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## RECOGNISING FAMILY DIVERSITY: THE 'BOUNDARIES' OF *Re. G*

*Re. G (Children)* [2005] E.W.C.A. (Civ) 462

JULIE McCANDLESS

**ABSTRACT:** In *Re. G*, the Court of Appeal awarded a joint residence order to the appellant, who was the lesbian ex-partner of the child's full biological mother. The award also indirectly vested the appellant, a social parent, with parental responsibility and extended a body of case-law to same-sex couples, which had until now only been applied to heterosexual couples. In the first part of this note I detail the facts and specific legal issues of the case, elaborating on some derivative issues relating especially to social parents and the parental responsibility framework under the Children Act 1989. In this context I put forward a defined test of 'parental fitness' (which focuses on active 'care' as its central consideration) for social parents who must appeal to the court's discretion to obtain parental responsibility. In the second part of the note, I discuss the positive aspects of *Re. G*, but simultaneously offer some reservations. These reservations revolve around a critique of law's preference for the 'sexual family' and I argue that while the legal recognition of 'family diversity' and parenthood remains modeled on this 'sexual family', the relaxation of family 'boundaries' will remain limited, despite legal victories such as *Re. G*.

KEY WORDS: care, Children Act 1989, family diversity, gender, lesbian cohabiting couple separating, parental responsibility, same-sex parent, sexuality, shared residence order, social parent

## INTRODUCTION

In *Re. G*,<sup>1</sup> the Court of Appeal had to deal for the first time with a case involving a dispute over a child of a (lesbian) same-sex couple.<sup>2</sup> Firstly, in granting the appellant, Ms. W's request for a joint residence order, so as she could indirectly acquire parental responsibility, the case can be commended for affording recognition to same-sex relationships and parenting. Secondly, and perhaps less obviously, the Court of Appeal's ruling should be applauded for similarly recognising social parenting and active care-giving from non-biological parents, such as Ms. W. Thirdly, having commanded unanimous agreement, Lord Justice Thorpe's leading judgment stands as a cogent judicial statement in support of the statutory trend towards *relaxing* the traditional parenthood and family-form boundaries, which legislation like the Children Act 1989 (under which this case was to be decided) has served to entrench.<sup>3</sup> However, the relaxation of traditional boundaries, especially in the context of the

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<sup>1</sup> *Re. G (Children)* [2005] E.W.C.A. (Civ) 462, hereinafter *Re. G*.

<sup>2</sup> Previous cases such as *G v F (shared residence: parental responsibility)* [1998] 3 F.C.R 1, have only been tried in the lower level courts. This particular case questioned the correct criteria to be applied to an application for leave to apply for a shared residence order in respect of a child, after a lesbian cohabiting couple separated.

<sup>3</sup> See Thorpe, L.J., *Re.G*, *supra* n.1, at para. 7. While Thorpe L.J. was referring specifically to the relaxation of the original s.4 boundaries of the Children Act, this notion can be given a more general application if we consider new reforming legislation such as the Adoption and Children Act 2002 and the Civil Partnership Act 2004.

valorisation of the ‘sexual family’ model<sup>4</sup> and non-biological parenthood, is far from total and ‘non-standard’ families and parents continue to struggle for recognition. I want therefore in this note, to firstly review the facts and legal issues raised and to elaborate some of the consequential and derivative legal problems which emerge, particularly for social parents. Secondly, I want to offer some analysis of why the case should be welcomed in the three contexts outlined above, but to simultaneously voice some reservations about the extent to which ‘family diversity’ really has been given recognition by the case. I will argue that while the trend of extending legal recognition to non-standard families remains based on the extent to which they reflect the ‘sexual family’, traditional ‘family’ boundaries can never be totally relaxed, despite notable legal victories such as *Re. G*.

## THE FACTS AND LEGAL ISSUES

The appellant, Ms. W, and the respondent, Ms. G, were in a relationship from August 1995, cohabiting until May 2003, whereupon they separated. During the course of their relationship, Ms. G and Ms. W had two daughters together, M and M, born 2 February 1999 and 26 June 2001. Ms. G was the full biological mother of both children, who were conceived through anonymous donor insemination. While Ms. G was the children’s main carer, Ms. W played a substantial part in their early lives, both in respect to their day-to-day care, and in the formation of their ‘kinship’ identity. She was, effectively, their co-mother, or social parent. This fact was nowhere disputed in the history of the case. The report of the CAFCASS officer stated, “...the

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<sup>4</sup> See Fineman (1995). This will be discussed further *infra*.

importance and value of Ms. W's role in their lives needs to be acknowledged..."<sup>5</sup>, while Judge Hughes' reserved written judgment from the trial proceedings of 2004 contained the following in the concluding paragraph: "...Miss W is a significant figure in their [M and M's] lives and....her important place both historically and in the future can be maintained and reinforced by good quality frequent contact."<sup>6</sup> Despite this recognition, the trial judge did not award Ms. W the requested joint residence order for the younger child. That Ms. W had only to request a joint residence order for the younger child deserves some elaboration.

Firstly, it should be noted that the law distinguishes between the status of being a parent and the power to act as a parent.<sup>7</sup> The former can be further divided into what Andrew Bainham has described as *legal parentage* and *legal parenthood*.<sup>8</sup> He uses *parentage* to refer to the genetic connection(s), and *parenthood* to refer to the legal parent(s).<sup>9</sup> Whilst often these will be held by the same person(s), adoption and assisted reproduction demonstrate the usefulness of his taxonomy, especially if we consider the growing legal emphasis of a child's 'right' to knowledge about their origins and genetic parents.<sup>10</sup> The latter—the power to act as a parent—is gained by acquiring 'parental responsibility' under the auspices of the Children Act 1989.

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<sup>5</sup> *Re. G*, *supra* n.1, at para. 9, *per* Thorpe L.J.

<sup>6</sup> *Ibid*, para. 16

<sup>7</sup> See Barton and Douglas (1995), pp.49-50.

<sup>8</sup> See Bainham (1999), pp.25-46.

<sup>9</sup> Which, it should be noted, he does not limit to two persons (ie. one male, one female). The historic need for male-female intercourse for reproduction, and the development (especially since Western industrialisation) of what Martha Fineman has described as the privatised, 'sexual family', have coupled to make persistent a model of parentage and parenthood whereby children are entitled to one parent of each sex, but no more, and sometimes, less (see the fatherlessness clause in s.28 of the Human Fertilisation and Embryology Act 1990). See Fineman, *supra* n.4. This two-parent framework will be critiqued further *infra*.

<sup>10</sup> This trend can be evidenced by the growth of 'open adoptions', and the fact that since April 1<sup>st</sup> 2005, gamete donors must provide *identifying* information, to which the children, born from their gametes, will be entitled to obtain, upon reaching 18. Bainham also draws attention to international law, especially Articles 7(1) and 8(1) of the United Nations Convention on the Rights of the Child, which he suggests acknowledge the child's fundamental right to establish connections with his or her genetic parents. Bainham, *supra* n.8, pp.36-39.

Whilst its framework is clearly modeled on the heterosexual two-parent family,<sup>11</sup> it does have the flexibility to recognise a multiplicity of *de facto* parenting situations.<sup>12</sup> Also, it is not necessary to have legal *parentage* or *parenthood* to have parental responsibility.

This brings us to the second point of elaboration. The method for obtaining parental responsibility varies between different categories of ‘parent’, and especially between those ‘parents’ whose role and/or connection is chiefly social, as opposed to those with a genetic and/or legal parenthood connection. For example, it is automatic for all mothers and fathers married to the child’s mother,<sup>13</sup> whilst unmarried (genetic) fathers may acquire it through jointly registering the child’s birth with the mother,<sup>14</sup> or through a formal parental responsibility agreement with the child’s mother or the court.<sup>15</sup> Given recent legislative changes, step-parents and civil partners will soon similarly be entitled to apply directly for parental responsibility through an explicit clause in the Act.<sup>16</sup> However, even with these reforms, some categories of ‘parent’ will remain outside such boundaries. These parents will include, for example, social parents who are not in a legally recognised partnership with a parent who already has parental responsibility or an egg donor who is the intended co-parent of a child bore by another woman, and conceived using the sperm of the birth mother’s partner.

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<sup>11</sup> See Sheldon (2001).

<sup>12</sup> For example, s.3(5) permits a person who does not have parental responsibility, but who does have care of the child, to do what is reasonable in the circumstances for the purposes of safeguarding the child’s safety or welfare.

<sup>13</sup> S.2. Note that while the legislation refers to ‘mothers’, we must qualify this with the term ‘gestational’ as opposed to genetic.

<sup>14</sup> S.4(1)(a).

<sup>15</sup> S.4(1)(b) or (c) respectively.

<sup>16</sup> S.12 of the Adoption and children Act 2002 will insert a new s.4A into the Children Act which will provide for the acquisition of parental responsibility by a step-parent, while s.75(2) of the Civil Partnership Act 2004 will insert into s.4A(1) the words, “or a civil partner of” immediately after the words “is married to”.

Thirdly then, parents outside the legislatively prescribed boundaries, have two options in seeking to obtain parental responsibility. These ‘options’ are more onerous and much less certain than those for biological parents, or for those adults who are legally connected to an already recognised parent.<sup>17</sup> By virtue of s.10(5)(b) of the Children Act, if they have lived with the child “for a period of at least three years” they are entitled to apply for a residence order, as defined in s.8. If a residence order is obtained, parental responsibility, under the terms of s.12(2) is then automatically granted, although with notable prohibitions in relation to agreeing to, or refusing an adoption order, and in appointing a guardian.<sup>18</sup> It can also be revoked by the court and expires when a child reaches the age of majority. When a person has not lived with a child for three years—as was the case with Ms. W and the younger daughter, who was only two years old when Ms. W and Ms. G separated—they must either rely on the consent of all those already with parental responsibility,<sup>19</sup> or the court’s discretion under s.10 to award a residence order, so as to obtain, again indirectly, parental responsibility.

We see then why obtaining parental responsibility for the younger daughter was at issue in the case. Ms. W was not entitled to apply for a (joint) residence order as with the older daughter, and had instead to appeal, from the outset,<sup>20</sup> to the court’s discretion to grant the Order. As mentioned, this was denied at trial level. The judge instead issued a sole residence order to Ms. G, attaching to it a series of s.8 specific

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<sup>17</sup> While child protection arguments will be put forward to justify these more onerous requirements, that such considerations are not similarly stressed for biological parents is somewhat concerning. This issue however, is beyond the scope of this note.

<sup>18</sup> S.12(3).

<sup>19</sup> S.10(5)(c).

<sup>20</sup> While the court still has the ultimate authority to award or deny the order, the point is that certain categories of parent have the direct right to apply, while others must be given permission to apply by the court.

issue orders, “which were designed to ensure that the appellant retained a significant role in the lives of the children.”<sup>21</sup> It was this refusal which was appealed to the upper court, the appellant’s counsel describing the resulting order “as but a pale shadow” of what Ms. W had requested.<sup>22</sup> Ultimately, she was denied the ability to obtain parental responsibility.

Why then is obtaining this legal status so important? While some commentators have questioned the importance of parental responsibility for *de facto* parenting,<sup>23</sup> it is an important practical and symbolic legal concept in the context of family relations. Parental responsibility is defined in s.3(1) of the Children Act as, “...all the rights, duties and powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property,” and its regulation must be in accordance with the guiding principle of the Act, the welfare of the child.<sup>24</sup> Sally Sheldon has acknowledged several reasons why parental responsibility is important.<sup>25</sup> Firstly, it allows an adult to take important decisions regarding a child’s upbringing, to include where they shall live, how they shall be educated, what religion (if any) they shall be brought up in, what non-essential medical treatment they shall receive, and to administer the child’s property.<sup>26</sup> Parental responsibility may be held by more than one person simultaneously,<sup>27</sup> and while a person holding parental responsibility can act alone on many issues, important decisions relating to, for example, the child’s home or education, need the consent of usually all those holding parental

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<sup>21</sup> *Per* Thorpe L.J., *Re. G*, *supra* n.1, para. 4.

<sup>22</sup> *Ibid*, para. 17.

<sup>23</sup> See Eekelaar (2001). His arguments seem sound in instances where the parents are working together, but where they disagree, to not have parental responsibility makes *de facto* parenting difficult indeed.

<sup>24</sup> See s.1.

<sup>25</sup> Sheldon, *supra* n.11, pp.94-95.

<sup>26</sup> See further Barton and Douglas, *supra* n.7, p.114 for a more detailed list of the rights included within the legal category of parental responsibility.

<sup>27</sup> S.2(5)-(6).



responsibility for the child.<sup>28</sup> Secondly, Sheldon notes that parental responsibility can act as a spring-board for entitlement to other legal rights related to family policy, such as work-leave.<sup>29</sup> Finally, she notes that parental responsibility accords the right to be heard in proceedings regarding a child's emigration, and to appoint a guardian for the child upon one's death.<sup>30</sup> Thus parental responsibility can be viewed as the first step to obtaining other 'parental rights'.

With this brief outline, we begin to see the importance of securing parental responsibility if a parent is to have a substantial role in the child's upbringing, and proper legal involvement in the child's life. While in many instances *de facto* parenting will take place without this legal formality, in cases like *Re. G* where the adults involved have ended an intimate relationship and are in disagreement over significant issues, the practical salience of parental responsibility cannot be underestimated. Indeed, the central disagreement in *Re. G* was the fundamental question of Ms. W's status as the child's parent. With no genetic connection to the child, her ex-partner wanted her role confined to that of "an extended family member, not in a parental position."<sup>31</sup> As even the trial judge recognised, there was a clear attempt by Ms. G to marginalise Ms. W's role, culminating in a proposed move from

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<sup>28</sup> S.2(7).

<sup>29</sup> See for example the Maternity and Parental Leave etc. Regulations 1999 (S.I. 1999 No.3312), whereby persons either recognised as a parent on the birth certificate and/or persons having parental responsibility can apply for the leave to care for a child, under qualified conditions.

<sup>30</sup> S.13 and 5(3) respectively.

<sup>31</sup> *Per* Thorpe, L.J., *Re. G supra* n.1 at para. 11. Note how Ms. G's statement here supports the rhetoric from traditional family rights and religious groups who spoke about the case in the media. For example, Dr. Adrian Rogers, an adviser to the Family Focus group said, "These two children are the wrong age to be brought up by a lesbian couple. This woman has no genetic link to the children, she is just someone who has spent time with them," Pilditch (2005). See also Norman Wells, of Family and Youth Concern, who said, "The female friends of a child's mother may well become significant figures in a child's life, but they can never provide an adequate substitute for the child's father and it is a mistake to pretend that they can," Dolan (2005).

Shropshire to Cornwall. The trial judge found that, "...the proposed move must in part be deliberately designed to frustrate current contact arrangements."<sup>32</sup>

Why then did the trial judge decline from indirectly granting parental responsibility, by granting the joint residence order as recommended by the CAFCASS officer assigned to the case?<sup>33</sup> The trial judge is quoted as saying:

In my view such a sharing of parental responsibility would result in endless disputes between the parties which may require the Court's intervention to resolve issues of education, accommodation, elective medical procedures and so forth which could not be in the long term interests of these children. A recent consultation document from CAFCASS encourages its officers to consider shared residence orders where parental cooperation and practical circumstances allow and it appear to be in the child's interests. This does not seem to me to be such a case.<sup>34</sup>

Her decision then seems to rest on the conviction that as the appellant and respondent had a hostile relationship, a joint residence order and shared parental responsibility would be unworkable and that therefore it was better to grant sole residence, and proscribe certain actions, such as the planned move to Cornwall. This stands in contrast to the CAFCASS officer's optimistic belief "that the animosity between the parties would dissipate over time."<sup>35</sup> While this view remains speculative, the trial judge seemed to gloss over, indeed omit an important point – that it is when the parents' relationship is acrimonious, that the holding of parental responsibility becomes all the more significant.

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<sup>32</sup> *Per* Thorpe, L.J., *Re. G supra* n.1 at para. 14, quoting Hughes, J.

<sup>33</sup> See *Re. G, ibid*, at para. 9.

<sup>34</sup> *Per* Thorpe, L.J., *supra* n.32. Note that neither counsel was able to find the CAFCASS document that Hughes J. was referring to.

<sup>35</sup> *Per* Thorpe L.J., *Re. G supra* n.1, at para. 13.

In acknowledging this however, I am not suggesting that the nature of the animosity should be disregarded. In too many cases, such ‘animosity’ is based on domestic violence, other harmful power struggles, or it may involve a primary carer trying to restrict the access of a dangerous, irresponsible or feckless parent in order to (justly) protect the physical and/or psychological welfare of the child. In these cases, it would generally not be in the best interests of the child and/or a primary carer, who is a victim of such, to award a joint order. Indeed, where there is base-line evidence that such a scenario exists, I would suggest that the case merits a rebuttable exemption from the ‘fit-parent’ framework I suggest below. The trends in US law of ‘failure-to-protect’ and ‘friendly-parent’ provisions<sup>36</sup> highlight the perverse legal results which can emerge if the dynamics of domestic violence (in its many forms) are not understood and addressed appropriately by legislation and the Courts. In cases which do not have such a dimension, where the person seeking the order has actively demonstrated themselves to be a ‘fit-parent’, their entitlement to parental responsibility should not hinge upon the co-operation of another parent. To indulge in clichés, their ability to parent should not be ‘held to ransom’ by an obstructive co-parent.

If parental fitness is to be used as a judicial standard, it would have to somehow be statutorily defined, in order to prevent it from being used as a vehicle for judicial

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<sup>36</sup> Most US States have now codified a ‘failure to protect’ standard in their child protective statutes and apply these provisions to victims of domestic violence by charging them with neglect for failing to remove their children from violent surroundings. See case such as *Cathy G.* (detailed in Miccio, K., 1999) and *In Re. Dalton* 424 N.E.2d. 1226 (Ill. App. Ct. 1981). A perpetrator of domestic violence, under a ‘friendly parent’ provision can seem much more conciliatory and willing to co-operate than a parent who has been victimised by the perpetrator. If a judge then fails to take into consideration the domestic violence, the victim parent’s refusal not to co-operate with the abusive parent makes them appear obstructive.

prejudice and stereotypes. I suggest that, where appropriate, the chief consideration for the ‘fit-parent’ criteria should be evidence of the applicant’s productive and active involvement in caring for the child.<sup>37</sup> Other proposed standards have included the Equal Parenting Council’s ‘good reason principle’ - that a parent should be deemed ‘fit’, unless there is a good reason, supported by credible evidence, why this parent’s role should be excluded or restricted that would apply even if the parents were together.<sup>38</sup> While I can understand the Council’s logic in purporting this standard, given the argument that separated parents are held to ‘higher standards’ than non-separated parents, such a principle perhaps remains too speculative and subjective for a judicial standard in this area. For example, is being a perpetrator of domestic violence a currently acknowledged reason to deem a parent ‘unfit’ if they are still with the other parent? Similarly, would a person’s sexuality be considered a sufficiently ‘good reason’? As the law remains unclear about the ‘good reasons’ why parents should be deemed ‘unfit’ when they are together, a standard which focuses more on actual parenting skills through a broad construct of active ‘care’ would charge judges with considering true ‘parental fitness’. It could also be reinforced with a list of prohibited considerations, such as gender, sexuality and race, and perhaps some indicative guidance on what active ‘care’ could incorporate.

As a final point, implicit in this ‘holding to ransom’ discussion, is that obstructive co-parents, where the animosity is not merited, should be better policed and sanctioned by the courts. To elaborate specifically on how such should be done in practice is

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<sup>37</sup> This could clearly be applied in the specific to cases such as *Re. G.* More generally however, I would suggest that as parenting behaviours are not completely a matter of ‘choice’ (for example, only women remain entitled to extended maternity leave, while men have only two weeks paternity leave), ‘care’ should be given a broad definition, and should not be restricted entirely to the day-to-day care of a child.

<sup>38</sup> Equal Parenting Council (2003).

beyond the scope of this note. However, given, for example, complaints about the family court system from father's rights groups—which are currently shaping up quite divisively for parenthood<sup>39</sup>—there is pressing need for this 'holding to ransom' to be disparaged by the courts. It is needed not only because it is morally reprehensible, but also because, if left unaddressed, it risks being used as an argument for the promotion and adaptation of de-contextualised and homogenous provisions, such as presumptions of joint residence upon parental separation.

While I have not elaborated on how courts could perhaps better manage obstructive parents, the current Government has made recent attempts. Getting back to the case, in his concluding paragraph, Thorpe L.J. referred to the Government's recent consultation paper, and their publication of the draft Children (Contact) and Adoption Bill, designed to introduce new powers and management techniques for judges to combat 'obstructive' behaviour. A solid body of case-law, like *Re. G*, which facilitates and encourages the granting of joint orders and parental responsibility to 'fit parents' through a recognition of their active 'care', would be an encouraging and supportive judiciary-based compliment to these, hopefully positive, Government initiatives. Indeed, it may help to progressively shape their final form in a way that is socially textured as opposed to prejudiced or stereotypical.

In this first part of the note I have dealt with the specific legal issues of the case, and elaborated more broadly on some of the important derivative issues, particularly in the context of legally recognising social parents. Drawing attention to both the problems of the parental responsibility framework under the Children Act and the importance of

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<sup>39</sup> For example, increased rhetoric of 'mother-blaming' and feminist bias, are replacing substantive critiques about a system which fails both mothers and fathers.

this legal category, especially where the parents separate and disagree over crucial issues, I have tried to suggest a workable and progressive standard that judges should use when a parent must appeal to their discretion if they are to be allowed to apply for, and obtain, parental responsibility. Although the ‘fit-parent’ standard cannot be applied homogenously as it has the clear potential to be manipulated in certain circumstances, if defined appropriately, it would be a useful judicial tool in many ‘separation’ cases. A definition based on a workable construct of ‘care’ has, I suggest, the potential to discourage and disrupt the use of stereotypes, particularly those based upon gender and sexuality, which have so often been used in a prejudiced manner in assigning ‘parental rights’ and legal entitlements.<sup>40</sup>

#### COMMENDING *RE. G*

Whilst the preceding section has addressed the legal hurdles that Ms. W had to surpass in order to obtain parental responsibility under the current legislative framework, what I want to discuss in this section are the more positive aspects of *Re. G* and Lord Justice Thorpe’s written judgment. However, in some instances I suggest that these are not without their specific shortcomings.

Firstly, the case must be seen as a positive step in the more general struggle of obtaining legal recognition for same-sex relationships and parenting. Essentially, *Re. G* has extended some important existent case-law to same-sex parents, which until now had only been applied to heterosexual parents. In his judgment, Thorpe, L.J.

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<sup>40</sup> For example, lesbian mothers have historically been denied parental rights on the basis of their sexuality, as opposed to any real question of their ‘parental fitness’.

aligns three main bodies of authority in justifying his award of joint residence. Firstly, he refers to the case of *A v A*<sup>41</sup>, and the intractable disputes between the parents, Mr. and Mrs. A. Whilst the respondent's counsel sought to distinguish this case on the basis that Mr. and Mrs. A had been married, and thus had automatic parental responsibility,<sup>42</sup> Thorpe L.J. applied the case as a point of general principle that courts should encourage co-operation between acrimonious parents. He cited Wall, J. (as he then was):

Control is not what this family needs. What it needs is co-operation. By making a shared residence order the court is making that point. These parents have joint and equal parental responsibility. The residence of the children is shared between them. These facts need to be recognised by an order for shared residence.<sup>43</sup>

Wall, J. thought that making a sole residence order in favour of Mr. A. would be misinterpreted, despite his personal belief that Mr. A. would honour the necessary arrangements. In the context of *Re. G* then, the lesser award made by Hughes, J. would, under this authority, be tantamount to endorsing Ms. G's attempts to 'control' Ms. W's relationship with M. In awarding a joint residence order and thus parental responsibility, Thorpe L.J. instead offered the clear message that Ms. W was the equal parent of M, and that Ms. G needed to co-operate with her, whether they were 'married' or not.

The second body of authority refers to applications for parental responsibility. Most of the case-law involving parental responsibility applications refers to unmarried

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<sup>41</sup> *A v A (Shared Residence)* [2004] 1 FLR 1195, hereinafter *A v A*.

<sup>42</sup> *Per* Thorpe, L.J., *Re. G supra* n.1 at para. 21.

<sup>43</sup> *Ibid.*

fathers' requests for parental responsibility orders (PROs). In brief, a three-fold criterion of 'commitment, attachment and motivation' has emerged as a guide for whether or not a PRO should be awarded.<sup>44</sup> Thorpe L.J. also draws attention to the more recent authority, which emphasises "the benefits to be achieved for a child by the grant of parental responsibility to both parents".<sup>45</sup> In support, whilst PROs are not simply granted to unmarried fathers upon request, they have been typically awarded unless there is a strong reason as to why they should not be. As Wall J. said:

...wherever possible, the law should confer on a concerned father that stamp of approval because he has shown himself willing and anxious to pick up the responsibility of fatherhood and not to deny or avoid it.<sup>46</sup>

What Thorpe L.J. has established in *Re. G*, is that this standard or 'threshold' should be similarly applied, in the specific, to same-sex parents- "...what Ward L.J. had to say of fathers is of application to same sex parents."<sup>47</sup> Thorpe L.J. refers to pivotal cases, the third body of authority, which trace judicial acceptance of 'family diversity'. These include *Fitzpatrick v Sterling Housing Association Ltd.*,<sup>48</sup> and the recent *Ghaidan v Godin-Mendoza*.<sup>49</sup> By family diversity, he is referring to same-sex couples, who have historically been denied both rights of legal recognition, and parenthood status where they are the non-biological parent. However, the recognition of same-sex relationships is modeled on the exclusive heterosexual couple. While this may be the case for many non-heterosexual relationships, it continues to deny recognition to

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<sup>44</sup> See Bainham (2005) pp.205-210.

<sup>45</sup> *Per* Thorpe, L.J., *Re. G supra* n.1 at para. 22, referring to the judgment of Ward L.J. in *Re C and V* [1998] 1 FLR 392.

<sup>46</sup> *Ibid*, at page 397. Note that refusals to grant PROs have been rare. See further Sheldon (2001), pp.103-4.

<sup>47</sup> *Per* Thorpe, L.J., *Re. G supra* n.1 at para. 22.

<sup>48</sup> *Fitzpatrick v Sterling Housing Association Ltd.* [2001] 1 AC 27, hereinafter *Fitzpatrick v Sterling*.

<sup>49</sup> *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113, hereinafter *Mendoza Case*.



various others, and has been an important criticism of recent legislative reforms, especially the Civil Partnership Act 2004.<sup>50</sup> Therefore, whilst *Re. G* is an important break-through for same-sex couples who have children, in that their sexuality must become irrelevant to the existent and future case-law relating to parental responsibility, it is perhaps only the beginning of a longer process of truly recognising ‘family diversity’.

To demonstrate, as Ms. W was a non-biological parent, it could be argued that Thorpe L.J. has further broadened the ‘threshold’ precedent to include all social parents who seek parental responsibility through clauses such as s.10 of the Children Act. However, the extent of this recognition, in line with how same-sex relationships are being recognised more generally, may depend on how closely the ‘family unit’ resembles the heterosexual and privatised two-parent model, or what Martha Fineman has termed, ‘the sexual family’<sup>51</sup>. For example, would a ‘third’ parent, in a collaborative family (sexually connected or otherwise) be afforded similar treatment under similar circumstances, or is the ‘threshold’ reserved for “...homosexual couple[s] whose relationship is marriage-like in the same ways that unmarried heterosexual couple’s relationship is marriage-like and indeed in an analogous situation”?<sup>52</sup>

This then introduces us, somewhat ironically through a criticism, to what I described as the second commendable aspect of the *Re. G* judgment. In brief, and subject to the same ‘sexual family’ criticism, the ruling in *Re. G* gave equal recognition to a parent, whose status was based, in the main, on social care-taking factors as opposed to

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<sup>50</sup> See Barker (2004).

<sup>51</sup> Fineman, *supra* n.4.

<sup>52</sup> *Per* Baroness Hale, *Mendoza Case*, *supra* n.48 at para. 143.

biological connections. While of course Ms. W's status was further based on her intimate relationship connection to Ms. G (thus the 'sexual family' criticism) it is still a powerful judicial statement in support and recognition of social parenting. It is important to recognise this. Recent reforms to the Children Act will soon provide new mechanisms for civil partners and step-parents to apply directly for parental responsibility.<sup>53</sup> However, social parents who are not in a legally recognised union with a parent who already has parental responsibility, will still have to rely on being granted a joint residence order if they are to obtain parental responsibility. Under *Re. G* then, where a person applying for a joint residence order, be it through the three-year requirement or the court's discretionary powers, if they satisfy the 'commitment, attachment and motivation' threshold,<sup>54</sup> and it is in the child's interest, parental responsibility cannot be denied on the basis that there is no biological connection.

One final commendable point is that this decision was reached unanimously. The two other Lord Justices agreed, without reservation to Lord Justice Thorpe's judgment in upholding the appeal. This then lends strong support to the case being used positively for future cases similarly involving same-sex and/or social parents. While we must rely on the incremental development of the common law to extend the precedent to those families and parenthood situations which are fashioned on the traditional 'sexual family' model, the potential impact of the case should not be underestimated. The traditional assumptions about parenthood, which prize the marital family unit, biological connections, as well as privatised care and gendered parenting roles, are deeply ingrained in Western cultures.<sup>55</sup> So while *Re. G* does not perhaps disrupt *all*

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<sup>53</sup> See *supra* n. 12.

<sup>54</sup> Preventing applications from baby-sitters, acquaintances and so forth, as opposed to actual 'social parents'.

<sup>55</sup> See Fineman, *supra* n.9.

these assumptions, it is a notable challenge which, at the least, aligns judicial thinking with recent statutory reforms, and at best, provides a legal avenue into further relaxing current boundary-based definitions of parenthood and families, in favour of redefining it to incorporate ‘care’ as the core principle.

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