Neutral Citation Number: [2016] EWHC 1330 (Fam)

Case number omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 June 2016

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

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

- -
- -

Miss Deirdre Fottrell QC (instructed by Goodman Ray) for the applicant

Hearing date: 27 May 2016

- -

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.

.....

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in open court

Sir James Munby, President of the Family Division :

1. In *In re A and others (Legal Parenthood: Written Consents)* [2015] EWHC 2602 (Fam), [2016] 1 WLR 1325, and then again in *Re the Human Fertilisation and Embryology Act 2008 (Case G)* [2016] EWHC 729 (Fam), and in *Re the Human Fertilisation and Embryology Act 2008 (Case I)* [2016] EWHC 791 (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 nine cases (Cases A, B, C, D, E, F, G, H and I). This is Case J. At the same time as I hand down judgment in this case I also hand down judgment in Case N, heard on the same day: *Re the Human Fertilisation and Embryology Act 2008 (Case N)* [2016] EWHC 1329 (Fam). Four further cases (Cases K, L, M, and O) are currently awaiting final hearing. There are at least four others (Cases P, Q, R and S) pending. For all I know there may be others.

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* or *Case I*. 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 at Guy's and St Thomas' NHS Foundation Trust, 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.

7. The clinic, the HFEA, the Secretary of State for Health and the Attorney General have all been notified of the proceedings. None has sought to be joined. 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. Although in all the previous cases I have dealt with there has been a report of the child's guardian, I decided that in this case, given the nature of the issues (see below) and given that the principles are now well established, there was no need either to join the child or to appoint a guardian.

8. As always, I have been greatly assisted in my task by the submissions I have had, both written and oral, from Miss Deirdre Fottrell QC, who appeared for X.

9. I had written evidence from X and Y. Both were present throughout the hearing, which took place on 27 May 2016. Neither was required, and neither asked, to give oral evidence.

10. Just as in each of the cases I had to consider in *In re A* and in *Case G* and *Case I*, so in this case, having regard to the evidence before me 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) X and Y, 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, about a year 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.

12. At the conclusion of the hearing I made an order declaring that X "is the father of" the child. I now (8 June 2016) hand down judgment explaining my reasons for making that order.

<u>The issue</u>

13. Adopting the terminology I have used in previous cases, the problem in the present case is very shortly stated. Before the treatment began, X signed a Form PP. Y signed a Form WP. There is no problem with the Form PP. The problem arises because when Y signed the Form WP, which otherwise was properly completed, she omitted to place a √ in the box in section 3 opposite the text "I consent to my partner (named in section two) being the legal parent of any child born from my treatment." The central issue is this: Did Y give her consent to X becoming the father of her child? In my judgment the answer is clear: she did.

14. I can take the matter quite shortly. This case is not unlike *Case I* where, as I said (para 21):

> "a √ was inserted in the wrong place and, as it were, against the wrong piece of text. It was, as [counsel] 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."

15. That there has been a mistake in this case in the completion of the Form WP is obvious, for the very purpose of completing the form is to give the consent indicated by the placing of a √ in the relevant box. And it is plain what was meant. After all, Form WP is headed "Your consent to your partner being the legal parent." What did Y think she was doing when she completed and signed the Form WP, if not to give her "consent to [her] partner being the legal parent"? The answer is obvious: by signing the Form WP she intended to and believed she was giving that consent. The only defect in the completed document is, as was the defect in *Case I*, a simple undetected clerical error. In the present case, as in *Case I*, this obvious mistake can, in my judgment, be 'corrected' as a matter of construction, and without the need for rectification.

16. In these circumstances, the application of the principles set out in the earlier authorities is simple and the answer is clear: Y gave the relevant consent and X is entitled to the declaration he seeks.

A final matter

17. On the same day as she signed the defective Form WP to which I have referred, Y, at the invitation of the clinic, also signed another Form WP to 'correct' an error which, she was told, had been made in the Form WP she had signed some years before in connection with earlier successful IVF treatment. The earlier Form WP had been wrongly dated. What ensued was quite remarkable, as the clinic committed itself to – blundered into – what, were these matters not so sensitive and grave, one might be tempted to call a comedy of errors. First, the suggested 'error' in the earlier Form WP was quite immaterial for, as I noted in *In re A* (para 78), "the precise date is not material; what is vital is that the form was signed … *before* the treatment." Secondly, it is quite clear that a mistake in a Form WP (or for that matter a Form PP) cannot be corrected retrospectively *after* the treatment by the signing of a substitute form. Thirdly, precisely the same error (the omission of the √ in the box in section 3) appears in each of the two Forms WP signed by Y on this occasion. Fourthly, one might have thought that the clinic, having, as it thought, detected an error in the

earlier Form WP, would have been more than careful to ensure that each of the new Forms WP was correctly completed. Not a bit of it!

18. The lack of understanding of the critically important legal framework with which it had to comply, and its seemingly lackadaisical failure to ensure proper completion of the new Forms WP in the face of what it believed to be its previous error, cast a sadly revealing light on the managerial and administrative failings of a clinic which one really might have thought would have been able to do better.

19. Not for the first time I am left with the feeling that the *medical* staff in these clinics, who seem to have been given the responsible for ensuring that all the necessary medical and *legal* consent forms were properly completed, wholly failed to appreciate the critical need to ensure that the *legal* consent forms were properly, indeed meticulously, completed. I repeat what I said in *In re A* (para 111):

> "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."

These administrative failures, which have been so characteristic a feature of every one of the cases I have had to consider, unhappily seem indicative of systemic failings both of management and of regulation across the sector. I can only hope that what all this litigation has revealed will by now have led to very significant improvements in understanding and practice.