Rules, rights and justice: an introduction to law

Adoption and donor tracing

MISHAL HUSAIN:
Who am I is one of those fundamental questions we all ask at some point in our personal development. But imagine how different the answers would be if you didn't have a genetic relationship with one or both of the people that brought you up. People who have been adopted or those conceived from donor eggs or sperm are in precisely this position. But while those of us who have been adopted have been entitled to trace our birth parents for thirty years, those conceived by the newer technologies do not automatically have this right. Does this matter? What lessons from the experiences of adopted people can be applied to those conceived from donated eggs or sperm? Is the law for the new reproductive technologies thirty years behind the law for adoption? Well in the studio with me are Julia Feast, the policy research and development consultant at the British Association for Adoption and Fostering, she's counselled thousands of adults who were adopted as children through the search and reunion process. Carol Howells is an academic lawyer and the course team chair for course W100, and Alexina McWhinnie is the senior research fellow at Dundee University's department of law, who's researched the relationships in assisted conception families. Welcome to you all. Let's start the discussion with adoption. Julia, what have we learned over the years about giving people the right to trace their biological parents?

JULIA FEAST:
When the law changed in 1975 it came about partly because many adopted people said I want to know more information about myself. Who am I you know? Where do I come from? Why do I look the way I do? And the law acknowledged that by changing as I said in 1975 and then subsequently in 1976. And it opened up doors for adopted people. They were able then to trace information about medical details, information about the family who they belonged to and just learnt a huge amount of information about who they are.

MISHAL HUSAIN:
So Carol, it's an example then of the law responding to a shift in society, to human needs.

CAROL HOWELLS:
Yes. Originally adoption was there to create legal security and it was, adoption was first introduced in 1926 to recognise the fact that many children were being cared for by other relatives, or by non family members and the rights of those individuals were put ahead if you like, of the rights of the children to know. But that did change in the 1970s with the recognition of this desire. And you know in many cases this need to know.

MISHAL HUSAIN:
Julia we talk a lot about the contact and reunion process, but just give us a sense from your experience of what it's actually like for adopted children.

JULIA FEAST:
It's a very big decision for people to make, to decide to search for birth family members, because inevitably the adopted person thinks about their own adoptive family and the impact it's going to have on them, the emotional effect. Many say they often feel disloyal doing it. But there is this desperate curiosity about who they are and why they look the way they do that sort of spurs them on. And it's often not things like having a baby or adoptive parents dying that will make them decide to search. It's just a basic curiosity, the need to know. For many people they will say that they feared that they will receive rejection if they search for birth family members. Others are really excited that this might be a very new thing for them and it will be lovely and a wonderful happy ending. So adopted people in our country at least can receive counselling prior to deciding whether to search or not, to think about the implications

for them and the impact it might have. Because it is an emotional rollercoaster, there's lots of highs and lows through the whole process. But the end result is for many people the majority will say that it's been a very good thing because they've been able to answer important questions that they have had.

MISHAL HUSAIN:
Well there's a long history of research for adoptive parents and children to draw on. The experience of years has informed them about child rearing practices such as how and what to tell children about their adopted status. Of course no such precedent exists for parents undergoing treatment by the newer reproductive technologies. So how is the experience of growing up different for children conceived using these newer technologies, including IVF. Alexina, you've researched the children of assisted reproduction. Is there a parallel with that kind of family? Do you think the ability to trace would be a good thing?

ALEXINA McWHINNIE:
Yes I do. The problem is that it's very difficult to persuade the people who are providing this service for infertile adults that this will be positive for the children, or even necessary for the children.

MISHAL HUSAIN:
Why?

ALEXINA McWHINNIE:
Because they only see it as our solution to adult infertility and that if you look at their medical literature in this area you will find there's enormous concentration on that because the science of it is based on mammalian physiology. So if you talk to some people they don't even differentiate between when mammalian is human if you see what I mean. So it's a different way of thinking.

MISHAL HUSAIN:
What about the lessons from adoption, Julie obviously this is your field, you've done a lot of work on adoption. When you look at the instances we're seeing now of assisted conception, often donor assisted conception, do you think there are direct parallels?

JULIA FEAST:
Yes, there are direct parallels, because if there's not a genetic relationship with both parents then that child may be very different. For example, if it's a child born of assisted conception that donated [gametes?] they may look more like their donor than the mother. And they may be growing up thinking, I look really different, and why do I look different. But unlike adoption where people are told that they are adopted, I mean people would not be allowed to adopt without being - agreeing to be truthful with their child. But those people who, you know adoption they can celebrate the child's differences.

MISHAL HUSAIN:
Alexina, would you agree that there are direct parallels in this too?

ALEXINA McWHINNIE:
Oh very much so. Very much so. And I think what would be fascinating would be to have an opportunity to explore it in much greater depth and this means I am up to date because there are parallels and I think not to acknowledge that is really almost insisting on inventing the wheel. Reinventing.

MISHAL HUSAIN:
Carol, does the law see the parallels?

CAROL HOWELLS:
The law's beginning to see the parallels but the law on assisted conception has lagged behind and in fact whilst it was - the lessons from adoption were considered prior to the 1990 legislation, they weren't embraced and that's perhaps because of the difference in the fact that everybody was recognising there were these wonderful new technologies that could

assist infertile couples to have children. It was a you know a huge, brand new horizon if you like. And more concentration was put on the couples to begin with than looking at the effects that there may be of any resultant children.

MISHAL HUSAIN:
So the science was ahead of the law then? The law was playing catch up?

CAROL HOWELLS:
In many ways yes.

MISHAL HUSAIN:
And Alexina do you think then the emphasis should be firmly on the rights of the child here?

ALEXINA McWHINNIE:
Yes, yes. But I think what we really need to focus on is the rights of the child, what happens to the child is actually the outcome of a medical intervention and this is a fundamental block if you see what I mean because as far as the medics are concerned the result of their intervention is to produce a pregnancy.

MISHAL HUSAIN:
And that's all that matters?

ALEXINA McWHINNIE:
Well for many yes, that is success as far as they're concerned. I mean nominally they will say they're interested in the welfare of the child, but they don't like that clause at all and they want rid of it.

MISHAL HUSAIN:
Julia would you agree then that there's a gap between how the medical profession looks at this and the human dimension or the social dimension?

JULIA FEAST:
Most definitely, because in adoption people who apply to adopt would go for preparation, they would have counselling, we'd know all about their history. When people want to have a child using donated egg or sperm, they don't have to be counselled, they can refuse, they can say I don't need to, I know all the implications. So unlike in adoption where people talk about what's the child's need and why do they need to know information about their background, and why is it important, that's often ignored.

MISHAL HUSAIN:
And Carol, how does the law deal with all of this? It sounds like in many ways it's a minefield in how to approach these very personal issues.

CAROL HOWELLS:
The law treads a very careful path in this area. And it hasn't always been able to keep pace in changes in academic research and with changes in attitudes. You know, infertility no longer carries the social stigma that maybe it once did. But one of the difficulties it did have when the act was passed in 1990, was thinking about the birth certificates. So actually either the married couple having treatment together are named on the birth certificate and in effect that's creating a fiction on that certificate and the fact that there has been assisted conception is not noted on the birth certificate anywhere and that has been one of the fundamental issues in then children finding out about this because quite often they're not going to find out because they're not told and it's not reflected on their birth certificate.

MISHAL HUSAIN:
Alexina do you think it's a basic problem with that fiction?

ALEXINA McWHINNIE:
Oh I think so, very much. I think there's enormous resistance within infertile people to tell their children because it reveals their infertility. And I would say that although we talk about it in

general terms much more easily and even male infertility is talked about generally. If you talk to men who are infertile they most certainly don't want to talk about it in public and are very, very upset and devastated.

MISHAL HUSAIN:
And, but isn't there an argument though that if you've been through that pain of infertility and you have managed to then have the happy result you wanted and have a child, what that child doesn't know would never hurt it?

ALEXINA McWHINNIE:
Well that's certainly been the argument in the past.

MISHAL HUSAIN:
You don't think it's got any merit?

ALEXINA McWHINNIE:
No. Because I think what happens is from my studies of families who have done this, they do it very successfully for a while, but they are running enormous risks that either when they go for a health record for example at the GP's surgery, is there anything of this in the family? They either have to lie or evade answering, and the children spot the differences. They don't say anything, but they're aware of the difference.

MISHAL HUSAIN:
And Julia, when it comes to the longer term perspectives, is that something that children will suffer from?

JULIA FEAST:
People can sense when there's something different within their family. It's amazing what children pick up. And adopted people who weren't told that they were adopted would often say when they were told maybe in their - it may have been disclosed unexpectedly in their fifties will say, that all fits into place now. I now know why I behave this way or that way. So I think children will pick it up. And it must be huge pressures for families to live with such a big secret.

MISHAL HUSAIN:
Well talk about tracing assumes that genetic identity is important but this is quite a Western idea. For some other cultures, knowledge of your genes would have little value. For them what's important is your social identity and that largely comes from the family you grow up in. So should we be so hung up about someone's genetic or biological identity? Or is the important thing social identity? Julia what do you think?

JULIA FEAST:
It's a combination of both really but I think the genetic identity's is important, particularly for medical information and we've learnt so much how our beings, our genes affect our health. And that's really, really important. So I think it's a combination. Growing up in a family in a social family, you learn from them and you take all the attributes that they can give you but you shouldn't then have to deny your roots in the process.

MISHAL HUSAIN:
Carol, what's the legal perspective on this question, genetic or social identity?

CAROL HOWELLS:
The law has difficulty with this question, and I think its difficulty is shown by the fact that it actually never defines what a family is. There is no legal definition. The law tends to talk in either sort of bloodline relationships, marriage lines, it talks about biological parents. But it actually doesn't come up with any solutions or any answers, because in many ways here it is trying to reflect what society is driving and because that concept is not a static one, the law is always if you like slightly behind and has created certain specific rights and obligations to cope with particular relationships. But doesn't acknowledge whether it's social, biological, or genetic identity that is the more important.

MISHAL HUSAIN:
Alexina, would you agree with Julia that when we talk about identity it is a combination of social and genetic? Or would you see the genetic being more important?

ALEXINA McWHINNIE:
No, it's obviously an interplay between the two. And - but I think a lot of this is partly historical. There was a great revolt against any concept about genetics being important because of the experience in Germany. And eugenics was a dirty word for a very, very long time. But

MISHAL HUSAIN:
These are the Nazi experiments?

ALEXINA McWHINNIE:
Yes, yes, yes. But well, just the whole concept. So you had the idea that identity was socially constructed and there's a very strong body of opinion particularly within sociology which sees it as a social construct, which would fit what you're saying about the different cultures really, it is socially constructed. But then at the same time we now have had developments in genetics which show clearly that there are certain conditions [entrees?] and so on that come through. And common knowledge is one of the first things that relatives say when a new baby gets born, it's - who does he look like? It is so in part of us.

MISHAL HUSAIN:
Carol I'm left again though thinking that obviously it's very difficult for the law to approach this area and you've been indicating that. But there's a basic problem isn't it, with the intrusion of law into our family lives and these are obviously such you know closely held issues and matters of extreme privacy for many people.

CAROL HOWELLS:
Yes they are. And I think that's probably one of the difficulties the law has with this, is where the acceptable line is to draw for legal principles and if you like legal interference with children's rights, with parents' rights, with the rights of grandparents, with the wider family.

MISHAL HUSAIN:
Okay, well many adults who were adopted as children have this deep feeling that their own sense of personal identity won't be complete without knowing who their birth mothers are. The feeling is so strong that it prompts them to go through the emotionally difficult process of adoption tracing. Something we've been hearing about. But let's talk in more detail about it. Because gradually small groups of donor assisted adults are coming forward and expressing similar needs. So whose rights should the law prioritise. The rights of children of new reproductive technologies, the donors, or the infertile couples who will subsequently become parents. Alexina where do you think that emphasis should be? Whose rights need to come first?

ALEXINA McWHINNIE:
I think without question it has to be the person created in this way. They never gave consent to being created in this way and they carry a lifetime of repercussions arising from it. And if you read the literature now about adults or teenagers who are talking about it, it's very poignant. They feel they're divided down the middle. They don't know one half of themselves. They talk about looking in the mirror and wondering, where did my ears come from? Where did my hands come? Why do I not have any good relationships with my father?

MISHAL HUSAIN:
But would you not accept the argument of someone who's gone through the pain of infertility and really struggled with all of that, but they just want to put that behind them once they have the child. They don't want to dwell on that past

ALEXINA McWHINNIE:

Well, I can understand it very well but we're listening to the children all the time in all other spheres. Why should we not be listening to the voices of people who have been created in this way?

MISHAL HUSAIN:
Julia, would you agree?

JULIA FEAST:
Absolutely. I feel a child has a right to know who their parents are, their genetic parents. I think it's really important so they can make informed decisions about their lives that may have profound effects if they don't know that information. And it's a pity in a way that the law is such that parents from donor conceived children don't have to tell, and there's no evidence of an adoptive child they will have a new certificate that's given on the adoption order. It doesn't mean to say they have to flaunt it everywhere because they also can produce a little certificate. And this is the argument that if donor conceived people had to have a different certificate then parents wouldn't be able to hide.

MISHAL HUSAIN:
So you think there should be a legal requirement of disclosure?

JULIA FEAST:
My view is that children should be told and that we need to help the parents to be confident that by being truthful with your child and telling them about their origins is not going to affect their relationship but adoption research has shown that the impact on the family on the adopted family is a positive one. Because the adoptive parents too can understand why their son or daughter needed to search and in many cases though they might have been slightly anxious about it, are supportive. And research has shown that the relationship with the adoptive family is a strong one. An enduring one.

MISHAL HUSAIN:
Alexina?

ALEXINA McWHINNIE:
I think to acknowledgement that children created in this way have a right and a need to know about their family origin, their kinship group if you like, that has been established under a court case which was Jill Rose and Another to establish that they had a right under human rights legislation to information or non identifying information about the donor. And that was a debate against the department of health and the Human Fertilisation and Embryology Authority. And the judgement was a very interesting one and a very important one. Because the judge recognised the need and psychological need for people created in this way to have information about their origins. The department of health argued that the donors right to family and life should also be protected but at the end of the day he came down very firmly on the side of the children created in this way.

MISHAL HUSAIN:
Are there other examples of what this process is like? The tracing process?

ALEXINA McWHINNIE:
Well there's never been an opportunity of tracing to date. Certainly those who were adults prior to the 1990 act, some have tried to get the information from the private clinics but without much success, although interesting quite recently one adult has managed to get some information through that contact. In fact, no, two now have. So there's the sort of movement and they're taking courage from each other to do it. But they met with great hostility when they started out.

MISHAL HUSAIN:
Carol, is there any evidence on what the process of tracing is like for a donor?

CAROL HOWELLS:

There is very little evidence because of course so few donors have been traced. But in some countries, America for example it has happened. And there are some stories which have been told. One in particular was of interest because the child traced the donor and built a good relationship with the donor and the donor's family. And his new family was very accepting of this fact because they saw that what had been done was you know enabling somebody who otherwise wouldn't have been able to have a child and so they saw it as a positive thing and a positive relationship. But the twist there was that the biological mother then attempted to form an emotional attachment with the donor and that's where an issue started to arise because that … felt they had had a child with this person.

MISHAL HUSAIN:
So it had an impact on the donor's family life?

CAROL HOWELLS:
It did indeed and because the donor was open about this with his wife and with his family, they were able to overcome this and I am sure there is evidence that many donors would welcome some tracing but there are others who just feel they're just a genetic contributor. That doesn't make any sort of relationship. It's just genetics.

WOMAN:
I think what's interesting in this debate is we don't really know what donors on the whole think about this. But I must say I shall never forget when I was doing this, doing my research being part of a session when a doctor was recruiting donors, six young men wanting to learn about donors. And one of them turned to the doctor and said, are the children happy? And I've always remembered that because I thought if one youngster at eighteen who really probably had been told it was the same as a blood donation and it would help his pocket money had worked it out that he had to think about the children. You can't assume that all donors haven't got some concern. They may not want to have it revealed and that's not being, that's not on the cards at all that it would only be with their permission. And of course some of them gave donations for a very long period and therefore have a very large number of children who could trace them. So it's an issue, but I don't see that given the present attitude towards the next generation of children, we can go on pretending that their rights can take precedence over those of the children.

WOMAN:
People fear that we're going to lose people who would donate sperm and egg. But I don't believe that's the case. I think we're going to get a different type of donor and maybe someone who's been married, got children and wants to help and be different, and would want to be open as well. So I - people's fears I don't think will be borne out. It's just how you educate people about the importance of knowing who we are, identity, and giving people support to make sure they can ensure the child has that.

MISHAL HUSAIN:
Well in 1975 the law for adoption grew up. In a wholesale review of legislation, new rights were granted to adopted people. But today fewer and fewer babies are put up for adoption while more and more infertile couples are pinning their hopes on the newer technologies. It remains to be seen how the law will respond to the challenge. Meanwhile I'd like to thank Carol Howells, Alexina McWhinnie and Julia Feast for their part in what for me has been a fascinating debate.