

Declarations of parentage following administrative errors

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Family analysis: A judge has described 'widespread incompetence' in the failure of fertility clinics through an administrative error to protect their patients' parentage, leaving both them and their children vulnerable. Suzi Denton, a family lawyer with Natalie Gamble Associates, examines the decision of In the matter of the Human Fertilisation and Embryology Act 2008 (Cases A, B, C, D, E, F, G and H).

Original news

In the matter of the Human Fertilisation and Embryology Act 2008 (Cases A, B, C, D, E, F, G and H) [2015] EWHC 2602 (Fam), [2015] All ER (D) 57 (Sep)

The Family Division granted, in seven cases (the eighth case having been adjourned), the declaration of parentage sought, in circumstances where it had subsequently come to light that there had been administrative errors by certain fertility clinics, concerning consent to acquisition of parenthood.

What was the background to this decision?

This case was brought by a group of parents who had conceived children through fertility treatment with donated sperm. They were left in a precarious position when they discovered that the non-biological parent might not be their child's legal parent due to administrative errors at the fertility clinics where their children had been conceived. This was only brought to their attention after an audit of 109 clinics which was carried out at the direction of the Human Fertilisation and Embryology Authority (HFEA), the regulatory body which oversees UK fertility clinics. The audit uncovered that 51 clinics had identified mistakes in their records, which meant that critical forms conferring parenthood on a non-biological parent were either missing or had been completed incorrectly.

What were the key issues in the cases?

The clinics had failed to protect their patients' parentage, leaving them and their children vulnerable and causing them 'much misery'. The most worrying aspect of this case is that there could be countless other couples across the UK whose parentage is not as it should be, but who are unaware of the situation. The remedies applied by the court in this case (declarations of parentage in accordance with section 55A of the Family Law Act 1986) were given to these parents after a careful analysis by the President of the Family Division, Sir James Munby, of each particular set of circumstances. Munby P found that, in each case, the forms had been signed but subsequently lost, the court could accept alternative documents as evidence of consent, or the mistakes made in signing the documents were so obvious that they could be corrected by the court retrospectively.

While this means resolution for the parents involved in this particular case, others in the same position cannot be completely certain of their own position unless they make a similar application. This has wide-reaching consequences for parents, who, through no fault of their own, are left in a state of limbo.

Munby P made damning criticisms of IVF clinics across the UK, and their regulator, the HFEA, highlighting a pattern of 'widespread incompetence' across the sector:

'The lamentable shortcomings in one clinic identified by Cobb J, which now have to be considered in the light of the deeply troubling picture revealed by the HFEA audit and by the facts of the cases before me, are, or should be, matters of great public concern. The picture revealed is one of what I do not shrink from describing as widespread incompetence across the sector on a scale which must raise questions as to the adequacy, if not of the HFEA's regulation, then of the extent of its regulatory powers. That the incompetence to which I refer is, as I have already indicated, administrative rather than medical, is only slight consolation, given the profound implications of the parenthood which in far too many cases has been thrown into doubt' (para [8]).

Fertility clinics (and the HFEA which regulates them) were urged to sharpen up their practice when treating patients conceiving with donor sperm, to ensure that these problems do not continue in the future. The forms relating to

parenthood are so critical, the President said, that they should be clearly and boldly marked, and clinics should consider asking a legal professional to confirm they have been completed correctly:

'A completed Form WP and a completed Form PP surely needs to be *checked* by one person (probably a member of the clinical team) and then *re-checked* by another person, entirely separate from the clinical team, whose sole function is to go through the document in minute detail and to draw attention to even the slightest non-compliance with the requirements--all this, of course, *before* the treatment starts. I trust that the parties will not be offended by the comparison, but the approach to checking that the Form WP and the Form PP have been fully and properly completed is surely just as important, and demands just as much care, attention and rigour as would be demanded in the case of a legal document such as a contract for the sale of land, a conveyance or a will--indeed, in the context of parenthood, even more important' (para [111]).

What constitutes valid consent under Part 2 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008)?

HFEA 2008, Pt 2 sets out who must consent to treatment and when they must do so.

If a woman is married at the time of treatment and is being treated with donor sperm, her husband, wife or civil partner is treated as being the child's other legal parent unless it is shown that he or she did not consent to the treatment (HFEA 2008, s 35).

If a woman is not married at the time of treatment and is being treated with donor sperm, her partner must fulfil the agreed fatherhood or female parenthood conditions as set out in HFEA 2008, ss 36, 37, 43, 44. This includes the partner giving written notice stating that he or she consents to being treated as a parent of any child resulting from treatment (Form PP) and the woman who is undergoing treatment giving notice that she consents to her partner being treated as the child's other legal parent (Form WP). Crucially, this notice must be signed *before* treatment takes place.

How does this decision build on the existing case law?

As mentioned above, the current cases were brought as a result of an audit which the HFEA asked every fertility clinic in the UK to carry out. The audit was in turn triggered by the decision of *Re E & F (Assisted Reproduction: Parent)* [2013] EWHC 148 (Fam). This involved a same-sex female couple who had separated, and one of whom argued that the other was not her children's other female parent as the correct consent forms had not been signed at the correct time. Cobb J agreed and found that the women had not signed Forms WP and PP before treatment took place and therefore any consent given was ineffective. In addition, the clinic had not provided sufficient information or counselling to either of the women to enable them to give informed consent, and inadequate records were being kept of when and how consent was being given. As such, the judge granted a declaration that the non-biological mother was not the children's legal parent.

Another case arising out of the HFEA's audit is *X v Y (St Bartholomew's Hospital Centre for Reproductive Medicine (CRM) intervening)* [2015] EWFC 13, [2015] All ER (D) 94 (Apr). In that case, the clinic could not find the consent forms in respect of a child conceived via a sperm donor. Theis J found in this case, for a number of reasons, that it was more likely than not that the parents had signed the appropriate consent forms and that these had been mislaid by the clinic. The applicant was therefore declared to be the child's legal father. The judge said:

'This case highlights the important responsibility imposed on licensed clinics that provide fertility treatment, to ensure they comply with all aspects of the relevant statutory provisions and guidance. The somewhat labyrinthine provisions of the relevant statutes, supporting guidance and code must be strictly adhered to by those implementing its provisions on the ground ... [t]he important message from this case is that any person considering fertility treatment should ensure they are, at the very least, familiar with what legal steps need to be taken prior to any such treatment, particularly concerning the issue of consent. This is because any failings by the clinic to follow the requisite procedures may have long term consequences for them, and any child born as a result of the treatment' (paras [2] and [4]).

What are the practical implications of the decision?

If an unmarried woman is having IVF treatment using a sperm donor, and wants her partner (whether a man or a woman) to be the child's second legal parent, it is essential that the correct consent forms are completed accurately and at the right time.

These forms are vitally important as, unlike other types of consent forms, they have the effect of conferring legal parenthood. Staff working at fertility clinics in the UK are not usually legally trained and, as shown by the string of recent cases in this area, mistakes are being made. Although these are seemingly minor errors, they do in fact have hugely important implications for a child's legal parentage, identity and European Convention on Human Rights, art 8 rights, and more robust safeguards need to be put in place by clinics to prevent mistakes being made in the future.

UK fertility clinics will no doubt be considering whether they need to involve lawyers to ensure that the process is done correctly in the future, and there will undoubtedly be a move to tighten up procedures. For other parents already affected by past mistakes, they now have the option to apply to the court for a declaration of parentage like these parents did (and if a solution cannot be found on the particular facts, they will need to explore other options such as adoption). The real worry is affected parents who are not aware or do not apply to resolve things--they will remain in an uncertain legal position which could affect them and their children long into the future.

Suzi Denton is an experienced Family Lawyer with Natalie Gamble Associates, where she advises on fertility law, including domestic and international surrogacy, as well as all legal issues arising from relationship breakdown, including divorce and civil partnership dissolution, separation, finances and disputes involving children. She is also a qualified mediator, supporting clients with resolving family disputes outside of court.

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