

Assisted Reproduction and the Welfare of the Child

Sheila A.M. McLean

It is probably true that one of the most controversial provisions in the Human Fertilisation and Embryology Act 1990 is s. 13 (5); the ‘welfare of the child’ provision. Although everyone would doubtless agree that as a society we have obligations towards children, the insertion of this section into the Act has generated considerable academic debate and professional concern. The section reads as follows:

A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father) and of any other child who may be affected by the birth.

The Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Report),¹ which formed the basis of the UK legislation in the area of assisted reproduction, considered the welfare of the future child and concluded that ‘hard and fast rules are not applicable...’² in this situation, preferring to leave the final access decision in the hands of the consultant. Although the Committee recommended that anyone seeking infertility treatment should be provided with the opportunity of advice and investigation, it could also:

...foresee occasions where the consultant may, after discussion with professional health and social work colleagues, consider that there are valid reasons why infertility treatment would not be in the best interests of the patient, the child that may be born following that treatment, or the patient’s immediate family.³

¹ Cmnd 9314/1984

² p. 12, para 2.13

³ p. 12, para 2.12

On this point, it can be said that the Committee concluded relatively inconclusively. Their final recommendation on the welfare issue related merely to the obligation they sought to impose on consultants to provide a full explanation of their decision not to offer treatment.⁴ Nonetheless, the Committee clearly envisaged that there may be occasions when doctors would be disinclined to offer treatment, based on grounds which were non-clinical.

As the Human Fertilisation and Embryology Bill made its way through the House of Lords, however, a more determined attempt was made to define eligibility for treatment services. Indeed, an amendment to the Bill which would have restricted access to married couples was defeated by only one vote.⁵ The compromise that emerges in s. 13(5) is clearly less restrictive, but nonetheless as Lee and Morgan say, '[a]ssisted conception is to be, for the most part, for the married, mortgaged middle classes....'⁶ Jackson agrees, saying '....the purpose of this part of the Act is clear: it incorporates the political and moral belief that the heterosexual, two-parent family is the optimum, or even the only legitimate place to bring up children.'⁷ Indeed, this vision of the 'normal' or appropriate family structure also influenced the Warnock Committee which concluded that '....we believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother, although we

⁴ at p.12, para 2.13

⁵ for discussion, see Lee, R.G. and Morgan, D., *Human Fertilisation & Embryology: Regulating the Reproductive Revolution*, London, Blackstone Press, 2001, particularly at pp 159-167

⁶ op cit, at p. 164

⁷ Jackson, E., *Regulating Reproduction: Law, Technology and Autonomy*, Oxford, Hart Publishing, 2001, at p. 193

recognise that it is impossible to predict with any certainty how lasting such a relationship will be.’⁸

Before evaluating the welfare provision, it is worth outlining how it has been interpreted by the Human Fertilisation and Embryology Authority (HFEA) which was established by the 1990 Act to oversee the provision of services covered by the Act. In its most recent Code of Practice⁹ the HFEA provides the following guidance to licensed clinics:

Treatment centres are expected to ensure that they have clear written criteria for assessing the welfare of any child or children which may be born or which may be affected by the birth of such child or children. Those criteria are expected to include the importance of a stable and supportive environment for any and all children who are part of an existing or prospective family group.¹⁰

The basis of the assessment of prospective parents must be ‘fair’ and should take into account:

- (i) The commitment to raise children
- (ii) The ability to provide a stable and supportive environment for a child/children
- (iii) Immediate and family medical histories
- (iv) The age, health and ability to provide for the needs of a child/children
- (v) The risk of harm to children including:
 - (a) inherited disorders or transmissible disease
 - (b) multiple births
 - (c) problems arising during pregnancy
 - (d) neglect or abuse
 - (e) the effect of a new baby or babies upon any existing child of the family.¹¹

⁸ *op cit*, at pp 11-12, para 2.11

⁹ *HFEA Code of Practice* (6th Edition), Published January 2004, came into effect March 1 2004

¹⁰ 3.3

¹¹ 3.12

Finally, guidance is given as to the nature and extent of the inquiries which clinics are required to conduct in order to make their evaluation:

In their assessment of prospective patients, treatment centres are expected to:

- (i) Take medical and social histories from each prospective parent and see each couple together and separately
- (ii) Obtain the patients' consent to make enquiries of each of their GPs. Refusal by the patients, or either of them, to give such consent is a factor to be taken into consideration in the decision to provide treatment. In such circumstances, the treatment centre is expected to ask the patient's reason for the refusal and record the answer on the patient's medical records. In the absence of such consent, treatment centres are expected to seek to establish the identity of the patient(s) by appropriate evidence e.g. passport, photocard driving licence and birth certificate
- (iii) Once the relevant consents have been received from the prospective patients, ask the GP of both partners if he/she knows of any reason why the patient(s) might not be suitable for treatment and if he/she knows of anything which might adversely affect the welfare of any resulting child
- (iv) Where unsatisfactory responses or no responses to enquiries are received, obtain the further consent from the prospective patient(s) to approach any individuals, agencies or authorities for such further information as the centre deems to be required for a satisfactory assessment. (A response may be deemed to be unsatisfactory, for example, where prospective parents have had children removed from their care or committed a relevant criminal offence.) Refusal by the prospective parents or either of them to give such consent is a factor to be taken into consideration in the decision whether or not to provide treatment.¹²

Flesh has, therefore, been put on the bones of the Warnock Committee's concerns and the rather vague legislative provisions. Despite this, the scope and value of the welfare provision remain controversial, although Jackson suggests that its inclusion has 'gone largely unnoticed.'¹³ Indeed, she continues that:

¹² 3.20

¹³ Jackson, E., 'Fertility treatment: abolish the welfare principle', available at http://www.prochoiceforum.org.uk/irl_rep_tech_1.asp accessed on 1/8/05

...the inclusion of a welfare principle was neither challenged nor defended. It was simply assumed to be self-evidently true that their future children's welfare ought to be taken into account before a couple is offered assistance with conception, and this assumption undoubtedly persists today.¹⁴

Evaluating the welfare of future children

The HFEA agrees that the welfare provision is a compromise; that 'a concern for the welfare of the child to be born as a result of the treatment should be one, but not the paramount, consideration to be taken into account before treatment is offered.'¹⁵

While the fact that the future child's welfare is not to be the sole or paramount consideration is not as restrictive a provision as might have been enacted, it remains nonetheless a pivotal consideration. Moreover, for some it doesn't go far enough. Some, for example, would argue that the welfare principle should be paramount, as it is in adoption legislation. CARE's¹⁶ response to the recent HFEA consultation on the welfare principle argues, for example, that 'the welfare of the child should be one of the fundamental ethical concerns in fertility treatment' and criticises the HFEA for failing to give adequate guidance.¹⁷

On the other hand, others have been critical of the inclusion of this provision, arguing that it is tantamount to an unacceptable intrusion into the private decisions of individuals seeking to achieve what is generally regarded as a social good; namely, the birth of a child. In the House of Lords debates on the Bill, Lord Ennals for example said '[h]aving children is a private area of human affairs. I believe that it is really not for the state to decide who should or should not be allowed to bear

¹⁴ *id*

¹⁵ *Tomorrow's Children: A consultation on guidance to licensed fertility clinics on taking in account the welfare of children to be born of assisted conception treatment*, HFEA, 2005, para 2.1

¹⁶ CARE describes itself as a mainstream Christian Charity

children...'.¹⁸ Moreover, it has been said that by its nature the legislative provision is 'incapable of distinguishing between adequate and inadequate parents.'¹⁹

Before considering the specific terms of the welfare principle in more depth, there is one further critique of its applicability in assisted reproduction that is hard to defeat; namely, and despite the HFEA's Code of Practice, the question as to how is it possible to evaluate the likely welfare of a child yet to be conceived? On what criteria should this judgement be based, and from where would we pluck the principles on which it could be based? As has been said:

....if the birth of a child should always be a cause of celebration, how could you appeal to a future child's welfare in order to decide that his or her birth would not be something to be celebrated? If the law always treats conceiving a child as beneficial, how could it at the same time enjoin infertility clinics to weed out would-be-parents on the grounds that their child's conception would no be beneficial?²⁰

Additionally, from a practical perspective, it is virtually impossible to identify welfare interests as they will inevitably change with time. For example, the fact that a couple has a stable relationship at the time of seeking assistance is no guarantee that this will be the case when the child is born. Indeed, how can the welfare of a potential child ever be judged to be that it should not be born at all? Moreover, from a legal perspective, courts have consistently declined to engage in valuing life against non-existence, yet it appears that this is what we expect clinicians to achieve.²¹

¹⁷ Tomorrow's Children, Response from CARE to the HFEA Consultation on the Welfare of the Child – Transcript

¹⁸ House of Lords, Official Report, 6 February 1990, col 789

¹⁹ Jackson, transcript, *supra cit*

²⁰ *id*

The Need for a Father?

One of the factors required by law to be taken into account in the welfare judgement is the child's need for a father. This provision was undoubtedly designed to demonstrate support for the standard, heterosexual family unit, and thereby to discourage – if not disallow – single and lesbian parenting. Unsurprisingly, the insertion of this requirement into the welfare provision generated considerable heat. For some, such as the Warnock Committee which, as we have seen, expressed a preference for 'children to be born into a two-parent family, with both father and mother...'²² it is self evident that this is the situation most likely to create the environment best suited to bringing up children. For others, it is thinly disguised prejudice against single and gay people, seeking to prevent them from doing what others are permitted – even encouraged - to do; that is, becoming a parent.

So what would be the fears for children in families which lack a father? These can probably be split into two major parts; first, are the possible social considerations and second, where the single woman is lesbian, possible influences on sexual and psychological developments.

Social considerations

Although the married, heterosexual family remains the ideal for many people, in fact the reality of the modern world is different. Golombok, writing in 2000, noted for

²¹ see the terms of the Congenital Disabilities (Civil Liability) Act 1976 (England and Wales);

example that ‘more than 40 per cent of children find themselves in a single-parent family at some time during their school-age years.’²³ Like other authors, she agrees that children in one-parent families are ‘less likely to do well at school and are more likely to develop psychological problems than children in two-parent families.’²⁴ O’Neill reports that single mothers:

- Are poorer
- Are more likely to suffer from stress, depression, and other emotional and psychological problems
- Have more health problems
- May have more problems interacting with their children²⁵

She concludes, therefore, that:

The weight of evidence indicates that the traditional family based upon a married father and mother is still the best environment for raising children, and it forms the soundest basis for the wider society.²⁶

Golombok, on the other hand, suggests that it is not the absence of a parent *in se* that causes problems, but rather the difficulties associated with it. She argues that ‘.....what is clear is that the circumstances of single-mother families can be just as diverse as those of two-parent families, and it seems that it is the circumstances in which these families find themselves, rather than the absence of a parent, that matter most for the child.’²⁷ Thus, although there are signs that children in single parent families may have certain disadvantages – indeed may even be more anti-social than

McKay v Essex Area Health Authority [1982] 2 All ER 771

²² p. 11, para 2.11

²³ Golombok, S., *Parenting: What Really Counts?*, London, Routledge, 2000, reprinted 2001, at

p. 3

²⁴ at p. 13

²⁵ O’Neill, R., *Experiments in Living: The Fatherless Family*, available at

<http://www.civitas.org.uk/pubs/experiments.php> accessed on 01/08/05

²⁶ *id*

others²⁸ – the level of risk to them (and others) is moot. Whether this is sufficient reason to deny single women the option of reproducing may also be moot and will certainly depend on the approach taken to reproduction and parenting. This will be returned to *infra*.

Sexual and Psychological Problems

It is evident that not only is there resistance to the deliberate creation of single parent families, but there is also concern surrounding families when the single parent, or the partners to a relationship, are lesbian. The possibility of a child growing up with no male role model has caused anxiety, both about the child's socialisation and about its sexual orientation.

Golombok *et al*, however, deduced from a study of children with lesbian parents that the parent-child relationship was positive and the children well adjusted.²⁹ Stevens *et al*, conclude that the gender role development of pre-school children is typical even when there is no resident father figure.³⁰ Golombok also concludes that 'father absence appears to make little difference to sex-role development for either boys or girls....',³¹ citing evidence that '...in both the UK and the USA, children from lesbian families have been found to be just as well adjusted as children from heterosexual homes.'³² In fact:

²⁷ *op cit*, at p. 13

²⁸ see O'Neill, *supra cit*

²⁹ Golombok, S, et al, 'Children with lesbian parents: a community study', Developmental Psychology, 2004;39:20-23

³⁰ Stevens, M., et al, 'Does father absence influence children's gender development? Findings from a general population study of preschool children, Parenting: Science and Practice 2002;2:47-60

³¹ *op cit*, at p. 21

³² *op cit*, at p. 56

The gender identity of children raised by lesbian mothers was found to be in line with their biological sex. These children were not at all confused about their gender identity; the boys were quite sure that they were male, and the girls that they were female. Neither did the sons and daughters of lesbian mothers differ from the sons and daughters of heterosexual mothers in their preference for masculine and feminine toys, games and activities.³³

As for sexual orientation, '[a]lthough children of lesbian mothers, particularly daughters, are more likely to consider the possibility of, and experiment with, same-sex relationships, the large majority of both sons and daughters of lesbian mothers identify as heterosexual when they grew up.'³⁴ Again, such evidence as there is suggests that sexual orientation is unlikely to be affected by being brought up in a same sex relationship. Thus, even if one disapproves of such relationships, unless we approach parenting with firm - perhaps excessive - attention to the precautionary principle, it is not self-evident that the welfare of children is adversely affected by the sexuality of their family. In any event, some people's disapproval of sexual orientation is scarcely an acceptable basis on which to make significant inroads into people's liberties.

There are, of course, standard heterosexual families in which children are put at direct risk by their parents' behaviour, and it may be that similar patterns occur in single parent or same sex families. However, there does not appear to be a direct correlation between the kind of family unit in which children live and the inevitability of harm. One leading commentator in this area has concluded, therefore, that:

³³ Golombok, *op cit*, at p. 54

³⁴ Golombok, *op cit*, at p. 54

It is no longer appropriate to assume that traditional families are good and non-traditional families bad for children. What matters most for children's psychological well-being is not family type – it is the quality of family life.³⁵

Interestingly, one case stands out as an exception to the assertion that children have a need for a father; namely the case of Diane Blood.³⁶ It will be remembered that in this case, Mrs Blood arranged for sperm to be removed from her moribund husband with the express intention of seeking to use it to conceive following his death. For our purposes, what is important about this case is not the technicalities of the lawfulness or otherwise of the removal and storage of the sperm,³⁷ but is rather the approach of both society and the law to her deliberate intent to create a child who would have no father. The Warnock Report specifically considered this situation and recommended that such pregnancies should be 'actively discouraged'.³⁸ In response, the Government concluded that although 'many people are uneasy about this practice' it was not felt 'at present that this should be prohibited by law, although, obviously, it is not a practice which should receive active encouragement.'³⁹

Of course, each of these preceded the passing of the 1990 Act, but Mrs Blood's case did not. It might, therefore, have been expected that it would have been concluded that the deliberate creation of a deliberately fatherless family would offend the welfare principle, just as much as any other case – for example a single or lesbian woman – might. As Mrs Blood was in the event given permission to obtain treatment services overseas, it was not necessary for the UK's welfare provision to be invoked.

³⁵ Golombok, *op cit*, at p. 104

³⁶ *R v Human Fertilisation and Embryology Authority ex parte Diane Blood* [1997] 2 All ER 687

³⁷ for a full consideration, see McLean, S.A.M., *Consent and the Law, Review of the current provisions in the Human Fertilisation and Embryology Act 1990, Consultation Document and Questionnaire*, London, Department of Health, 1997; McLean, S.A.M., *Review of the Common Law Provisions Relating to the Removal of Gametes and to the Consent Provisions in the Human Fertilisation and Embryology Act 1990*, London, Department of Health, 1998

Interestingly, however, there was considerable support for her desire to have children using her deceased husband's sperm. 'The Times', for example criticised the HFEA's refusal to permit her to sue the sperm as showing 'an unyieldingness that seems singularly inappropriate in this case';⁴⁰ 'The Guardian' called its decision 'callous and pedantic'.⁴¹ In addition, Bills were introduced in both Houses of Parliament, although they were subsequently withdrawn, which would have waived the written consent requirements in certain (unspecified) circumstances.⁴² It may seem somewhat illogical that parliamentarians, many of whom will have voted in favour of the welfare provision, were so ready to abandon it in Mrs Blood's case.

Fitness for Parenting?

If the constraints intended by the welfare principle cannot be justified on the basis of the need for a father or the sexual orientation of the parent(s), is it justifiable on other grounds? Is the real agenda not directly about the child, but rather about our judgement on prospective parents? Clearly, although it may be well nigh impossible accurately to evaluate the welfare of the future child in terms of the presence or absence of a father-figure, it may be possible to make certain predictions based on other characteristics of the intending parents. As we have seen, the HFEA's Code of Conduct places considerable emphasis on this in its guidance to clinics. Certainly, we probably all know of people who we believe would be better not to have become

³⁸ at p.55, para 10.9

³⁹ *Human Fertilisation and Embryology: A Framework for Legislation*, Cm 259/1987, para 59

⁴⁰ 18 October 1996

⁴¹ 4 October 1996

⁴² Human Fertilisation and Embryology (Amendment) Bill (HL Bill 19, 1996); Human Fertilisation and Embryology (Consent) Bill (Bill 28, 1996)

parents, but that is a deduction usually drawn after the fact. In the case of assisted reproduction, of course, the conclusion is sought before the child is even conceived.

In its consultation document, *Tomorrow's Children*,⁴³ the HFEA identifies a number of possible harms to children. These may be 'medical, physical, psychological or social'.⁴⁴ Medical harms, such as the transmission of genetic disease, are of no interest in this discussion, but clearly the others are. The HFEA describes physical harms as possibly arising when:

...either parent has a history of child abuse or neglect. They may have been convicted of a child-related offence or they may have had a child or children taken into the care of a local authority. A child may also be at risk of physical harm from a drug or alcohol addicted parent, either during the pregnancy or once the child is born.⁴⁵

Psychological harm may be the result of growing up in a particular family structure, or may arise because of the family's general situation.⁴⁶ Finally, social harms may arise when:

...the care they receive from their parents is compromised. This might be because the parents are older, their health is impaired or the parents' relationship is unstable. Where there will be no legal father, a social harm could also be a lack of contact with male adult role models.⁴⁷

Of course, each of these factors may well compromise a child's welfare, and society has in place mechanisms – social and legal – to offer protection for children who find themselves in such circumstances. However, neither of these has direct relevance to

⁴³ *supra cit*

⁴⁴ *supra cit*, 2.3

⁴⁵ *id*

⁴⁶ *id*

⁴⁷ *id*

the unconceived. Social mechanisms cannot kick in until there is a person to protect, and equally, as Jackson points out, ‘...family law’s protective function only applies to a child who already exists, and has no bearing upon a couple’s choices prior to conception.’⁴⁸

Some commentators, therefore, have suggested that the welfare of the child principle is not only a disguise for prejudice against people based, for example, on their sexual orientation, but is in reality a fitness for parenting test, reminiscent of the days when states believed that only the ‘fit’ should be allowed to reproduce. If so, they ask, then why should we confine ourselves to scrutinising people undergoing assisted reproduction; why not prevent others whom we believe to be potentially harmful to their children from reproducing? Harris, for example, says:

...if we are serious that people demonstrate their adequacy as parents in advance of being permitted to procreate, then we should license all parents. Since we are evidently not serious about this, we should not discriminate against those who need assistance with procreation.⁴⁹

Of course, it may be objected that there is a difference between the two situations.

Where people can conceive naturally, assessing their suitability to parent would involve policing the bedroom; something both practically and ethically unacceptable. This is not, however, definitive; the fact that we have a commitment to respecting people’s private choices – a commitment reinforced by the terms of the Human Rights Act 1998 – may not apply if we deem assisted reproduction to be a public rather than a private issue. It might, therefore, be argued that whereas reproduction by sexual

⁴⁸ Jackson, E., *Regulating reproduction: Law, Technology and Autonomy*, Oxford, Hart Publishing, 2001, at p. 195; see also *Re F (in utero)* [1988] 2 All ER 193

⁴⁹ Harris, J., ‘Rights and Reproductive Choice’, in Harris, J. and Holm, S. (eds), *The Future of Human Reproduction: Ethics, Choice and Regulation*, Oxford, Clarendon press, 5-37, at p.7

intercourse is essentially a private matter, once assistance is required to facilitate reproduction it becomes a public matter and the state gains a right to impose restrictions. Even if this is so – and it is highly debatable – any limitations must be justified as proportionate to the consequence sought to be avoided. In the absence of evidence that the inclusion of the welfare provision in the legislative framework is based on sound evidence, it is difficult if not impossible to satisfy the proportionality argument. As Jackson argues, our reluctance to interfere with the procreative liberty of those who can conceive without assistance, and our enthusiasm for curtailing that liberty in those who need help to conceive, means that ‘the welfare of future children occupies a curious middle ground, in which it is always less important than fertile couples’ bodily integrity and sexual privacy and more important than infertile couples’ decisional privacy.’⁵⁰

Indeed the recent report from the House of Commons Select Committee on Science and Technology agrees that the welfare provision is ‘more akin to a ‘fitness for parenting’ requirement, which was historically used to prevent certain ‘undesirable’ groups from reproducing and is now widely rejected.’⁵¹

Nonetheless, the HFEA’s consultation document records that many of those working in the area of assisted reproduction believe that the welfare of the child principle is useful. The document notes that ‘[m]ost respondents from staff working in clinics regard the welfare of the child assessment as an important part of clinical practice.’⁵² Closer inspection of this review of clinics, however, also shows that clinics seldom

⁵⁰ *loc cit*, transcript

⁵¹ House of Commons Science and Technology Committee, *Human Reproductive Technologies and the Law*, HC 7-1 (2005), at p. 45, para 93.

⁵² Para 3.1

turn patients down for treatment, which either means that virtually all of those presenting for treatment are the classic ‘good’ heterosexual patient in the ideal marriage (unlikely) or in fact that clinics do not regard the welfare of the child principle as being of major importance. If so, its continued existence as part of the legislative framework and the decision-making process about access to treatment services must be in doubt on these grounds alone.

The House of Commons Select Committee Report

There are, as we have seen, other reasons to doubt the soundness of the welfare principle. It has already been argued that it is vague and that it is not based on relevant evidence. There are, however, other strong arguments against retaining it which were canvassed by the House of Commons Select Committee on Science and Technology in its recent report, *Human Reproductive Technologies and the Law*.⁵³

Describing the welfare of the child provision as ‘contentious’ and as having ‘prompted widespread concerns of principle and practicality...’,⁵⁴ the Report aligns itself firmly on the side of those who oppose it as being discriminatory, disproportionate and disingenuous. The Select Committee’s approach to the welfare principle is in part predicated on its avowed approach to assisted reproductive services in general. For the Committee, assisted reproduction is essentially standard medical practice and should be subject to minimal state regulation. This aspect of the Report is based in large part on John Stuart Mill’s rejection of state intervention unless it can

⁵³ HC 7-1 (2005)
⁵⁴ at p. 44, para 91

be shown that failing to prevent certain behaviour will result in harm to others.⁵⁵

This approach predicts two conclusions. First, that the precautionary principle is inappropriate; rather those who object to certain practices should be required to establish that harm results. Second, in the case of welfare assessments carried out before conception, there is no 'person' to be harmed and therefore no basis to intrude into reproductive behaviour.

The Report also notes that the welfare provision is unevenly applied:

If one accepts that the welfare of the child provision is important and that the involvement of healthcare professionals justifies an erosion of liberty, logic would dictate that any professional intervention to overcome infertility or subfertility should be subject to the same standards. IVF is just one of a number of techniques that include ovulation induction, tubal and uterine surgery, surgical management of endometriosis, IUI and GIFT. Only with the last two is a welfare of the child assessment required, and only if donor sperm is being used. The exclusive requirement to consider the welfare of the child for fertility treatments where fertilisation takes place outside the woman or involves donated sperm is illogical. If the legislation aims to regulate the treatment of infertility or subfertility then it should cover all forms of interventions. If it wishes to do both then this needs to be clearly stated and justified.⁵⁶

For the Select Committee no, or inadequate, justification for the legislative provision could be found. The intrusion into individuals' reproductive decisions could not be supported. The Report concluded therefore that the welfare provision 'discriminates against the infertile and some sections of society, it is impossible to implement and is of questionable practical value in protecting the interests of children born as a result of assisted reproduction.'⁵⁷ It should, accordingly, be abolished in its current form.

⁵⁵ 'On Liberty'

⁵⁶ at p. 50, para 105

⁵⁷ at p. 51, para 107

Conclusion

The genesis of the welfare provision lies in a conservative approach to parenting, and in particular in the leap into the dark that was made when assisted reproduction moved from science fiction to science fact. When Warnock was reporting, and when the Human Fertilisation and Embryology Bill was moving through its parliamentary stages, much was unknown about the safety of various forms of assisted reproduction, and a principle calling for the highest technical standards would have been intelligible. That the legislators went beyond that and moved into the realms of assessment of quality is perhaps unfortunate, albeit that it may also have been explicable in the face of uncertainty.

Things have moved on since then, however, and arguably even if there was a reason for the welfare of the child provision in 1990, it is less easy to justify it in the early part of the 21st Century. Even the Department of Health seems to have acknowledged this. In its written evidence to the Select Committee the Department noted that in its review of the provisions of the legislation it would need to pay attention to social change, saying:

Changes in societal attitudes and developments in human rights legislation have taken place since the introduction of the Act, and the review will need to consider the extent to which the Act has kept pace with these. The Act is, for instance, framed in terms of heterosexual couples receiving assisted reproduction treatment. We will consider in the review of the Act, particularly through the public consultation exercise, the extent to which changes to the Act may be needed to better recognise the wider range of people who seek and receive assisted reproduction treatment in the 21st century.⁵⁸

However, in her verbal evidence to the Select Committee, the then Parliamentary Under-Secretary of State for Public Health, Melanie Johnson, seemed to place even more importance on the welfare of the child provision than does the current law, declaring that ‘the welfare of the child has to be the overriding main concern of anybody working in this area. The main overriding concern is the welfare of the child.’⁵⁹ Following subsequent questioning she said that ‘the single most important factor is the welfare of the child.’⁶⁰

This emphasis on the welfare provision may alter with changing Government Ministers, but it seems to reflect the presumption that welfare calculations are both feasible and desirable. Whether this position, or the more radical approach of the Select Committee, will dominate remains to be seen. This is not a trivial question. Although few intending parents are turned down for treatment – one notable exception being the case of *R v Ethical Committee of St Mary’s Hospital (Manchester) ex parte Harriott*⁶¹ - its very existence can and should be evaluated on the basis of principle rather than the frequency of its use. The privacy rights guaranteed by, for example, Article 8 of the European Convention on Human Rights, incorporated into UK law by the provisions of the Human Rights Act, are defeasible on limited grounds, namely where this:

....is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁶²

⁵⁸ Memorandum from the Department of Health, Ev 195-200. Ev 197, para 21

⁵⁹ Ev 185

⁶⁰ *id*

⁶¹ [1988] 1 FLR 512

It must be at least arguable that the welfare principle cannot be said to satisfy any of the permissible derogations from the basic right. Indeed, it has been described as ‘an invidious and opportunistic invasion of infertile people’s privacy.’⁶³ If it can thus be described, and Article 8 were deemed to be engaged by the welfare provision, it is likely also to run foul of the non-discrimination provision in Article 14 of the Convention.

The final question, therefore, must be: what is the welfare provision for? If it is seldom invoked to deny access to treatment, and if it is based on little or no empirical evidence, its ethical status must be in doubt. Further, it is generally unwise to include in legislation concepts which are difficult to define, readily open to subjective interpretation and not justified by evidence. The case of Diane Blood, already referred to, is also testimony to the ease with which such provisions can be discarded in the face of a sympathetic individual. Mrs Blood now happily has two healthy and much loved children and has written movingly about her experiences in a book, *Flesh and Blood: The Human Stories behind the Headlines*.⁶⁴ The welfare provision could have been used to prevent the birth of these children and it is perhaps instructive that when confronted head on by a forceful and intelligent media campaign by Mrs Blood, resistance to the deliberately created fatherless family waned considerably. Even Baroness Warnock supported her case, despite having previously and explicitly disapproved of such a situation arising. If the welfare provision is to be honoured more in the breach than in reality, this surely puts one final nail in its coffin. To be sure the state has an obligation to protect the welfare of children. What it arguably

⁶² Article 8 (2)

⁶³ Jackson, transcript, *supra cit*

⁶⁴ Edinburgh and London, Mainstream Publishing, 2004

does not have is the right to force superfluous and discriminatory rules on those who merely seek to establish a family.