

IN THE HIGH COURT OF JUSTICE Neutral citation number: [2025] EWFC 43
SITTING AT THE BRISTOL DISTRICT REGISTRY

Date: 28 February 2025

Before:
HHJ COPE
(SITTING AS A JUDGE OF THE HIGH COURT)

Between:

A

First Applicant

-and-

B

Second Applicant

Mr James Lawford Davies (of LDMH Partners) for the 1st and 2nd Applicant

Judgment date: 28 February 2025

Judgment

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.

Her Honour Judge Cope:

Introduction

1. The court is concerned with an application by A and B for a declaration of parentage pursuant to section 55A Family Law Act 1986 in relation to C. They are represented by Mr Lawford Davies.
2. In support of the application, I have been provided with various documents including statements from the applicants, a detailed chronology and a statement from the clinical director, Mr Chu, at the Oxford Fertility Clinic (OFC).
3. The case arises out of an audit of the OFC in January 2024 which revealed that the relevant forms had not been completed by the applicants resulting in uncertainty about the parental legal status of C who was born as a result of fertility treatment. The OFC accepts that this application is necessary as a result of its error.
4. Plainly, such an error has had a significant impact on the applicants who have been understandably upset by it. It is important therefore that clinics undertaking this type of treatment take every step to ensure that they have robust systems in place to avoid this sort of thing from happening again. In this respect I am told by Mr Chu that there are now checks by two nurses and a further check by the quality manager. I am also told there has been one previous error by the clinic which was the subject of a reported decision by the then President of the Family Division, Sir James Munby.

Background

5. The background can be summarised in this way. The applicants knew each other for some years and always planned to have a family. They knew from the outset that A might not be able to have children. At some point they decided to go to the Cotswold Fertility Clinic (CFC) which was part of their local NHS trust. CFC is a satellite clinic for three licensed clinics namely London Women's Clinic (LWC) in Cardiff, Bristol Centre for Reproductive Medicine and OFC. They opted for LWC.

6. A completed various consent forms in January 2022, including a HFEA MT form, naming B as his partner, consenting to the use of his sperm to create embryos for use in B's treatment, the storage of such embryos for 10 years, and the use of his sperm and embryos created using his sperm by her in the event of his death or mental incapacity. Tests in February 2022 meant the couple decided they would have IVF treatment using B's eggs and donor sperm. They were both asked to complete numerous HFEA and internal clinic consent forms prior to and during their first treatment cycle at LWC. On all of these forms, B consistently named A as her partner. The couple were also sent information about counselling and other aspects of treatment.

7. Notably, the applicants correctly and consistently completed pro forma HFEA consent to legal parenthood forms:
 - a. B completed a pro forma HFEA WP form titled 'Your consent to your partner being the legal parent' which she completed electronically on 31 March 2022, naming A as her partner and consenting to A being the legal parent of any child born as a result of her treatment; and
 - b. A completed a pro forma HFEA PP form titled 'Your consent to being the legal parent' which he also completed electronically on 31 March 2022, naming B as his partner, consenting to being the legal parent of any child born from B's treatment, and consenting to being posthumously registered as legal parent.

8. On the same day, B also completed a HFEA WT form, naming A as her partner, consenting to the use of her eggs to create embryos for her treatment, and to the storage of those embryos for 10 years.

9. The applicants also attended a virtual counselling appointment online on 21 February 2022 during which they discussed the ethical, legal and social implications of using donor sperm in treatment, and specifically discussed the legal implications of treatment and legal parenthood (amongst other things). Following

this appointment, the counsellor sent the couple additional information, including a link to a HFEA information page about legal parenthood.

10. The applicants both attended a treatment planning appointment with a specialist registrar at CFC on 7 April 2022. They discussed B undergoing an egg collection at LWC and plans for a subsequent embryo transfer.
11. On 18 July 2022, B completed a further HFEA WT form, again naming A as her partner and consenting to the use of her eggs to create embryos for her treatment, and to the storage of those embryos for 10 years.
12. After two unsuccessful treatments/pregnancies the couple opted to move to OFC although they would still use the CFC for scans and tests. The transfer of their treatment to OFC was duly arranged and the applicants were provided with the log in details for the Clinic's online consent platform. However, since CFC did not use an online consent platform, the applicants were given paper copies of the consent forms they needed to complete for their ongoing treatment. A blank suite of consent forms (including HFEA WT and MT forms, an internal consent form for blood screening, an internal consent form for IVF/ICSI, an internal consent form for Additional Techniques, and an internal consent for the use of gametes in training) were posted to the couple, but no new or further HFEA legal parenthood (WP and PP) consent forms were provided at this time. The couple completed and signed these forms in the clinic with the assistance of a fertility nurse.
13. The applicants both attended an online appointment with OFC's counsellor on 10 January 2023 during which they discussed various issues relating to their treatment, including '...all aspects of the HFEA counselling protocol including welfare of the child issues'.
14. On 14 February 2023, the applicants both attended a treatment planning appointment at CFC. The same nurse saw the couple. During this appointment A was incorrectly asked to complete a HFEA PBR form, 'Your consent to being registered as the legal parent in the event of your death'. A completed this by hand,

providing B's details as his partner, and consenting to being registered as the legal parent of any child born as a result of B's treatment after his death.

15. The first treatment was not successful. B later requested a counselling appointment.
16. The couple then opted for all treatment to take place at OFC and to proceed with a natural frozen transfer. On 12 April 2023 OFC emailed B to confirm that new consent forms had been uploaded to her online 'Fertility Consent' platform, stating 'Please discuss all decisions on the consent forms with your partner prior to submitting the forms as your answers should match where appropriate'.
17. On 5 June 2023, B emailed the Clinic wanting to check they had the forms in respect of the legal parentage and reassured that they did. Regrettably, it was not identified at this point that OFC did not have the WP and PP forms the couple had completed on 31 March 2022, nor were they asked to complete new WP and PP forms. It was also not recognised that the PBR form was not applicable for an unmarried couple.
18. On 20 September 2023, the couple both completed additional consent forms including an internal Clinic 'Consent to frozen embryo transfer'. On 21 September 2023, a member of clinic staff completed an internal 'Consent to treatment – Patient/Partner not in clinic' form on which she confirmed that A had been called, his ID checked, that he had confirmed he had watched the videos on the 'Fertility Consent' platform and understood the content, and that he had completed his own consent forms.
19. On 10 October 2023, ahead of B's embryo transfer, a laboratory checklist was completed, confirming that the applicants' consents had been checked. Again, it was not identified that OFC did not have WP and PP forms for the applicants.
20. B underwent a frozen embryo transfer at OFC on 16 October 2023 with A in attendance. This was successful.
21. On 4 January 2024, OFC conducted a routine audit of legal parenthood consent forms and identified that although the applicants had completed WP and PP forms

at the outset of their treatment at LWC these forms had not been provided to the OFC, nor had the couple been asked to complete new WP and PP forms at the Clinic prior to B's frozen embryo transfer.

22. In addition to the legal parenthood consent forms, the applicants also completed numerous additional HFEA and internal clinic forms relating to their treatment – both at LWC and OFC. At LWC the London applicants completed the following forms:

- a. B completed an internal LWC 'Patient Demographic and Registration Form' online on 24 November 2021, naming A as her partner and confirming that they were not married;
- b. A completed an internal LWC 'Patient Demographic and Registration Form' online on 25 November 2021, naming B as his partner and confirming that they were not married;
- c. B and A completed an internal LWC 'Zika Virus, Fertility Treatment And Gamete Donation' form online on 25 and 29 November 2021 respectively, naming B as the patient and A as her partner;
- d. B completed a HFEA CD form, 'Your consent to disclosing identifying information', online on 25 November 2021, naming A as her partner;
- e. A completed a HFEA CD form, 'Your consent to disclosing identifying information', online on 29 November 2021, naming B as his partner;
- f. A completed a HFEA MT form, 'Your consent to your sperm and embryos created outside the body using your sperm being used in treatment (IVF and ICSI)' on 13 January 2022, naming B as his partner, consenting to the use of his sperm to create embryos for use in B's treatment, the storage of such embryos for 10 years, and the use of his sperm and embryos created using his sperm in the event of his death or mental incapacity;
- g. A also completed a HFEA GS form, 'Your consent to the storage of your eggs or sperm' online on 13 January 2022, consenting to the storage of his sperm for 10 years;
- h. A also completed an internal LWC 'Consent form for Storage of Frozen Sperm' online on 13 January 2022, consenting to the storage of his sperm;
- i. B and A both completed a donor sperm order form for London Sperm Bank by hand on 6 March 2022, naming B as the patient and A as her partner;

j. B and A both completed an internal LWC 'Embryo and blastocyst transfer and cryopreservation' consent form online on 31 March 2022, naming B as the patient and A as her partner, and consenting to the fertilisation of Bs eggs with donor sperm for use in IVF, and confirming that they had been informed and understood that the sperm donor will not be the legal parent of any resulting child;

k. B completed a HFEA WT form, 'Women's consent to treatment and storage form (IVF and ICSI)' on 31 March 2022 naming A as her partner, consenting to the use of her eggs to create embryos for her treatment, and to the storage of those embryos for 10 years;

l. B completed a further HFEA WT form, now titled 'Your consent to your eggs and embryos created using your eggs being used in treatment (IVF and ICSI) or stored' online on 18 July 2022, naming A as her partner, consenting to the use of her eggs to create embryos for her treatment and to the storage of those embryos for 10 years;

m. B completed an internal LWC 'Consent to Egg Collection procedure' form by hand on 20 July 2022, naming A as her partner;

n. B completed an internal LWC 'Consent to Embryo Transfer Procedure' form by hand on 25 July 2022, listing A as her partner;

o. B and A both completed an internal LWC 'Consent for thaw and frozen embryo transfer (FET)' form by hand on 26 September 2022, naming B as the patient and A as her partner, confirming that they had read the HFEA's guidance notes on consent and legal parenthood, and consenting to an embryo transfer;

p. B completed an internal LWC 'Consent to Embryo Transfer Procedure' form by hand on 1 November 2022, listing A as her partner.

23. At OFC the applicants completed the following forms:

a. A completed an internal OFC 'Male Medical History' form online on 13 December 2022, confirming that he had undergone fertility investigations at LWC;

b. A completed an internal Clinic 'Personal Information' form on 13 December 2022 providing B's details as his partner, confirming that they lived at the same address but that he was not married or in a civil partnership;

- c. A completed an internal Clinic 'Additional Information' form online on 13 December 2022, confirming that he was not married or in a civil partnership, was not married to anyone else, and had never been married;
- d. B completed an internal Clinic 'Additional Information' form online on 13 December 2022, confirming that she was not married or in a civil partnership, was not married to anyone else, and had never been married;
- e. The applicants both completed an internal Clinic 'Gamete Embryo Transfer In Patient Agreement' by hand on 24 January 2023, requesting the transfer of their selected donor sperm to the Clinic;
- f. A completed a HFEA PBR form, 'Your consent to being registered as the legal parent in the event of your death', by hand on 14 February 2023, providing B's details as his partner, and consenting to being registered as the legal parent of any child born as a result of B's treatment after his death;
- g. The applicants both completed an internal Clinic 'IVF and ICSI Consent' form by hand on 14 February 2023, naming B as the patient and A as her partner, and confirming various matters including legal parenthood.
- h. The applicants couple both completed an internal Clinic 'Patient Information' form by hand on 14 February 2023, opting to have IVF with donor sperm and providing the same address;
- i. The applicants both completed an internal Clinic 'Freezing (Cryopreservation) and Storage of Embryos' consent form by hand on 14 February 2023, naming B as the patient and A as her partner, and confirming that they had been given verbal and written information about embryo freezing and given an opportunity to receive counselling;
- j. The couple both completed an internal Clinic 'Use of Embryos or Gametes (Eggs or Sperm) in Training Staff' form by hand on 14 February 2023, naming B as the patient and A as her partner;
- k. The applicants both completed an internal Clinic 'Zika Virus and Ebola Declaration' by hand on 14 February 2023, naming B as the patient and A as her partner;
- l. The couple both completed an internal Clinic 'Additional Techniques' form by hand on 14 February 2023;
- m. B completed a HFEA WT form, 'Your consent to your eggs and embryos created using your eggs being used in treatment (IVF and ICSI) or stored' by

hand on 14 February 2023, providing A's details as her partner and consenting to:

- i. the creation of embryos using her eggs;
- ii. the storage of her eggs for 10 years; and
- iii. the storage of embryos created using her eggs for 10 years

On the same form, B withheld her consent to the use and/or storage of her eggs and embryos in the event of her death or incapacity.

n. B completed an internal Clinic 'Consent: HIV, Hepatitis B & C Blood Test' consent form by hand on 14 February 2023 and on which:

- i. B was named as the patient and A as her partner;
- ii. both consented to the use of the techniques described; and
- iii. both confirmed their understanding that they were free to withdraw or vary their consent until the point of use.

o. The Applicants both completed an internal Clinic 'Donor Matching Consent' by hand on 1 March 2023, confirming their choice of sperm donor and that they had been offered and on which:

- i. B was named as the patient and A as her partner;
- ii. both consented to the use of the techniques described; and
- iii. both confirmed their understanding that they were free to withdraw or vary their consent until the point of use.

p. B completed an internal Clinic 'Consent: Surgical Procedure and Anaesthesia' form by hand on 9 March 2023, consenting to egg collection for the purpose of fertility treatment;

q. The applicants both completed an internal Clinic 'Embryo Transfer Consent' form by hand on 14 March 2023, consenting to a single embryo transfer;

r. A completed a HFEA CD form, 'Your consent to disclosing identifying information', by hand on 11 April 2023 and providing B's details as his partner;

s. A completed a further HFEA CD form using his e-signature on 15 April 2023, providing B's details as his partner;

t. A completed an internal Clinic 'Personal information form' online on 15 April 2023, providing B's details as his partner and confirming that they lived at the same address but that he was not married or in a civil partnership;

u. B completed an internal Clinic 'Personal information form' form online on

15 April 2023, providing A's details as her partner and confirming that they lived at the same address but that she was not married or in a civil partnership;

v. The applicants both completed an internal Clinic 'Consent to frozen embryo transfer' form using their e-signatures on 20 September 2023;

w. The applicants both completed an internal Clinic 'Additional Techniques – Assisted Hatching' consent form using their e-signatures on 20 September 2023.

x. The applicants both completed an internal Clinic 'Additional Techniques' consent form using their e-signatures on 20 September 2023.

y. The applicants both completed an internal Clinic 'Zika and Ebola Declaration' using their e-signatures on 20 September 2023.

z. The applicants both completed an internal Clinic 'Embryo Transfer Consent' by hand, consenting to a single embryo transfer.

24.C was born in June 2024. The applicants were subsequently registered as C's parents.

25. The application was issued on 10 December 2024. I directed that the applicant be served on the clinic, the HFEA, the Attorney General and the Secretary of State for Health. Not one of those bodies has indicated a wish to take any active part in the proceedings. The hearing has taken place solely with Mr Lawford Davies representing the applicants. He has assisted me with a detailed skeleton argument.

The law

26. The law in a case of his nature has recently been set out in *Theis J in X v Y* [2023] EWFC 217, paragraphs 8 – 11, which I set out below:

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 2062 (Fam). A number of the cases in *Re A* [2015] concerned situations in which the correct forms were missing but an alternative non-HFEA internal clinic consent form (referred to in the judgment as Form IC) was accepted as satisfying 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 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 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 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 to have a corresponding place in the Barts Form IC, but what the partner is signing is an acknowledgment – “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 Form IC is obvious. Why, after all, is W’s partner being asked to sign for 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 judgement, 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).’

27. It is therefore clear that an alternative document which contains an acknowledgement 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 – 27 HFEA 2008.

28. In the more recent case of *A and B v 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 W and P before the 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.

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

29. Having referred to the law as set out by Theis J in *X v Z* the case was factually different in that the clinic was of the view that the couple had signed the relevant forms but they had been deleted. Rather than resolve the issue, Theis J was invited to rely upon other evidence about the consent documents signed which would satisfy the requirements of sections 36 – 37 HFEA 2008 which she was content to do.

30. In previous cases, the court has also accepted that WP and PP forms completed at an earlier stage of treatment can remain valid in future cycles. In the case of *Re P and Ors* [2017] EWHC 49 (Fam), in relation to Case U, the then President found that a legal parenthood consent completed prior to the conception of an older child

remained valid in relation to the legal parenthood for a child subsequently conceived:

‘At the end of the day, the key point is the language of section 44(1)(a), referring to consent in relation to "any child resulting from treatment provided." That language, unsurprisingly, is tracked in the relevant part of the Form PP (see In re A, para 28): "any child born from my partner's treatment." The point, in my judgment, is a short one. "Any" means any; and, so long as the consent has not been withdrawn (and that manifestly did not happen here), there is no temporal or other limitation to the quite general expressions referring to the "treatment". So the Form PP completed before the first cycle of treatment continued to operate for the subsequent cycle of treatment, and notwithstanding the birth of the first child. In these circumstances, X is entitled to the declaration she seeks.’

31. A similar approach (albeit in relation to different circumstances) was taken in *Re C (Declaration of Parentage Written Consent)* [2019] EWHC 648 (Fam) in which Mrs Justice Theis held (at paragraph 70):

‘There is no requirement in ss 43 or 44 for the relevant notices or consents to post-date implementation of the HFEA 2008. There is no reference to timing, other than requiring them to be in writing and signed before the treatment took place. The legislation puts the emphasis on the written consent, which is ultimately determinative. The undisputed evidence in this case is that such consents were in place prior to the treatment taking place, they were in writing and signed. The provisions of ss 43 and 44 required no more. These sections do not prescribe a specific form or an earliest date, apart from the requirement for them to be in place before treatment took place.’

Submission

32. Mr Lawford Davies invites me to find that the legal requirements in this case are met in the basis of the alternative forms completed by the couple.

Conclusion

33. There can be no doubt that B is C's mother on the basis that she carried him as a baby following her treatment at the clinic (section 33 2008 Act).
34. A could only become C's legal parent by way of sections 36 and 37 of the 2008 Act). The difficulty in this case arises due to requirement of section 36(b) that the legal parenthood conditions set out in section 37 of the 2008 Act were met at the time when the treatment took place.
35. In my view, in line with the reasoning in *Re A & Others*, this is a case in which alternative, internal forms should be accepted as satisfying the statutory requirements. Further, and in line with the reasoning in *A & B v Bourn Hall Clinic*, this is also a case in which the other forms completed by the applicants may be relied upon so as to meet the statutory requirements in sections 36 and 37 of the 2008 Act, notwithstanding that they may not explicitly spell out consent to legal parenthood.
36. I also take into account the valid and extant WP and PP forms completed for the applicants' first treatment cycle at LWC which demonstrate their express intention that they both be the legal parents of any child born as a result of B's treatment. There is no timing requirement in the legislation (other than the requirement that the documents are signed before treatment is provided).
37. The applicants embarked on all treatment cycles at both clinics together and repeatedly confirmed that they were seeking treatment together. All of their cycles were carried out in joint enterprise with mutual support. They attended counselling about the implications of having children together using donor sperm. It was always the intention of both applicant that they both be the legal
parents of any children born as a result of B's fertility treatment, and both believed that they had done all that they needed to do in order to meet the statutory and regulatory requirements for both treatment cycles, including those relating to legal parenthood, and completed all of the documentation provided to them by the clinics.

38. Following C's birth, both were registered as the legal parents.

39. Further, it is also OFC's evidence that, if staff had been concerned that the couple were not being treated together and/or that they had not consented to A being the legal parent of their child, the matter would have been referred to the Clinic's multidisciplinary team for discussion and in most circumstances the OFC would have not agreed to proceed with treatment. I have already set out the many consent forms completed by the couple.

40. Taking all matters into account, I am content to make the declaration sought.

41. That is my judgment.

Her Honour Judge Cope sitting as a section 9 judge 28 February 2025