Neutral Citation Number: [2016] EWHC 1572 (Fam)

Case number omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 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 M)

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Miss Deirdre Fottrell QC (instructed by Goodman Ray) for the applicant
Ms Rose Grogan (instructed by Weightmans) for Central Manchester University Hospitals NHS Trust

Hearing date: 22 June 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 (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), *Re the Human Fertilisation and Embryology Act 2008 (Case I)* [2016] EWHC 791 (Fam), *Re the Human Fertilisation and Embryology Act 2008 (Case N)* [2016] EWHC 1329 (Fam) and *Re the Human Fertilisation and Embryology Act 2008 (Case J)* [2016] EWHC 1330 (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 eleven cases (Cases A, B, C, D, E, F, G, H, I, J and N). This is Case M. Three further cases (Cases K, L and O) are currently awaiting final hearing. There are at least five others (Cases P, Q, R, S and T) pending. There are probably others, for the HFEA has identified no fewer than 90 cases where there are "anomalies".

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 any of the other cases. 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).

The facts

4. 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.

5. 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 IUI treatment provided by a clinic at Central Manchester University Hospitals NHS 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. Although they have recently separated, Y is wholeheartedly supportive of X's application.

6. The clinic, the HFEA, the Secretary of State for Health and the Attorney General have all been notified of the proceedings. With the exception of the clinic, which has been joined, none has sought either to be joined or to attend the hearing. The clinic's position, entirely supportive of X's application, is set out in various witness statements and in the position statement prepared by Ms Rose Grogan, who appeared before me on its behalf. Although in some of 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.

7. 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.

8. I had written evidence from X and Y. X was present throughout the hearing, which took place on 22 June 2016. Y was at home looking after their children. Neither was required, and neither asked, to give oral evidence.

9. Just as in each of the cases I had to consider in *In re A* and in *Case G*, *Case I*, *Case J* and *Case N* 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) 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.

10. I add that there can be 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. Ms Fottrell has taken me through the various documents which make that clear.

11. At the conclusion of the hearing I made an order declaring that X "is the father of" the child. I now (30 June 2016) hand down judgment explaining my reasons for making that order.

<u>The issue</u>

12. Adopting the terminology I have used in previous cases, the problem in the present case is very shortly stated. For reasons which cannot now be identified, there was no signed Form PP and no signed Form WP. However, both X and Y had signed a Form IC. That was in March 2009. The treatment began *after* the 2008 Act came into force on 6 April 2009. The Form IC is similar to though not in precisely the same form as the Forms IC I have had to consider in previous cases.

13. 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 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 subsequent coming into force of the 2008 Act. The third is whether it makes any difference that X and Y have now separated.

14. 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 not married to [Y], but acknowledge that she and I are being treated together, and that I will become the legal father of any resulting child."

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).

15. 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. In *Case I*, paras 17-20, I concluded that it makes no difference for this purpose 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. It follows, in my judgment, that the Form IC completed and signed in March 2009 continued to operate as valid and effective consent for the purpose of section 37 of the 2008 Act, notwithstanding the change in the statutory regime which occurred on 6 April 2009.

16. The third issue: The fact that X and Y have separated is legally irrelevant to anything I have to decide: see *In re A*, para 65, and *Case G*, para 7.

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

A final matter

18. When told by the clinic of the mistake which had been made, X and Y were very hurt and bewildered, very worried. It took them some time to understand the full implications of what they had been told. But in contrast to the clinics in some of the other cases, the clinic here has behaved throughout in an appropriately supportive and responsible manner. X and Y were first told about the problem in February 2015. Following my judgment in *In re A* in September 2015, the clinic contacted X and Y again, telling them about the judgment, advising them to obtain legal advice and, crucially, telling them that the clinic would fund their legal fees. As X says, "This was a huge relief for us as we simply do not have the money to pay the costs ourselves." In her position statement, Ms Grogan stated that "The Trust apologises again for the mistakes made by the clinic and the distress and anguish that this has caused." Very properly, Ms Grogan repeated that apology in X's presence and hearing as she began her oral submissions. She reiterated the clinic's agreement to pay X's costs.