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Case number omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 April 2016

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the Matter of the Human Fertilisation and Embryology Act 2008
(Case I)

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Miss Deirdre Fottrell QC and Miss Marisa Allman (instructed by Graysons) for the applicant
Miss Sarah Morgan QC (instructed by Goodman Ray) for the child's guardian

Hearing date: 6 April 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. In *In re A and others (Human Fertilisation and Embryology) (Legal Parenthood: Written Consent)* [2015] EWHC 2602 (Fam), [2016] x WLR xxx, [2016] 1 All ER 273, and then again in *Re the Human Fertilisation and Embryology Act 2008 (Case G)* [2016] EWHC 729 (Fam), I have had to consider a number of cases which raised issues very similar to those which confront me here.

Background

2. In my judgment in *In re A*, I set out (paras 6-8) the lamentable background to all this litigation. I referred to the significant number of cases in which the Human Fertilisation and Embryology Authority ("the HFEA") had identified "anomalies". I have now given final judgment in eight cases (Cases A, B, C, D, E, F, G and H). This is Case I. Six further cases (Cases J, K, L, M, N and O) are currently awaiting final hearing. For all I know there may be others pending.

3. There is no need for me to rehearse again the statutory framework and the legal principles which I dealt with in my judgment in *In re A*. None of it was challenged before me in *Case G*. None of it has been challenged before me in this case. I shall therefore take as read, and apply here, my analyses of the statutory scheme under the Human Fertilisation and Embryology Act 1990 and the Human Fertilisation and Embryology Act 2008 (*In re A*, paras 14-25), of the various consent forms which are in use (*In re A*, paras 26-31), of the previous authorities (*In re A*, paras 32-43) and of the three general issues of principle which I addressed (*In re A*, paras 44-63).

4. I set out (*In re A*, paras 47-48) my analysis of the potential applicability in these cases of the equitable doctrine of rectification and of the principle that the court can, as a matter of construction, 'correct' a mistake if the mistake is obvious on the face of the document and it is plain what was meant. This was a topic to which I returned in *Case G* (para 4), supplementing but not altering what I had said in *In re A*.

The facts

5. For the reasons which I explained in *In re A*, para 66, I propose to be extremely sparing in what I say of the facts and the evidence in this case.

6. The applicant, who I will refer to as X, is a man who was at all material times in a relationship with the first respondent, a woman who I will refer to as Y. Following IVF treatment provided by a clinic, CARE Sheffield, operated by the Care Fertility Group, which is and was regulated by the HFEA, Y gave birth to their child. X seeks a declaration pursuant to section 55A of the Family Law Act 1986 that he is, in accordance with section 36 of the 2008 Act, the legal parent of the child. Y is wholeheartedly supportive of X's application. Since the birth of their child, X and Y have married. That does not, however affect, any of the questions which I have to determine.

7. Neither the clinic nor the Secretary of State for Health is a party to the proceedings. Both have made clear, however, that they do not challenge the relief sought by X. The clinic's position is set out in a witness statement from the individual who is the "person responsible" within the meaning of section 17(1) of the 1990 Act. The

Secretary of State's position is set out in a detailed letter from the Government Legal Department ("the GLD"). The report of the child's guardian is very positive and entirely supportive of the application.

8. I have been greatly assisted in my task by the submissions I have had, both written and oral, from Miss Deirdre Fottrell QC and Miss Marisa Allman for X and from Miss Sarah Morgan QC for the guardian.

9. I had written evidence from X and Y. Both were present throughout the hearing, which took place on 6 April 2016. Y gave oral evidence.

10. Just as in each of the cases I had to consider in *In re A* and in *Case G*, so in this case, having regard to the evidence before me, both written and oral, I find as a fact that:

    i) The treatment which led to the birth of the child was embarked upon and carried through jointly and with full knowledge by both the woman (that is, Y) and her partner (X).

    ii) From the outset of that treatment, it was the intention of both Y and X that X would be a legal parent of the child. Each was aware that this was a matter which, legally, required the signing by each of them of consent forms. Each of them believed that they had signed the relevant forms as legally required and, more generally, had done whatever was needed to ensure that they would *both* be parents.

    iii) From the moment when the pregnancy was confirmed, both Y and X believed that X was the other parent of the child. That remained their belief when the child was born.

    iv) Y and X, believing that they were entitled to, and acting in complete good faith, registered the birth of their child, as they believed the child to be, showing both of them on the birth certificates as the child's parents, as they believed themselves to be.

    v) The first they knew that anything was or might be 'wrong' was when, some years later, they were contacted by the clinic.

    vi) X's application to the court is, as I have said, wholeheartedly supported by Y.

11. I add that there is no suggestion that any consent given was not fully informed consent. Nor is there any suggestion of any failure or omission by the clinic in relation to the provision of information or counselling. This is a matter which the GLD helpfully suggested might benefit from further exploration. Having been guided through that process by Miss Fottrell I am entirely satisfied that the necessary counselling was provided by the clinic. I do not propose to go into the details. It suffices to record that my conclusion is based in part on the very clear evidence of X and Y and in part on what was recorded contemporaneously by the clinic in written documents.

12. At the conclusion of the hearing I made an order declaring that X "is the father of" the child. I now (12 April 2016) hand down judgment explaining my reasons for making that order.

The issues

13. This case raises issues I have not previously had to consider. They arise from the fact that the relevant consents were provided by X and Y shortly *before* the 2008 Act came into force on 6 April 2009, whereas the relevant treatment commenced, on 6 April 2009, *after* the 2008 Act had come into force. Forms WP and PP were introduced with effect from 6 April 2009 as part of the new scheme introduced by the 2008 Act. Prior to that, the relevant form used for the purposes of the original scheme under the 1990 Act was what I have called a Form IC. The clinic's mistake was in failing to appreciate, despite all the guidance on the point previously circulated by the HFEA, that, because the treatment commenced on 6 April 2009, it was necessary to comply with the requirements of the 2008 Act. Apparently, staff at the clinic believed that the requirements of the 2008 Act applied only to procedures carried out *after* 6 April 2009 and did not appreciate that they applied to procedures carried out *on and from* 6 April 2009.

14. In these circumstances, given the facts and my findings, taken in the context of the analysis in *In re A*, three issues arise. The first is whether the language of the Form IC, a document signed by X and Y on 27 February 2009, is apt to satisfy the requirements of sections 36 and 37 of the 2008 Act. The second is whether, assuming it is, the Form IC has that effect notwithstanding the coming into force of the 2008 Act. The third arises because, as completed, the Form IC showed that what was going to be used was X's sperm whereas in fact what was used was the sperm of an anonymous donor.

15. The first issue: I need not set out the contents of the Form IC in any detail. For present purposes, there are two things to be noted. The first (see section 37(1)(a) of the 2008 Act) is that X signed a declaration in the following terms:

> "I am the male partner of [Y]. I acknowledge that she and I are being treated together … In consenting to the course of treatment outlined above, I understand that I will become the legal father of any resulting child(ren)."

The other (see section 37(1)(b) of the 2008 Act) is that nowhere in the Form IC did Y state in terms that she consented to X being treated as the father of the child. I can take the matter very shortly. For the reasons I set out in *In re A*, paras 52-53, I am satisfied that the Form IC signed by X and Y is, as a matter of content and construction, apt to operate both as a Form PP and as a Form WP, complying with the requirements of both section 37(1)(a) and section 37(1)(b).

16. The second issue: In *In re A*, paras 54, 61, I concluded that a properly completed Form IC which, as a matter of content and construction, is apt to operate both as a Form PP and as a Form WP and which complies with the requirements of sections 37(1)(a) and 37(1)(b), is not precluded by any of the provisions of the statutory scheme from operating as consent for the purposes of section 37 of the 2008 Act; and

that failure to use a Form WP or a Form PP does not invalidate a consent which would otherwise comply with section 37.

17. Can it make any difference that the Form IC was completed and signed *before* the 2008 Act came into effect, or that the objective at the time it was signed was to comply with the requirements of the regime under the 1990 Act, rather than the new regime under the 2008 Act? Surely not. The only question, in my judgment, is whether the document being relied upon – in the present case the Form IC – is, as a matter of content and construction, apt to satisfy the requirements of both section 37(1)(a) and section 37(1)(b). If it is, then the statutory requirements are satisfied; if it is not, then the statutory requirements are not satisfied. The point, in the final analysis, is as short and simple as that.

18. Miss Fottrell makes the very powerful argument that, if the treatment in this case had taken place on or after 27 February 2009 but *before* 6 April 2009, the Form IC completed and signed on 27 February 2009 would have sufficed to establish X's legal parenthood in accordance with the regime under the 1990 Act, just as, if the Form IC had been signed on 6 April 2009 immediately before the treatment was begun, that would have sufficed, in accordance with the analysis in *In re A*, to establish X's legal parenthood in accordance with the new regime under the 2008 Act. It would, she submits, be wholly artificial to treat the Form IC as somehow becoming invalid or of no effect with the coming into force of the 2008 Act on 6 April 2009. After all, as Miss Morgan points out, neither X or Y ever withdrew their consents. When the treatment began on 6 April 2009, everyone – X, Y and the clinic – was proceeding on the basis of and relying upon the consents given on 27 February 2009. I agree with Miss Fottrell and Miss Morgan.

19. Miss Fottrell goes further, submitting that it would be perverse to treat the Form IC as having become invalid in respect of those parts of it relating to consent to legal parenthood given that it plainly remained operative in respect of those parts of it relating to consent to medical treatment. Miss Morgan makes the same submission. I agree.

20. It follows, in my judgment, that the Form IC completed and signed on 27 February 2009 continued to operate as valid and effective consents for the purpose of section 37 of the 2008 Act, notwithstanding the change in the statutory regime which occurred on 6 April 2009.

21. The third issue: It was clear to everyone from the outset – X, Y and the clinic – that there was no question of X's sperm being used and that the treatment would involve use of the sperm of an anonymous donor. It had, for example, been the subject of counselling involving both X and Y in September 2008. It is, accordingly, clear beyond sensible argument that there is an error in the Form IC as completed and signed, inasmuch as it recorded that what was going to be used was X's sperm. Equally plainly, what was meant was that what was going to be used was the sperm of an anonymous donor. The mistake was, in reality, as simple as this, that a ✓ was inserted in the wrong place and, as it were, against the wrong piece of text. It was, as Miss Morgan submits, a simple undetected clerical error. In the circumstances, this obvious mistake can, in my judgment, be 'corrected' as a matter of construction, and without the need for rectification (see paragraph 4 above).

22. It follows from all this that X is entitled to the declaration of parentage which he seeks.

Adoption

23. In a letter from the clinic dated 26 June 2014 to X and Y describing the clinic's understanding of the legal position, the following remedies were identified as being possible: a parental responsibility order (not in fact feasible because X's name was already on the birth certificate); or a step-parent adoption. There was no suggestion that a parental order might be possible. My impression is that the view of the clinic in this case, shared at the time both by the HFEA and by the other clinics whose actions I have had to consider, was based on assumptions, derived from Cobb J's judgment in *AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357, which were widespread until, in February 2015, Theis J gave judgment in *X v Y (St Bartholomew's Hospital Centre for Reproductive Medicine Intervening)* [2015] EWFC 13, [2016] PTSR 1.

24. With heavy hearts, and I can understand only too well why they should have thought adoption an utterly inappropriate remedy (see *In re A*, para 71), X and Y decided to proceed by way of adoption. As X said, "It was an extremely difficult decision for us to make … It was against all that we had hoped when we started the process." Y's statement says it all: "My thought on adoption was one of devastation for [X]. The realization that he may have to adopt … his own son … was tremendous … It was an extremely difficult decision for us to make to initiate adoption proceedings." However, in March 2015 X applied to the family court for an adoption order.

25. Happily, the District Judge to whom the case was allocated spotted the potential significance of Theis J's judgment. When the matter came on for directions before the Circuit Judge, counsel then instructed by X submitted that there was a very real possibility that X was already the legal father; that it appeared that the adoption application was misconceived; that the appropriate remedy was an application to the High Court for a declaration of parentage; and that the adoption application should be stayed. In her very helpful note for the court, counsel observed that "it would appear that the couple have been ill advised by the clinic and put to the great distress of making this application which is likely to be proven unnecessary."[1] The Circuit Judge made an order staying the adoption proceedings. In subsequent orders the same Circuit Judge extended the stay, most recently until 30 April 2016. In a recent order I directed that the adoption proceedings were to be allocated to me.

26. Given my decision in relation to X's application for a declaration of parentage, any need to pursue the adoption application falls away. Miss Fottrell submitted that I should give her client leave to withdraw the adoption application. That must be right. Accordingly, and sitting for this purpose in the family court, I made an order giving X leave to withdraw the adoption application.

A final matter

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[1] Very properly and responsibly, counsel made clear that she did not hold herself out as experienced in such matters and that the intention was to instruct specialist counsel. It was in these circumstances that Miss Allman, who had appeared before Theis J as advocate to the court in *X v Y*, was subsequently instructed on behalf of X.

27. I have drawn attention in my previous judgments to the devastating impact on parents of being told by their clinic that something has gone 'wrong' in relation to the necessary consents (see *In re A*, para 69, and *Case G*, para 31). I commented (*Case G*, para 32) that these were situations calling for "empathy, understanding, humanity, compassion and, dare one say it, common decency, never mind sincere and unqualified apology." In *Case G*, I was very critical of that clinic's behaviour in this respect.

28. In the present case, X and Y were similarly affected. Y, who received the initial telephone call from the clinic, says she was "beside myself" and felt "physically sick." X, when he got the news from Y, felt "total devastation." "I was totally numb and shocked."

29. Unhappily, they did not receive from the clinic the support they were entitled to look for. In the very first telephone call, Y recalls being told that X's name should not have been put on the birth certificate and that the certificate should have recorded the father as being unknown. X and Y are critical of the clinic's handling of the problem which, after all, it had created. In her report, the guardian, who has been involved in all nine cases to date, observed that the subsequent actions of the clinic "do not compare favourably to those of the other clinics" and that the clinic has appeared "defensive and insensitive." She described the comment about the birth certificate as being "not only factually incorrect but most terribly hurtful."

30. The letter dated 26 June 2014 to which I have already referred contained not a single word of apology or regret. A subsequent letter dated 15 April 2015 contained an offer to pay the reasonable costs of the parenthood application "without cap" and an offer of £1,000 each to X and Y "by way of ex gratia payment in recognition of the anxiety they have suffered, in full and final settlement of all causes of action." As in the case of the earlier letter, it contained not a single word of apology. In January 2016 the clinic filed the witness statement to which I have already referred. It contained this anaemic sentence: "I would like to take this opportunity to express my sincerest apologies on behalf of CARE Sheffield and CARE Fertility Group for the distress that this matter has caused [X], [Y] and the [child]." This, I was told, was the *first* apology either X or Y had had from the clinic.

31. The clinic's behaviour is by no means the worst I have seen in the course of considering all these cases, but it was, nonetheless, seriously deficient and, in my judgment, deserving of the criticisms voiced by X, by Y and by the guardian.