



Neutral Citation Number: [2023] EWFC 217

Case No: FD23F00056

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2023

Before :

MRS JUSTICE THEIS DBE

Between :

	X	<u>1st Applicant</u>
	- and -	
	Z	<u>2nd Applicant</u>

Ms Natalie Gamble (of NGA Law) for the 1st and 2nd Applicant

Judgment date: 30th November 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 30th November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE THEIS DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE :

Introduction

1. This matter concerns a joint application by X and Z for a declaration of parentage pursuant to s 55A Family Law Act 1986 in relation to Y, age 5 months.
2. The court is able to deal with this application on the papers. It is not opposed. In addition to the material in the court bundle, the court has the benefit of a detailed skeleton argument prepared by Ms Gamble on behalf of X, for which the court is extremely grateful.
3. This is another case where an audit of a licensed clinic has discovered that the relevant forms have not been completed, resulting in uncertainty about the parental legal status of a child born to individuals undergoing fertility treatment. Whilst it is right to note that the evidence of the medical director from Herts and Essex Fertility Centre ('the Clinic'), Mr Ogutu, is that the audit revealed 99.18% compliance, the ramifications of non-compliance, on even a limited number of individuals, is far reaching. X and Z describe in their joint statement on being informed by the Clinic of the difficulties regarding the forms that they were *'shocked and upset, particularly because we had been through such a long journey...We couldn't believe that at this stage, after all we had been through, we were being told that our baby might not be our baby anymore.'* This demonstrates the need for clinics who undertake this type of treatment to take every step to ensure they have robust systems in place to avoid what happened in this case occurring again.

Relevant background

4. X and Z are an unmarried couple who have lived together since 2017. Due to medical reasons they were unable to conceive. They sought specialist fertility advice and underwent four unsuccessful cycles of IVF treatment using their own gametes. They were advised to use donor eggs and donor sperm and Z became pregnant following the second embryo transfer of a donor egg/sperm embryo at the Clinic, which is licensed by the Human Fertilisation and Embryology Authority ('HFEA'). Y was born in June 2023.
5. This application has been issued due to the Clinic discovering upon an audit that Form PP was not part of X's medical notes. The Clinic notified X of this error and initially sought that he re-sign the PP Form before realising that this would be ineffective as it was being signed after the embryo transfer. The Clinic advised X sought legal advice and this application was issued. The Clinic accepted full responsibility for what occurred and agreed to fund the legal advice.
6. In addition to X and Z's joint statement, there is a statement from Mr Ogutu, medical director at the Clinic. The evidence is unclear whether the PP Form was signed prior to conception and was deleted or completing it was overlooked. Mr Ogutu's statement suggests it was signed in July 2022 and then deleted but there are no records to verify this. X and Y's statement is less clear. They could not recall specifically signing the PP Form, they signed all the forms they were asked to sign and relied on the Clinic to furnish them with the correct forms. They do recall seeking explicit confirmation that

X would be their child's father at the consultation with Mr Ogutu in August 2021, supported by the checklist that was completed following that consultation.

7. This application was issued on 16 May 2023. The court directed that the application should be served on the Clinic, the HFEA, the Attorney General and the Secretary of State for Health. They all confirmed they did not wish to take any active part in the proceedings. The matter was listed for hearing which was vacated by the court having considered the evidence and skeleton argument filed on behalf of the applicants, determining that the matter could be dealt with on the papers.

Legal framework

8. Sections 36-37 Human Fertilisation and Embryology Act 2008 (HFEA 2008) set out what is required in order to establish joint legal parenthood for unmarried different sex couples conceiving at licensed fertility clinics with donor sperm. In summary, each parent must give a notice in writing to the licensed clinic, prior to the embryo transfer which leads to the conception of the child, of their mutual intention that the non-birth parent be treated as the child's father. The HFEA Forms which are normally required to be completed, according to the HFEA Code of Practice and licensing requirements, are HFEA Form WP and HFEA Form PP.
9. The court may rectify issues arising from missing or incorrect HFEA WP and PP Forms where a doubt has been raised about whether legal parenthood has been properly established. The principles applied were set out in the judgment of Sir James Munby in *Re A and others (2015) EWHC 2602 (Fam)*. A number of the cases in *Re A (2015)* concerned situations in which the correct HFEA Form was missing but an alternative non-HFEA internal clinic consent form (referred to in the judgment as a 'Form IC') was accepted as satisfying the statutory requirements instead (see *Re A, C, E, F and H*). The then President of the Family Division stated at [50] – [52]:

"50. The first question is whether, as a matter of its content and construction, a Form IC is apt to operate (a) as a Form WP and/or (b) as a Form PP. This involves a comparison between the structure and language of the Form IC and the structure and language of the Form WP and Form PP, assessed in the light of the requirements of sections 37 and 44.

51. I start with the comparison between the Form IC and the Form PP. So far as concerns sections 37 and 44 and the content of the Form PP, there is, in my judgment, no difficulty. What sections 37(1)(a) and 44(1)(a) require is a "notice in writing" by, as the case may be, M or P "stating that [M or P] consents to being treated as ["the father" or "a parent" as the case may be]." That statutory language is tracked in the Form PP formula, "I consent to being the legal parent." The Barts Form IC uses the words "I acknowledge that ... I will become the legal father of any resulting child." This has to be read in conjunction with the "NB" reference to "the legal parenthood of the child." The MFS Form IC uses the words "I acknowledge that ... I intend to become legally responsible for any resulting child". This has to be read in conjunction with the "Note" reference to "consent ... in the interest of establishing the legal parenthood of the child."

*52. I am conscious of the view which Cobb J expressed in *AB v CD*, para 70. But for my part I have no difficulty. Both the Barts Form IC and the MFS Form*

IC make clear that what is in issue is "establishing ... legal parenthood" by W's partner and that this is why the Form IC is being signed by W's partner. In the MFS Form IC the word "consent" is used. Indeed, the phrase "partner's consent" appears immediately below the space where the partner has to sign. True it is that the word "consent" does not appear in the corresponding place in the Barts Form IC, but what the partner is signing is an acknowledgement – "I acknowledge" – that he or she "will become" a "legal" parent and acquire "legal parenthood." It is said that Casement was hanged on a comma, but I cannot accept that everything here turns on the use of the word "acknowledge" rather than "consent" when the purpose and effect of the words used in the Form IC is obvious. Why, after all, is W's partner being asked to sign the Form IC at all, if not to make sure that he or she becomes a parent? By signing the Form IC, W's partner is acknowledging in terms that he or she will become a parent and, by necessary implication, that this is something he or she wants. Taking the Form IC in context and having regard to its content and language, even a black-letter lawyer in Lincoln's Inn would struggle to deny that what is being signed is a consent. In my judgment, this Part of the Form IC – both the Barts Form IC and the MFS Form IC – is, as a matter of content and construction, apt to operate as a Form PP and complies with the requirements of sections 37(1)(a) and 44(1)(a).

10. It is therefore clear that an alternative document which contains an acknowledgment of intention to become a legal parent and is in writing and signed, can directly stand in place of an HFEA Form PP to satisfy the notice requirements in section 36-7 HFEA 2008.
11. In the more recent case of *A, B and Bourn Hall Clinic [2021] EWHC 1750 (Fam)* Poole J made clear that even documentation which did not explicitly refer to legal parenthood could be sufficient. In this case, neither of the applicants had signed any documents which specifically referenced an intention for the second mother to be a legal parent, albeit that they had signed general consents to treatment. Poole J nonetheless accepted that the documents signed by the applicants, when taken as a whole and in the context of their broad understanding that it was possible for them both to be legal parents, could constitute valid consent to legal parenthood for the purposes of section 43-44 HFEA 2008. He stated at [36]-[37]:

“35. The authorities demonstrate that it is possible for alternative consent documentation to stand in the place of the WP and PP forms such as to meet the statutory requirements in Sections 43 and 44 of the 2008 Act. The alternative documentation must be in writing and signed by both W and P before conception and must demonstrate informed consent... I have already found that the applicants received information and counselling prior to treatment and the seven documents can be interpreted in that context. The applicants' expectation was that the signing of these forms, and for the present I am assuming the alternative case that the WP and PP forms were not signed, had the desired effect; the effect they had been counselled about and given information about and which they plainly wished to bring about of making them both legal parents. It is fair to note that the documentation does not spell out consent to legal parenthood explicitly, but I am satisfied that, taken together, that is the effect of the seven documents.

35. In the circumstances, I am satisfied that I can and should make the declaration sought on both the primary case and the alternative case...

Submissions

12. Ms Gamble submits that rather than seeking to resolve the evidential issue about the PP Form, and whether it was signed, the court can rely on the other evidence about the consent documents signed, which will satisfy the requirements of ss36-37 HFEA 2008.
13. In particular the following matters are relied upon:
 - (1) The references in the statements that legal parenthood was discussed in the medical appointments on 10 June 2021 and 31 August 2021.
 - (2) The validly signed HFEA Form WP dated 10 June 2022 where Z consented to X being the legal father.
 - (3) The internal clinic consent forms signed by X during the treatment process prior to conception which explicitly set out and confirmed his intention and consent to being the legal father. In date order: (i) Consent to IVF dated 13 January 2021, signed by X which includes the following ticked declaration *“I am not married or in a civil partnership with the person I am seeking treatment with. I understand that I will become the legal parent of any resulting child”*. (ii) Agreement for egg recipient, signed by X 10 June 2022 which includes the following ticked declaration *“I am not married or in a civil partnership with the person I am seeking treatment with. I understand that I will become the legal parent of any resulting child”* and *“I understand that donated sperm was used in my/our treatment and that I/we must complete the relevant HFEA consent forms to confirm our consent to the partner not receiving treatment being the second legal parent of any child born.”* (iii) Consent to treatment using donor eggs, signed by X on 10 June 2022 which includes the following (ticked) declaration: *“I am not married or in a civil partnership with the person I am seeking treatment with. I understand that I will become the legal parent of any resulting child”* and *“I understand that donated sperm was used in my/our treatment and that I/ we must complete the relevant HFEA consent forms to confirm our consent to the partner not receiving treatment being the legal parent of any child born.”* and (iv) Consent to frozen embryo transfer, signed by X on 18 August 2022 – which includes the following (ticked) declaration: *“I am not married or in a civil partnership with the person I am seeking treatment with. I understand that I will become the legal parent of any resulting child”* and *“I understand that donated sperm was used in my/our treatment and that my partner and I must complete the relevant HFEA consent forms to confirm our consent to be the legal parents of any child born.”*
14. Ms Gamble submits the combination of the content of these forms, signed by X, and the wider evidence of the intentions of X and Z satisfy the requirements of ss 36-37 HFEA 2008.

Decision

15. The legal framework in ss 36-37 HFEA 2008 is clear as to the necessary requirements to establish joint legal parenthood for unmarried different sex couples conceiving at licensed fertility clinics with donor sperm. Each parent must give notice in writing to the licensed clinic prior to the embryo transfer which leads to the conception of the child of their mutual intention that the non-birth parent be treated as the child's father or other parent.
16. *Re A* establishes that the court can look to the evidence as a whole to determine what the applicants were consenting to when they consented to treatment, and that a consent form in a different format from the normally required HFEA Form can constitute a valid notice for the purposes of satisfying s36-37 HFEA 2008.
17. In my judgment the combination of the validly completed HFEA Form WP by Z and the various consent forms signed by X, as set out in paragraph 13 (3) above, in which he expressly consented to become a legal parent of any child conceived, all in writing and signed by him prior to the embryo transfer which led to Y's conception, are sufficient to satisfy the notice requirements in section 36-37 HFEA 2008 on the facts of this case.
18. The requirements of section 36-37 HFEA 2008 are therefore met and the court can and should make a declaration of parentage which resolves any doubt and confirms that X is, and always has been, Y's legal father.