



Neutral Citation Number: [2024] EWHC 649 (Fam)

Case No: FD24F00103

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2024

Before :

MRS JUSTICE THEIS DBE

Between :

	Y	<u>Applicant</u>
	- and -	
	Z	<u>2nd Applicant</u>

Ms Natalie Gamble (instructed by **NGA Law**) for the **Applicants**

Judgment date: 21st March 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 21st March 2024 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

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. The court is concerned with an application dated 30 November 2023 by Y and Z for a declaration of parentage under section 55A of the Family Law Act 1986 (FLA 1986) relating to V now age 10 months. V was conceived by Y and Z at a licensed fertility clinic with donor sperm. Following V's birth an issue has been raised by the clinic, Complete Fertility ('the Clinic') regarding the paperwork that was completed that enables M to be V's second legal parent.
2. Following directions made by this court on 6 February 2024 notice was given to the Clinic, the Human Fertilisation and Embryology Authority ('HFEA'), the Attorney General and the Secretary of State for Health. None of those persons sought to apply to be joined as a party. Y and Z filed a joint statement in support of the application and Ms Saran, has filed a statement on behalf of the Clinic clearly setting out the relevant records and evidence from the Clinic.
3. On the 14 March 2024 I directed that having considered that written material and the detailed skeleton argument filed on behalf of the applicants the hearing listed on 21 March 2024 could be vacated and I would determine the application on the papers and hand down a judgment on 21 March 2024. This procedure was heralded by Sir James Munby in *Re D and others (Practice: Declaration of Parentage)* [2017] EWHC 1782 (Fam) at [10] and has been adopted in subsequent cases (such *Re X and Z* [2023] EWFC 217) where, like here, there is no factual dispute and none of the other persons listed above have sought to intervene. The court is grateful for the comprehensive skeleton argument filed on behalf of the applicants.
4. This is another case where an audit of an HFEA 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. Ms Saran, Consultant in Reproductive Medicine and the statutory Person Responsible for the purposes of the Clinic's HFEA licence, expresses the Clinic's sincere apologies for the Clinic's oversight in relation to completion of the WP and PP forms when the change was made for the embryo transfer to Z rather than Y. Ms Saran sets out that measures have been taken by the Clinic to ensure this situation does not occur again. She states a full incident investigation was conducted and the Clinic has revised their 'Legal Parenthood Pathway' document. These steps are to be welcomed, as the ramifications of non-compliance, on even a limited number of individuals, is far reaching. Y and Z powerfully describe in their joint statement their shock and distress on being informed by the Clinic of the difficulties regarding the forms, the implications for Y's legal status in relation to V and how they have found the whole process traumatic, including the need to make this application. This illustrates the need for clinics who undertake this type of treatment to ensure they have reliable systems in place to avoid what happened in this case occurring again.

Relevant background

5. The applicants are same-sex partners who have lived together since 2017. They wished to start a family and in 2021 contacted the Clinic together in 2021. It was always their intention they would both be joint legal parents.

6. Embryos were created in August 2021 using Z's eggs and donor sperm. The first four embryos transferred to Y were unsuccessful. The fifth, transferred to Z, was successful and resulted in the birth of V. V's birth was registered recording Z as her mother and Y as her second legal parent.
7. A few months after V's birth Z and Y were notified by the Clinic that an audit had revealed that their medical file did not contain the requisite HFEA WP and PP forms signed by the applicants to nominate Y as V's second legal parent. The Clinic file did have completed WP and PP forms from May 2021 through which the applicants nominated Z as the second legal parent of any child carried by Y, as had been originally planned. The Clinic could find no other forms completed to reflect the change for Y to be the legal parents of any child carried by Z.
8. Having sought legal advice the applicants decided to issue this application to confirm that Y is V's second legal parent.

The evidence

9. The applicants rely on the WP and PP forms they did sign and their other signed consent forms which expressly refer to their intention to be joint legal parents. Whilst they recognise the WP and PP forms they did sign are the wrong way round, they say when looked at together with all the other evidence the requirements of s43-44 Human Fertilisation and Embryology Act 2008 ('HFEA 2008') are satisfied.
10. In particular, they rely on:
 - (1) HFEA Form PP signed by Z on 23 May 2021 giving Z's consent to being a legal parent of any child born from Y's treatment;
 - (2) HFEA Form WP signed by Y on 24 May 2021 consenting to Z being the legal parent of any child born from her treatment ; and
 - (3) Agreement to treatment with donor sperm form dated 7 July 2021 signed by both Applicants. This is an internal clinic consent form which contains the words: "*We have completed the appropriate HFEA legal parenthood consent forms for our relationship status, as set out in Part 7 of this document*".
11. In addition, the applicants signed numerous other consent forms which, although not explicitly referencing legal parenthood, make abundantly clear that the applicants were involved in the treatment consistently as partners and were having treatment together:
 - i) HFEA Consent to Disclosure form dated 16 May 2021 and 24 May 2021 (separately signed by both Applicants);
 - ii) Pre-conception questionnaire dated 23 May 2021 (signed by Z);
 - iii) HFEA Consent to Donating Eggs form dated 25 May 2021 (signed by Z);

- iv) Internal clinic agreement for oocyte recipients dated 6 June 2021 (signed by both applicants);
 - v) HFEA Welfare of the Child form dated 7 July 2021 (signed by Y);
 - vi) Confirmation of donor characteristics form dated 9 July 2021 (signed by both applicants);
 - vii) COVID Health questionnaire dated 31 August 2021 (signed by Y);
 - viii) Costed treatment plan dated 14 September 2021 (signed by both applicants);
 - ix) COVID Health questionnaire dated 6 January 2022 (signed by Z);
 - x) COVID treatment consent dated 6 January 2022 (signed by both applicants);
 - xi) Frozen embryo thaw consent dated 6 January 2022 (signed by both applicants);
 - xii) COVID Health questionnaire dated 29 April 2022 (separately signed by both applicants);
 - xiii) COVID treatment consent dated 29 April 2022 (signed by both applicants);
 - xiv) COVID frozen embryo thaw consent dated 29 April 2022 (signed by both applicants);
 - xv) Consent to frozen embryo thaw dated 11 May 2022 (signed by both applicants);
 - xvi) COVID Health questionnaire dated 5 July 2022 (signed by both applicants);
 - xvii) COVID treatment consent dated 5 July 2022 (signed by both applicants); and
 - xviii) Frozen embryo thaw consent dated 5 July 2022 (signed by both applicants).
12. It is clear from the evidence that the applicants signed all consent forms provided to them, that they were partners creating a family together and that they believed at the time of the embryo transfer in the summer of 2022 that they had done all required of them to be treated as joint legal parents. They say in their statement at [12]:
- “Throughout our treatment, we signed all the consent forms [the Clinic] gave us and we were consistently recorded as partners. It was our clear understanding throughout that both of us would be recognised as [V’s] legal parents. We relied on [the Clinic] to provide us with the necessary paperwork and had no reason to doubt they had done so correctly.”*
13. Ms Saran also sets out in her statement that it was clear the applicants were creating a family together and wished to be treated as joint legal parents, stating at [28]:

“Having reviewed the documentation, it is clear to me that the couple’s intention was always for [Y] to become the legal parent of any child born as a result of [Z’s] treatment. I am not aware of any other documentation or information which indicates otherwise: to the contrary, all of the documentation is consistent in indicating that the couple intended that they both be legal parents.”

Legal framework

14. The relevant law (s43-44 Human Fertilisation and Embryology Act 2008 ‘HFEA 2008’) sets out that 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 other legal parent. 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.
15. 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 relevant principles are set out in *Re A and others (2015) EWHC 2602 (Fam)*. Several 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 was accepted as satisfying the statutory requirements instead (see *Re A [50] – [52]*).
16. Although each case is fact specific, it is established that an alternative document which contains an acknowledgment of intention to become a legal parent, is in writing and signed, can be considered to stand in place of an HFEA Form WP or PP to satisfy the notice requirements in section 43-44 HFEA 2008.
17. In the more recent case of *A, B and Bourn Hall Clinic [2021] EWHC 1750 (Fam)* the court made clear that documentation which did not explicitly refer to legal parenthood could suffice. In that 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 [35] – [36]:

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

Discussion and decision

18. The authorities demonstrate 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 documents other than the required HFEA Form can constitute a valid notice for the purposes of satisfying s43-44 HFEA 2008.
19. In addition, the court can also explicitly accept the WP and PP Forms which were signed as validly conferring legal parenthood on Y. Parenthood forms signed at an earlier stage can remain valid in future cycles of treatment, which enables the court to rely on the WP and PP Forms signed for the initially planned embryo transfers to Y for the subsequent embryo transfer to Z, notwithstanding the lapse of time or change of treatment plan. In *Re C (Declaration of Parentage Written Consent)* [2019] EWHC 648 (Fam) an internal consent to legal parenthood signed by a same-sex partner in March 2008 prior to the implementation of the HFEA 2008 was valid in respect of treatment carried out after its implementation. At [69]-[70] I stated *“The critical question is whether a consent signed prior to the HFEA 2008, at a time when the law did not permit a second female partner to become a parent following the use of donor sperm, is valid for the purpose of s 44. It has been established that the equivalent consent given by a male prior to the implementation of the HFEA 2008 is valid consent (see Re I [2016] EWHC 791 (Fam) [16]-[19]). 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”*.
20. As a consequence, the WP and PP Forms which the Applicants signed in May 2021 applied to the embryo transfer which took place in August 2022 leading to V’s conception as much as they applied to the earlier embryo transfers.
21. In addition, the court can correct errors in documentation. In *Re A (ibid)* Munby P ruled that the court could correct or rectify mistakes in parenthood forms. He said at [63]: *“I conclude, therefore, that, in principle the court can ‘correct’ mistakes in a Form WP or a Form PP either by rectification, where the requirements for that remedy are satisfied, or, where the mistake is obvious on the face of the document, by a process of construction without the need for rectification.”* In *Re G (2016) EWHC 729 (Fam)* even though the parents had signed the WP and PP forms the wrong way round Munby P held that they were nonetheless valid. He said at [15]-[16]: *“As will be appreciated from the analysis in Re A, Y, as the gestational mother, should have signed Form WP and X, as her partner, should have signed Form PP. In fact, and as a result of what is accepted to have been errors by the clinic, Y completed and signed a Form PP and X*

completed and signed a Form WP... In these circumstances, and in the light of my findings of fact as set out in paragraph 12 above, it is common ground, and I agree, that, application the principles laid down in Re A, X Is entitled to the relief she seeks.” In effect, this means that the court can, in an appropriate case, read the WP and PP Forms completed by the applicants as if they had been completed the other way around, correcting the error made in this case of failing to update the forms and to sign them the other way around following the decision to try and embryo transfer to Z rather than Y.

22. Having considered the evidence in this case I agree the WP and PP Forms signed by both applicants in May 2021 can be read as validly conferring legal parenthood on Y even though they were signed the wrong way around, as they were signed in anticipation of an earlier cycle of treatment in which M rather than Z was intended to be the birth mother. This conclusion is fully supported by the other evidence of the clear understanding that both Y and Z would be legal parents of any child conceived.
23. A declaration of parentage will be made.