility for X.

10. We heard the appeal on the morning of 18 July 2024, which had been fixed as the first day of the final welfare hearing before the judge. After hearing argument, we were able to inform the parties that the appeal would be dismissed, allowing the welfare hearing to proceed. We now give reasons for our decision.

Declarations of Parentage

11. Where a dispute about legal parentage arises, there is a specific statutory remedy. The power of the High Court or the family court to make declarations of parentage is contained in Part III of the FLA 1986, entitled 'Declarations of Status'. Section 55A FLA 1986, as inserted by the Child Support, Pensions and Social Security Act 2000, section 83, and amended by the Crime and Courts Act 2013, section 17, Schedule 11, relevantly provides:

> **55A Declarations of parentage.**
>
> (1) Subject to the following provisions of this section, any person may apply to the High Court or the family court for a declaration as to whether or not a person named in the application is or was the parent of another person so named.
>
> (2-4) …
>
> (5) Where an application under subsection (1) above is made and one of the persons named in it for the purposes of that subsection is a child, the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child.

> (6) …
>
> (7) Where a declaration is made by a court on an application under subsection (1) above, the prescribed officer of the court shall notify the Registrar General, in such a manner and within such period as may be prescribed, of the making of that declaration.

12. This provision is supplemented by section 58:

> **58 General provisions as to the making and effect of declarations.**
>
> (1) Where on an application to a court for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.
>
> (2) Any declaration made under this Part shall be binding on Her Majesty and all other persons.
>
> (3) A court, on the dismissal of an application for a declaration under this Part, shall not have power to make any declaration for which an application has not been made.
>
> (4) No declaration which may be applied for under this Part may be made otherwise than under this Part by any court.
>
> (5-6) …

13. Rule 8.20 of the Family Procedure Rules 2010 identifies the respondents to an application for a declaration of parentage. They are (i) the person whose parentage is in issue, except where that person is a child; and (ii) any person who is or is alleged to be the parent of the person whose parentage is in issue, except where that person is the applicant or is a child.

14. In the present case, P's application for a declaration, in Form C63, was issued on 19 September 2023. The respondents are named as X, Q and F. The form does not require the applicant to specify the terms of the declaration sought, but in a section entitled 'Why are you making this application?' P gave a short account of her case and ended: "This will mean that X's birth is registered incorrectly and a declaration of parentage is sought so that the birth certificate may be corrected."

15. A question arose obliquely during the hearing of this appeal as to the scope of the undefined word 'parent' in section 55A. Is the court only concerned with the status of legal parentage, or does the power also extend to declarations of genetic parentage? There are a number of first instance decisions that appear to suggest that it does: *M v W (Declaration of Parentage)* [2007] 2 FLR 270 (Hogg J); *Re H No. 1* [2020] EWFC 74, [2021] Fam 349 (MacDonald J), at [50]; and *Re Ms L & Anor* [2022] EWFC 38, [2022] Fam 315 (Cobb J). These concerned applications related to the birth parentage of adopted children. The courts appear to have approached the matter on the basis that a declaration under section 55A can concern genetic parentage, but an alternative

interpretation, not explored in those cases, would be that what was at issue was the child's pre-adoption legal parentage, something that would clearly fall within the scope of section 55A(1). This issue may need to be definitively resolved on another occasion, but this case undoubtedly concerns X's legal parentage and I shall proceed on the basis that the FLA 1986 concerns the attribution of legal status. If I am wrong, nothing in the present appeal turns on it.

Legal Parentage

16. The baseline position is the common law principle that a child's legal parents are the gestational mother and the genetic (also known as biological) father. This is a principle of law and not a rule of evidence or a presumption. However, the common law modifies the principle in relation to a married man, who will benefit from a rebuttable presumption of parenthood in respect of a child born to his wife during the marriage, whether or not he is the genetic father. That presumption of legitimacy has been extended by statute to apply to a male civil partner: Legitimacy Act 1976, section A1(2). There is no such presumption in respect of a child born during the marriage of two women: Marriage (Same Sex Couples) Act 2013, Schedule 4, paragraph 2.

17. The baseline position is also modified in certain respects by the HFEA 2008 and its predecessors, the Family Law Reform Act 1987 and the Human Fertilisation and Embryology Act 1990, in relation to children born as a result of assisted reproduction. So, a sperm donor to a licensed clinic will not be the child's legal father: section 28(6) of the 1990 Act. Further (touching the present case), a mother's female spouse will be the only second parent, unless it is shown that she did not consent to the treatment: sections 42(1) and 45(1) HFEA 2008. However, the legislation only applies in cases of assisted reproduction that fall within the footprint of the statutory scheme; if not, the baseline position will apply: *In re R (A Child) (IVF: Paternity of Child)* [2005] UKHL 33, [2005] 2 AC 621 at [39] and [41]; *M v F & H (Legal Paternity)* [2013] EWHC 1901 (Fam), [2014] 1 FLR 35 at [27].

18. Q's claim to be X's only second parent therefore depends upon sections 34(1), 42(1) and 45(1) of the HFEA 2008:

> **34 Application of sections 35 to 47**
>
> (1) Sections 35 to 47 apply, in the case of a child who is being or has been carried by a woman (referred to in those sections as "W") as a result of the placing in her of an embryo or of sperm and eggs or her artificial insemination, to determine who is to be treated as the other parent of the child.
>
> **42 Woman in civil partnership or marriage to a woman at time of treatment**
>
> (1) If at the time of 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 subject to section 45(2) to (4), 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 placing in

> W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).
>
> **45 Further provision relating to sections 42 and 43**
>
> (1) Where a woman is treated by virtue of section 42 or 43 as a parent of the child, no man is to be treated as the father of the child.
>
> (2) In England and Wales…, sections 42 and 43 do not affect any presumption, applying by virtue of the rules of common law or section A1(2) of the Legitimacy Act 1976, that a child is the legitimate child of the parties to a marriage or civil partnership.

Birth Registration

19. The registration of a birth under the Births and Deaths Registration Act 1953 will, for important practical purposes, identify a child's legal parents. A birth certificate is perhaps the most fundamental of all documents concerning personal status. However, the registration process depends on the accuracy and completeness of what the registrar is told by the informant(s), and many genetic parents do not appear on birth certificates. Registration is therefore practical evidence of legal parentage, but the legal status of parentage does not spring from registration. In a case where a child's parentage is called into question, the court may make declarations under the FLA 1986, which may or may not confirm the details that appear in the register. It is for that reason that section 14A of the 1953 Act provides for re-registration after a declaration of parentage and notification by the court to the Registrar General under section 55A(7) FLA 1986.

20. Registration has been said to constitute prima facie evidence of parentage, but it is not conclusive: *Brierley v Brierley* [1918] P 257, relying on the forerunner to section 34(2) of the 1953 Act. Registration of birth is certainly evidence of parentage upon which the outside world, including a court, is entitled to rely, but where there is an issue about parentage it does not create a legal presumption.

The judgment

21. The judgment of Mrs Justice Gwynneth Knowles is reported as *P v Q and Others* [2024] EWFC 85 (B) (Fam).

22. The judge's approach to the HFEA 2008 appears from [15]:

> "15. Section 42 and all of the other sections from 35 to 47 only apply where the relevant gateway condition in s.34 is satisfied, namely that there was artificial insemination of W or the *"placing in her of the embryo or the sperm and eggs".* This is clear from the actual words of s.34(1) and 42(1). Unless the court can be satisfied on the balance of probabilities that this condition is met, s.42 does not apply and *"another woman"* cannot in law be a parent of a child who is conceived. In these circumstances,

> the court must fall back upon the common law in order to establish parentage."

23. She therefore asked whether Q could satisfy 'the gateway condition' by showing that X was conceived by AI. She again noted at [48] that the parenthood provisions of Part II of the HFEA 2008 apply to cases involving assisted reproduction. At [49], she distinguished *In re S (Children)* [2023] EWCA Civ 897, [2023] 3 WLR 1143 as being a case where the children had undoubtedly been born from AI:

> "49. At the outset, it is important to understand how this case differs from the previously decided authorities concerned with the interpretation of s.42 of the HFEA 2008. As I indicated earlier in this judgment, the most recent exposition of the interpretation of s.42 is contained in the judgment of Peter Jackson LJ in Re S (Children) [2023] EWCA Civ 897 in paragraphs 35-45. Having reviewed the legislation and the most recent authorities as to the interpretation of s.42 of the HFEA, Peter Jackson LJ concluded relevantly as follows:
>
> > *"44 … Where no issue is brought before a court, the spouse or civil partner of the gestational mother will be the parent of a child born after assisted reproduction in consequence of the statutory presumption of parenthood. Where an issue is raised, the court must give effect to the statutory wording by asking itself the question: "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?"*
> >
> > *45. This question is the only one that must be answered in order to determine whether an individual is to be treated as the child's legal parent…"*
>
> It is crucial to note that this formulation is predicated on a child being born **after assisted reproduction** (my emphasis). …"

24. The judge then considered the problems that may arise with informal arrangements:

> "51. … Of course, it would be unrealistic not to recognise that informal and consensual arrangements might also involve sexual intercourse between a sperm donor and the gestational mother but this would not be assisted reproduction. In those circumstances, where two women are married or in a civil partnership and a child was conceived and born as a result of sexual intercourse, the legal parenthood of the non-gestational parent conferred by s.42 of the HFEA would remain intact if there was no challenge by either the sperm donor and/or the gestational mother. It is, however, a status more apparent than real and built on shaky foundations. Unsurprisingly, it is capable of being displaced if the sperm donor and the gestational mother come forward at a later date to attest to natural intercourse or a lack of consent at the time the child was conceived. This is why

> informal and consensual arrangements resulting in the birth of a child are often not straightforward in their legal effect and, when relationships between the adults break down, can render a non-gestational parent vulnerable to status challenges just like the one mounted in this case."

25. The judge rejected Q's case that, under section 55A(5) of the FLA 1986, the court should refuse to hear P's application on welfare grounds. She found as a fact, despite unsatisfactory aspects of their evidence, that NI had occurred between P and F. There was no medical evidence that might assist her in deciding whether X was born as a result of the AI or the NI. Accordingly, she concluded at [61] that she was unable to find, on the balance of probabilities, that X was conceived by AI. The method of conception was unclear [64]. Before us, the parties agreed that the judge's finding could also be expressed as being that it was equally likely that X was born as a result of AI or of NI.

26. Setting out her conclusion, the judge stated:

> "63. There is no issue in this case that X was conceived from P's egg and F's sperm and that P carried and gave birth to her. The starting point at common law is that P is X's mother and F is her father. This remains the position unless it is displaced by the statutory framework set out in the HFEA 2008. As Peter Jackson J (as he then was) made clear in paragraph 27 of M v F and H (Legal Paternity) (see above), the HFEA only governs situations that fall within its footprint and, where this is not the case, the common law continues to apply.
>
> 64. There was much debate in oral submissions about the burden of proof though I found much of what was said did not illuminate that particular issue. S. 42 of the HFEA 2008 creates a rebuttable presumption that consent exists in cases of marriage and civil partnership and, on any analysis, that assisted reproduction is the method of conception. The presumption can be rebutted by evidence which shows that consent has not been given and/or, on my analysis, that assisted reproduction may not have occurred. In this case, the burden of proof lay on P to produce that evidence. This is straightforward, entirely conventional, and in accordance with the Court of Appeal's decision in In re S (Children) (see above). In this case, I have found, on the balance of probabilities, that Q did not consent to anything other than assisted reproduction but the method of X's conception was unclear because P and F had natural intercourse during the relevant conception window. In those circumstances, the presumption of Q's legal parenthood is rebutted and the common law position applies.
>
> 65. Analysed in this way, the discriminatory effect feared by Miss Weston KC – namely that it would be too easy to displace parenthood pursuant to s.42 of the HFEA by the making of allegations however poorly founded – is more apparent than real.

> The evidential burden on P and, to a lesser extent, on F in this case does not equate, as Miss MacLynn KC suggested, to an impermissible presumption of legitimacy or parentage for same-sex couples such as P and Q. It is properly the requirement to establish a case on the balance of probabilities that the criteria in s.42 did not apply to the circumstances of X's birth where, prior to late 2022, the parties acted in the belief that they did."

27. Finally, at [69], the judge stated that X's birth certificate does not prove her parentage.

28. The judge therefore declared (1) that Q is not X's legal parent, and (2) that F is her legal parent. She directed that notice be given by the court to the Registrar General for consideration of whether X's birth should be re-registered.

The appeal

29. Q applied for permission to appeal on four grounds:

> (1) The learned judge 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 under s. 55A of the Family Law Act 1986.
>
> (2) The learned judge was wrong not to exercise her power under section 55A(5) to refuse to hear the application on the basis that hearing the application was not in the child's best interests.
>
> (3) The learned judge was wrong to make a declaration of non-parentage in respect of Q and wrong to make a declaration of parentage in respect of F.
>
> (4) The declarations under appeal were made in breach of section 6 Human Rights Act 1998 and Articles 6, 8 and 14 of the European Convention on Human Rights in that they discriminate unlawfully against the appellant.

30. I granted permission on Ground 1 only. As to Ground 2, the judge was correct to hear the application for the reasons she gave. It was unclear what separate argument was contained in Ground 3, beyond the arguments made in other grounds. Under Ground 4, the judge relied on the decision of Cobb J in *AB v CD & Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357 at [90-95], where he rejected the argument that the framework of the HFEA 2008 is discriminatory towards same-sex couples. I refused permission because Q's contention on appeal amounted to an unsustainable root-and-branch challenge to the fundamental distinction drawn by the HFEA 2008 between genetic and non-genetic parents.

31. We are grateful for the thoughtful submissions that have been made on the single issue that now arises.

32. On behalf of Q, Professor George and Ms Kabweru-Namulemu (Ms Weston KC having been unable to attend the appeal hearing) submitted in essence that:

(1) The starting point is the understood position that Q has the status of legal parent, as reflected in X's birth certificate. Section 42 HFEA 2008 created a status of parenthood which did not fall away as soon as evidence of any absence of consent or doubt about the method of conception, however weak, was led: *In re S* (above) at [36-44].

(2) The judge's factual findings provided no basis for making a declaration. Section 58(1) required P to prove the underlying factual truth of the propositions to be declared to the satisfaction of the court. The burden of proof lies on those who assert, and accordingly it was for P to prove that X was conceived by NI. She was unable to do that, and the declaration therefore had to be refused. There is no common law default position that had any part to play in determining the answer to that evidential question. The judge failed to apply this fundamental requirement of civil litigation, instead making the declarations on the basis that Q had not disproved P's assertions.

(3) The judge's approach, which effected a fundamental change in the legal status of Q and X, undermines the certainty that the HFEA 2008 seeks to achieve by encouraging anyone seeking to exclude a wife or former partner from parenthood to raise questions regarding the conception of the child and place an almost impossible burden of proving AI on the non-genetic parent.

(4) The judge also lowered the standard of proof, by saying at [64] that AI "may not have occurred", and that the method of conception was "unclear". P proved only that it was possible, not that it was probable, that conception was by way of NI.

(5) By section 42 HFEA 2008 (and in section 35, making equivalent provision for heterosexual couples) Parliament has provided for parentage to be achieved through assisted reproduction outside licensed clinics in cases involving same-sex married and civil-partnered couples. The judge failed to give effect to this policy by viewing the facts relating to the conception in isolation, and ignoring this history of joint family planning, participation in AI, birth registration and commitment. These should, as a matter of policy, have been given significant weight.

33. On behalf of P, Mr Turner KC, Ms Wiseman and Mr Landman submitted that:

(1) The status of being a parent (father or mother) has its basis in the provision of the genetic material that resulted in the conception and birth of the child, unless that parentage is displaced or replaced by relevant legislation. This common law principle, reflected in section 45(1) and (2) of the HFEA 2008, is a principle of law, based on genetic fact. It is not a legal or evidential presumption. Its straightforward application can be seen in the decisions in *Re B (Parentage)* [1996] 2 FLR 15 at 21 (Bracewell J); *M v F* (above); and *Z v X* [2020] EWFC 67 (Fam) at [32-33] (Theis J).

(2) Scientific testing has established that F is X's genetic father. For the consequences of that to be displaced, the burden of proving compliance with the HFEA 2008 rested with Q. If the court could not be satisfied on a balance of probabilities how X had been conceived, it was required to have recourse to

common law and to make a declaration of paternity in favour of F. The statutory scheme was never engaged because the foundational criteria were not established.

(3) Once an issue arose as to whether X was conceived by NI or AI, the court had to determine that as a matter of fact. It was not requiring Q to prove the unproveable, but considering the legal consequence of something being incapable of proof.

(4) To require P to disprove that the provisions of the HFEA 2008 applied would be to create a presumption of legitimacy in a female same-sex marriage, despite the clear legislation against the existence of such a presumption.

(5) As to section 58 HFEA 2008, the judge was right to make the declarations, being satisfied of the truth of the proposition that F is the legal father of X.

(6) X's birth certificate was no more than prima facie evidence of parentage and could not be determinative.

34. Acting pro bono on behalf of F, as did their instructing solicitors, Creighton & Partners, Ms Bazley KC and Mr Eaton made these further submissions:

(1) The judge's findings about X's genetic paternity, the occurrence of NI and the impossibility of knowing which method of conception led to the birth are not the subject of any appeal. The wider factual context has no bearing on the analysis.

(2) In respect of the declaration of parentage or non-parentage, section 58(1) FLA 1986 required P to prove (a) that F was the biological father of X, and (b) that F and P had unprotected sexual intercourse within the conception window. P discharged that burden.

(3) Since F is X's genetic parent, the declaration that was made was entirely appropriate.

(4) The judge was right to distinguish *In re S*.

(5) It is accepted that there were errors of approach in the wording of the judgment at [64], but the judge's approach at [63] was correct.

35. X's Children's Guardian was not represented on the appeal, though Mr Michael Gration KC attended as an observer. Because the arguments have been fully explored by the represented parties, I am satisfied that X's perspective has not been neglected.

Analysis and conclusion

36. In this unprecedented case the facts have all been found by the judge, and there is no challenge to them. The only issue is one of legal analysis.

37. I consider that the declarations were rightly made. Having already summarised the legal framework at [11-20] above, I can express my reasons quite shortly.

38. Section 55A FLA 1986 empowers the court to make one or more declarations as to whether or not a named person is or was the child's legal parent. In order to reach a conclusion, the court may have to decide issues both of fact and law, as it did in this

case. Its focus is on the relationships identified in the application, but it must reach its conclusion by normal processes of fact-finding and legal analysis, leading to a conclusion that a named person is or is not the legal parent of the child.

39. Section 58(1) FLA 1986 provides that, where it is satisfied of the truth of the proposition to be declared, the court must make the declaration unless it would be manifestly contrary to public policy to do so. It is not directed to the truth of the underlying facts but to the truth of the declaration – the legal proposition to be declared. It does not import a burden of factual proof into section 55A but mandates the consequences of the court reaching its conclusion about legal parentage, namely that it will make a declaration unless it would be manifestly contrary to public policy.

40. Section 58(3) does not concern the burden of proof either, but prevents the court from making a declaration this is different to the one that has been sought. For example, on an application for a declaration that Mr A is the father of a child, the court may not declare that the father is Mr B. This is a due process provision to prevent declarations being made without proper notice being given and formalities being observed.

41. The judge was right to start from the position that a child's parentage will be defined by the common law, unless it is displaced by the statutory provisions regulating parentage in cases of assisted reproduction. P is X's legal mother. X's genetic father will her legal father, unless that status is displaced by the presumption of legitimacy or by legislation.

42. It is common ground that conception other than by assisted reproduction does not fall under the HFEA 2008. The parentage provisions in Part II (including section 42, on which Q relies) are reached via section 34, which requires that the child has been born as a result of assisted reproduction, as does section 42 itself. For the legislation to apply, that foundational condition must satisfied.

43. Where a declaration of legal parentage is sought, the questions that need to be asked will vary from case to case. In this case, P had the burden of proving as facts that F is X's genetic parent and that she and F had NI during the conception window. That was the burden she bore if her application were to have a chance of success. Even so, it was capable of being defeated if Q could show that the statutory provisions regulating parentage in cases of assisted reproduction were engaged, in other words that the case fell within the statutory footprint. That was the burden that Q had to discharge in order to prevent the declarations being made. In the unusual circumstances of the case, she was unable to do that.

44. That is enough to dispose of the appeal, but I add these observations out of respect for the arguments we received, and because the outcome is a hard one for Q, and perhaps for X.

45. The starting point, notwithstanding the birth registration, cannot be Q's previously understood parental status. The status of legal parentage has to be judged at a point in time, here the moment of conception: see *Re R* at [39]. Everyone, including P until late 2022, proceeded on the misunderstanding that Q was X's legal parent, but once a dispute arose, the legal question had to be resolved on the basis of fact, not supposition.

46. The judge was right to distinguish *In re S (Children)* for the reasons she gave, namely that it concerned the issue of consent to a conception that was the unquestioned result of AI. In the present case, that prior condition was contested.

47. Policy arguments cannot alter the analysis. Notwithstanding Q's commitment to X, her understood status as a legal parent arose from informal arrangements, with all their inherent risks.

48. I agree with Ms Bazley that there are difficulties about some aspects of the judge's reasoning, but that they are inessential to her conclusion, expressed at [63]. The errors are at [64] and [65], cited above:

    (1) As its wording shows, section 42 HFEA 2008 contains a rebuttable presumption of parenthood, not of consent: see *In re S* at [36].

    (2) Likewise, the section does not contain any presumption about the method of conception. Instead, it is predicated on the foundation that the child has been conceived by AI. There is therefore no presumption to rebut: if the foundation is not established, section 42 is simply not engaged. For the same reason, the statements that "AI may not have occurred" and that Q only consented to AI are not relevant to the analysis.

    (3) The submission that Q's case would create an impermissible presumption of legitimacy or parentage for same-sex couples is well-founded.

    (4) The final sentence of [65] is not easy to understand, but if it is taken to mean that there was a burden on P to establish that the birth was not the result of AI, that would be inconsistent with the judge's main reasoning. The burden on P was to show that F was the genetic father and that there had been NI at the relevant time. After that, it was for Q to establish that she had the benefit of the legislation.

49. To conclude, it is understandable that there should be anxiety about the disturbance that can be caused to accepted relationships by later assertions about the means of conception, whether well-founded or mischievous. However, these difficult situations are not confined to cases of assisted reproduction, or to same-sex relationships. They can arise in all walks of life: see, as examples, *Re H & A (Children)* [2002] EWCA Civ 383, [2002] 1 FLR 1145; and *In the matter of the Baronetcy of Pringle of Stichill* [2016] UKPC 16, [2016] 1 WLR 2870. Whatever the family situation, the court will scrutinise the evidence and reach its conclusion in the normal way. This case is exceptionally unusual because the outcome turns on the burden of proof. In other unusual cases involving both AI and NI, the evidence may allow the court to find one means of conception more probable than the other. Where there are alternative possible methods of conception, medical advice may assist in distinguishing between them. And in the present case, there is nothing intrinsically surprising about the conclusion that X's genetic parents are her legal parents. Q's position will be protected by the extensive powers of the family court to make whatever orders X's welfare may require.

50. These are my reasons for dismissing the appeal. After circulating our judgements in draft, we were informed of the outcome of the welfare hearing before the judge. It is

good to hear that all outstanding matters were resolved, and that the judge's order leaves all three adults with parental responsibility for X.

Lady Justice Nicola Davies:

51. I agree.

Lord Justice Arnold:

52. I also agree.
