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Introductory note by Francis Bennion The Note below was updated by my three-part article (See www.francisbennion.com/2008/001.htm) on the fatherhood item in the 2007-08 Human Fertilisation and Embryology Bill [HL]. This article was published early in 2008.

Ambiguous amendments on fatherhood in the Human Fertilisation and Embryology Bill 2007 [HL]

by Francis Bennion[1]

There are technical defects in provisions contained in the Human Fertilisation and Embryology Bill [HL]. Projected repeals in the Human Fertilisation and Embryology Act 1990 ss 13(5) and 25(2) would remove parentheses relating to a child's need for a father. As the Bill stands it is uncertain precisely what effect the removal of these parentheses is intended to have. It seems most likely that the Bill intends that in future cases the need for a father is to be disregarded in decisions regarding the giving of fertilisation treatment. The following note suggests that the Bill should be altered to make the intention clear.

There are technical defects in provisions relating to a child's need for a father which are in the Human Fertilisation and Embryology Bill. This Government Bill proposes to amend the Human Fertilisation and Embryology Act 1990 in various ways. It was given an unopposed second reading by the House of Lords on 21 November 2007. The Committee stage was completed in December. The Report stage and Third Reading are scheduled for 15 January 2008. The Bill will then proceed to the House of Commons.

The faulty amendments

There are two faulty amendments, both dealing with the same point about the need for a father. The first is to section 13(5) of the 1990 Act, which states:

> (5) 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 faulty amendment to this (which I will call amendment A) is in clause 14 of the Bill, subsections (1) and (2) of which read:

> (1) Section 13 of the 1990 Act (conditions of licences for treatment) is amended in accordance with subsections (2) to (4).
> (2) In subsection (5), omit—
>
> * * *
>
> (b) "(including the need of that child for a father)".

The parenthesis directed to be omitted is repealed by clause 66 and Schedule 8 Part I of the Bill. This form of double repeal is usual.[2]

[1] Aged 85. Retired Parliamentary Counsel. Author of various works on statute law, including *Bennion on Statutory Interpretation* (fifth edition forthcoming).
[2] For the reasons behind the practice of double repeal see *Bennion on Statutory Interpretation* (4th edn, 2002), section 86 (pages 253-254).

The second faulty amendment is to section 25(2) of the 1990 Act. This states, in relation to the code of practice required by section 25(1) to be maintained by the Human Fertilisation and Embryology Authority (HFEA):

> (2) The guidance given by the code shall include guidance for those providing treatment services about the account to be taken of the welfare of children who may be born as a result of treatment services (including a child's need for a father), and of other children who may be affected by such births.

The faulty amendment to this (amendment B) is in clause 23 of the Bill, subsections (1) and (2) of which read:

> (1) Section 25 of the 1990 Act (code of practice) is amended as follows.
> (2) In subsection (2), omit "(including a child's need for a father)".

Again, the parenthesis directed to be omitted is repealed by clause 66 and Schedule 8 Part I of the Bill.

It should be noticed that in both these cases the repealed provision is a *parenthesis*, defined by the OED as an explanatory or qualifying word, clause or sentence. It is not a proposition in itself, but explains or qualifies the proposition to which it relates. If deleted it leaves that proposition with the meaning it possesses in itself. When however it is contained in an Act of Parliament and deleted by a later Act of Parliament there is need for the later Act to indicate why it is being deleted and with what intention. Here the Bill fails to do that, so there is uncertainty. Statute law should be clear and certain.

How the amendments are ambiguous

I will conduct the main discussion by reference to amendment A because amendment B is really consequential on it. As proposed to be amended by the deletion of the parenthesis relating to the need of the child for a father (amendment A), section 13(5) of the 1990 Act would read:

> (5) 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, and of any other child who may be affected by the birth.[3]

This has four different possible legal meanings.[4] If the provision is read without regard to its legislative history, that is without paying attention to its original wording and the effect of the Bill, one would naturally think (what I will call meaning 1) that the general reference to "welfare" included due consideration of the position with regard to a father, though without special emphasis. Taking it into account (or not) would be a question of discretion, to be exercised in accordance with the reasonable opinion of those taking the decision whether or not to administer IVF treatment in the instant case.

If the provision is read with regard to its legislative history, one is faced with this question. Was meaning 1 really what Parliament intended when it repealed the parenthesis? Perhaps Parliament meant (meaning 2) that the need for a father was so obvious that there was after all no need to single it out for special mention and that it was undesirable to stress this one aspect by doing so.

[3] The way the 1990 Act would be worded if the Bill were passed in the form in which it was introduced is helpfully shown in a document dated 8 November 2007 published on the Department of Health website at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_080205

[4] The meaning intended by Parliament, which may not be the same as the grammatical meaning, is known as the legal meaning: see Bennion, *op. cit.*, sections 2 and 3 (pages 14-16).

Or perhaps it meant (meaning 3) that Parliament wished to signal that it so dislikes the need for a father being taken into account that it intended, from the commencement of amendment A, that that need should be altogether disregarded.

Another possibility is that Parliament considered the parenthesis to be no longer appropriate because either there is an actual father or, with a lone woman being treated as the sole parent, or two women together being treated as sole parents, the question of a father simply does not arise. Here (meaning 4) amendment A would be regarded as simply a piece of statute law revision.

The following table sets out the four possible meanings.

1	The general reference to "welfare" in section 13(5) as amended includes due consideration of the position with regard to a father, but without special emphasis.
2	Section 13(5) as amended is to be construed in the same way as its unamended version.
3	The question of the need for a father should not be considered.
4	The question of the need for a father does not arise.

Which of these four meanings would Parliament be taken to have intended if the Bill remains as it is? The rules of statutory interpretation should come to our rescue here.[5] I would say as a brief summary that when the literal rule of interpretation held sway it would have been plausible to favour meaning 1. After the commencement of amendment A the wording of section 13(5) will be as shown above and (it would have been said) effect should be given to its literal meaning. Now we have purposive construction and the informed interpretation rule.[6] These point to meaning 3 or meaning 4, which have broadly the same effect. This leaves meaning 2 unsupported.

Lord Darzi's explanations

Under the rule in *Pepper v Hart*[7] statements made in debate by the sponsor of a Bill may be admissible in aid of interpretation, so long as they are "clear". On this Bill the Government spokesman in the House of Lords was Lord Darzi of Denham. I give below all statements by him in the debates so far that bear on the question.[8] On second reading he said:

1. Many speakers, including the most reverend Primate the Archbishop of York and the noble Baroness, Lady Deech, have mentioned the child's need for a father. I hope that I may be able to address some of the concerns through further explanation of the Government's thinking. Many of the concerns raised appear to be motivated not by any practical effect that the clause may have in relation to assisted reproduction but by a general concern for the perceived signal or message that may be derived from its removal. I understand that concern.

2. Let me say at the outset that the proposal is not motivated by any attack on fathers or on the concept of fatherhood. Nor is it motivated by a simplistic desire for political correctness. The Government recognise clearly the extremely important role that

[5] See generally, Bennion, *op. cit.*, section 78 (pages 240-243).
[6] The informed interpretation rule says that the person who construes an enactment must infer that Parliament intended it to be given a fully informed, rather than a purely literal, construction. For further details of the rule see Bennion, *op. cit.,* Parts XIII and XIV.
[7] 1993 AC 593.
[8] Emphasis added. To assist reference I have also added numbering.

fathers can and do play in their children's lives and the consequences that can follow where a relationship breaks down. Many measures taken by this Government are aimed at strengthening the role of fathers and ensuring that they are aware of their responsibilities.

3. However, today's debate deals with a very specific context: a fraction of the fewer than 1.5 per cent of births in the UK that result from licensed assisted conception treatments. Hence, we are talking about a few hundred children. The issue is what duties the state imposes on clinicians regarding whom they may or may not treat, or whether access to services—including those purchased privately—should be easier or harder for certain groups of people. Naturally, that will involve us considering our own individual views, to which we are well entitled, on the desirability of different family forms. However, unless the law is to be purely rhetorical, we must look at what is the intended outcome and whether it is justified by evidence.

4. The duty to consider the welfare of the child is subject to the HFEA guidance, which states:

   > "*Where the child will have no legal father the treatment centre is expected to assess the prospective mother's ability to meet the child's/children's needs and the ability of other persons within the family or social circle willing to share the responsibility for those needs*".

5. There is no ban on single women or same-sex couples receiving assisted conception treatment. There is no requirement in the law as it stands that there must be a father or any man involved in the upbringing of the child. The outcome intended to be achieved by the current law is therefore extremely unclear—or, as the noble Baroness, Lady Warnock, said, ineffective and wishy-washy.

6. Undoubtedly, we want anyone contemplating having children to think through the implications. Given the nature of the procedures in question, we are talking about people who will almost invariably have considered very carefully their decision to approach treatment services and who will have decided to act responsibly. In addition, the law requires the provision of information and an offer of counselling.

7. We must also remember that from a medical standpoint there may be no need to involve the services of a clinician at all. Informal arrangements for artificial insemination can take place. We must be careful that there is no perverse incentive for some people to avoid regulated services and the quality and safety assurances that they provide. The Government propose to retain the overarching requirement to consider the welfare of the child, which in practice, following consultation by the HFEA, *focuses on the likelihood of serious harm to the child.*

8. In relation to fathers, there is clear evidence of poorer outcomes for children where a marriage or partnership breaks down and the father is then absent. It is right and proper that that should be addressed. However, in the context that we are discussing today, the available research evidence suggests that it is the quality of parenting that is the factor of prime importance, not the gender of the parent per se—a point strongly emphasised by my noble friend Lady Hollis.

9. Elsewhere in the Bill there are provisions to extend legal parenthood in cases that recognise the family forms that already exist in practice, if not in law. The Government came to the view that, on balance, the reference in the 1990 Act to the need for a father should be removed in favour of the general duty to consider the

welfare of the child. This does not prevent us from valuing the role of fathers in their children's life, but it recognises the crucial role played by all parents.[9]

At the Committee stage Lord Darzi said:

10. I stress that the Government's decision to propose the removal of the phrase, "including the need for a father", is not motivated by any attack on fathers or the concept of fatherhood. Nor is it an attempt at political correctness. The Government recognise clearly the extremely important role played by fathers in their children's lives and the serious consequences that can follow where a relationship breaks down. That is why the Government have taken action to strengthen the role of fathers and to ensure that fathers are aware of their responsibilities.

11. However, we are dealing here with a very specific context, and other factors come into play. As the noble Baroness, Lady O'Neill, said at Second Reading, we are all clear that the legislation does not in any way abolish the biological reality of fathers. That is quite correct: the Bill will not sweep away the biological need for men, but nor will it change the social reality of fathers for the overwhelming majority of families in this country, either now or in future. The idea that the Bill in any way sounds the death knell for fathers is very far removed from the truth.

12. The question that we are dealing with is the duties placed on clinicians by law to examine and judge their patients. As a clinician, I am well aware of the difficulty of making such judgments about people's circumstances and predicting with certainty what may happen at a later date. The Government came to the view that, on balance, the reference in the 1990 Act to, "the need for a father", should be removed, but that the general duty to consider the welfare of the child in a broad sense should remain. Clause 14(2)(b) removes the words, "including the need of that child for a father", from Section 13(5) of the 1990 Act.

13. There is no ban on single women or same-sex couples receiving assisted-conception treatment. There is no requirement in law that there must be a father or any man involved in the upbringing of the child. Nor is it a matter of policy that single women or same-sex couples should not be able to access clinics.

14. The outcome intended to be achieved by the wording of the 1990 Act is therefore unclear. As the noble Baroness, Lady Warnock, has previously remarked, it is ineffective and wishy-washy. To retain the provision would be to perpetuate a confusing and potentially discriminatory situation. I echo the lucid analysis of my noble friend Lady Hollis, at Second Reading, that fathers belong in children's lives but that the phrase does not belong in the Bill. Either the question is meaningless, or the answer is ignored, or both are meaningful and therefore discriminatory.

15. Amendment No. 55, tabled by the noble Baroness, Lady Deech, would retain the existing requirement for consideration of a child's need for a father to be a condition of a treatment licence. Amendment No. 56 adds the requirement to consider the child's need for a mother.

16. The Bill retains the provision that requires a clinician to take into account the welfare of any child born as a result of treatment services when providing treatment. By removing the requirement to consider the need for a father, we are recognising the existence of a wider range of family arrangements. It is vital that children are raised in a loving and supportive family environment. The evidence suggests that the quality of parenting is the factor of prime importance and not necessarily the gender, or even the size, of the family. The Government fully recognise the important role that fathers play in their children's lives. The proposal does not detract from that role but it does recognise the crucial role played by all parents.

[9] Lords Hansard, 21 November 2007, cols 868-869.

17. The noble Lord, Lord Alton, referred to a man being pursued by the Child Support Agency after providing sperm to a lesbian couple. My understanding is that the sperm was donated through a private arrangement—outside the scope of the Bill—and the removal of the provision on the need for a father will seriously encourage that in future. It did not come under the provision of the 1990 Act. Therefore, legally, the sperm provider, or the donor, is the father of that child.
18. The noble Baroness, Lady Finlay, talked about the responsibility that will be placed on a clinician. It will be interesting to debate that when we discuss—next April, I believe—the Bill on professional regulation. However, I doubt that any clinician would take responsibility for that assessment if the Bill remains with the provision on the need for a father.
19. The noble Baroness, Lady O'Cathain, has signalled her intent to oppose clauses in Part 2 and the associated Schedule 6. She has made clear her views about the importance of parenthood and the foremost interest of the child within the family setting. She has been supported by many noble Lords, who have expressed their concerns most forcefully. I fully understand the points made about the general principle that children should be brought up in a supportive family environment. No one would disagree with that. However, it is essential that we do not become sidetracked by general principles, important as they are, and risk losing sight of precisely what the Bill seeks to achieve.
20. In essence, the Bill seeks to address current anomalies in the law in which parenthood is bestowed following treatment involving donated sperm. Addressing these anomalies is in the best interests of the child. Let me be clear what those anomalies are. At present, if an unmarried man and a woman, who may have known each other only for a short time, have treatment together at a licensed fertility clinic using donated sperm, the man will, as a matter of course, be regarded as the father of any resulting child. He will be recorded on the child's birth certificate as such.
21. In comparison, where two women in a civil partnership, who have been in a stable relationship for many years, have treatment in a licensed clinic using donated sperm, they are treated very differently. First, although the civil partner who gives birth is regarded, quite rightly, as the mother of the child, the other civil partner has no parental recognition or rights in respect of the child at all—this is a child, let us not forget, who is born to her legal partner. Secondly, the child would have only one parent, the mother, recorded on their birth certificate. These anomalies do not serve the best interests of the child. The Bill addresses them by enabling the child in such a situation to have two legal parents instead of one, both of whom could be recorded on the birth certificate as the mother and a parent.
22. Let me take this opportunity to clarify that it is our intention that the child will have one mother and a parent, not two mothers. The woman who gives birth to the child will be the mother of the child. Clause 33 is absolutely clear about this. I hope that this clarification will put your Lordships' minds at ease, knowing that it is not the Government's intention to allow for a child to have two mothers.
23. We must keep in mind that the legal parenthood provisions in the Bill appear only where donated sperm is involved. The 1990 Act ensures that sperm donors are not regarded as the father of any children born from their donation. Recognition of a same-sex couple as the parents of the child born following treatment with donor sperm does not take the parenthood from the father or oust him from the birth certificate, because there is no legal father. On the contrary, it enables the child to have two legal parents. Surely that must be in the best interests of the child.
24. On Amendments Nos. 57A and 59B, tabled by the noble Baroness, Lady O'Cathain, the Bill sets out that any woman shall not be provided with treatment services unless

she, and any man or woman treated with her, has been given a suitable opportunity to receive proper counselling about the implication of any treatment services being received. This provision is in the 1990 Act relating to a woman and a man, but the Bill now includes reference to two women being treated together.

25. Before providing treatment using donated sperm, clinics are required to offer counselling to a man and woman who are treated together. Further to this, the Bill sets out that any woman shall not be provided with treatment services unless she and an intended second parent have been given a suitable opportunity to receive proper counselling about the implication of signing up to a parenthood agreement in respect of a child who may be born as a result of that treatment. I feel that it is of prime importance for couples to be encouraged to receive counselling in these situations in order to give them an opportunity to consider all the implications and consequences of treatments. The Government believe that it is highly desirable for any person undergoing fertility treatment or undergoing a parenthood agreement to receive counselling, in order to give them this opportunity. It is important that, when two people are signing up to a parenthood agreement, they are both fully aware of what this means at all stages of the process. We do not want to restrict this only to men and women being treated together, as the Bill also makes provision for two women to be the legal parents of a child. It is equally important that the intended second parent also has a chance to receive these services in order to understand the serious and lifelong commitment of the parenthood agreements that they are entering into.

26. On Amendment No. 59A, the Bill makes provision for unmarried heterosexual couples and two women not in a civil partnership to enter into parenthood agreements and be recognised as the parents of a child born through assisted conception. Currently, an unmarried man and a woman who are treated together can both be considered the legal parents where donor sperm is used. The Bill introduces a provision that clarifies the fatherhood of the man through a fatherhood agreement and allows for two women to enter into a parenthood agreement when undergoing fertility treatment services so that they are both legal parents of any resulting child. The Bill sets out who the intended second parent could be in each situation: a male or a female partner of the mother.

27. The Bill also makes provision for the person responsible to give notice to the intended mother or intended second parent where one party withdraws their consent to the parenthood agreement. If the provisions were removed by the amendment, unmarried couples and two women undergoing fertility treatment would still be able to undergo parenthood agreements but would fall outside the notification procedure. It is vital to let the other parent know that consent has been withdrawn.

28. I entirely understand the concerns expressed in this debate, but I believe that the proposals in the Bill recognise society as it exists and value all parents. I hope that noble Lords will feel able not to press their amendments and have further discussions before Report.[10]

Conclusion

Before dealing with the light thrown by Lord Darzi's comments on the legal meaning of the passages in question, I will mention two problematic points, indicated by the italics I have inserted in Lord Darzi's paragraphs 4 and 7.

Paragraph 4 sets out the HFEA guidance referred to in section 25(2) of the 1990 Act, whose terms are given near the beginning of this note. I call it problematic because, although section 25(2) requires the guidance to cover the child's need for a father, this guidance singularly

[10] Lords Hansard, 10 December 2007, cols 50-53.

fails to do that, merely referring to "the child's/children's needs". It could perhaps stand as it is if meaning 1 were considered to be the correct one.

In paragraph 7 Lord Darzi stated that the Government propose to retain the overarching requirement to consider the welfare of the child, "which in practice, following consultation by the HFEA, *focuses on the likelihood of serious harm to the child*". The italicised words suggest that meaning 1 is not the one intended, because the lack of a father could scarcely be characterized as causing serious harm.

I suggest that Lord Darzi's paragraphs 2-4 and 10 favour meaning 1, while his paragraphs 7-9, 12-14, 16, and 21-28 favour meaning 3. So *Pepper v Hart* does not apply because there is not a "clear" statement of the Government's intended legal meaning. Appropriate amendments are therefore needed to the Bill.

It may be difficult to frame these amendments. The uncomfortable truth is that, while Parliament has been on record for nearly twenty years as saying that a child has need of a father, if it passes this Bill it will be providing, on grounds apparently considered sufficient, for the bringing into existence, by artificial means officially sanctioned, of children in relation to whom that need cannot be satisfied. Speaking as an experienced legislative draftsman, I do not see how this contradiction is to be adequately dealt with (it can scarcely be resolved) except by adopting and clearly expressing meaning 3. It seems that a need the law has recognised is to be deliberately disregarded. If that is the legislative intention it should surely be clearly expressed.

I would respectfully add a final word. The House of Lords is supposed to be a revising chamber. This applies both to the policy of measures laid before it and also their technical state. The peers considering the Bill on second reading and in committee included several lawyers of high standing, yet none of them mentioned the defects exposed in the present note. The latest edition of *Bennion on Statutory Interpretation* runs to around 1,500 pages. It is surely desirable that in its examination of Government Bills the House of Lords should pay due regard to the rules, principles, presumptions and literary canons which govern the legal effect of the legislation it passes.

This note can be accessed at www.francisbennion.com/2007/027.htm

Francis Bennion
www.francisbennion.com
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