Neutral Citation Number: [2016] EWHC 1329 (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**

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

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**Miss Deirdre Fottrell QC** (instructed by Child & Child) for the applicant

Hearing date: 27 May 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 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 N. At the same time as I hand down judgment in this case I also hand down judgment in Case J, heard on the same day: *Re the Human Fertilisation and Embryology Act 2008 (Case J)* [2016] EWHC 1330 (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, the Complete Fertility Centre, Southampton, operated by Southampton 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. Y is wholeheartedly supportive of X's application. Following the treatment, and before the birth of their child, X and Y married. That, no doubt, gives rise to certain presumptions, but it does not affect any of the questions which I have to determine.

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.

The issue

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 did not sign a Form WP. Both of them signed a Form IC, though it was not in precisely the same form as the Forms IC I have had to consider in previous cases. 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. The only material difference between the Form IC used in this case and the other Forms IC which I have previously had to consider, is that X's declaration was in these terms:

> "I am not married to [name] but I acknowledge that she and I are being treated together and that I will take appropriate action to become the legal father of any resulting child."

Below this there was the following Note:

> "NOTE: The centre is not required to obtain a partner's acknowledgement in order to make the treatment lawful, but … it is advisable in the interests of establishing the legal parenthood of the child."

15. Whatever might otherwise be the effect of the words "I will take appropriate action …" there is, on the facts of this case, no problem, because X *subsequently* signed the Form PP.

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. 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, *Case G*, para 31, and *Case I*, para 28). 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 both *Case G* and *Case I*, I was very critical of those clinic's behaviour in this respect. Here again, unhappily, the clinic's response fell far short of what was required.

18. In the present case, X and Y were similarly affected as had been the parents in other cases. X, who received the initial telephone call from the clinic, says he "cannot describe the shock I felt." "It is impossible to describe what it feels like to be told so baldly over the telephone that the child you believed you were the legal parent of was not your legal child." He was initially unable to contact Y. When she got home "I was beside myself; I was not crying but I was distracted, shaking and unable to function at all." The impact on him was graphically illustrated by the fact that he was unable to remember either the name or the telephone number of the doctor who had telephoned

him. Y remembers the "shocking state" X was in when she got home. In her statement, she voiced her anger that "a doctor should think it reasonable to ring someone up and give them such terrible news over the phone and then not back up the news with an offer of an appointment to discuss the issues in person, an offer of counselling and not to confirm the advice in writing." By the time there was further communication, about a week later, X and Y had lost all confidence in the clinic and decided to seek their own legal advice.

19. The contrast with other events, before and after, is poignant and telling. X recalls how "I quite literally burst into tears when I found out [Y] was pregnant." And the intense emotion, the enormous joy, the immense happiness with which X and Y reacted in court as I announced my decision was the most powerful and moving indication which it is possible to imagine of all they had had to go through.

20. Unhappily, they did not receive from the clinic the support they were entitled to look for. The clinic declined to meet X and Y, as they wished. The clinic was tardy in confirming, though eventually it did, its unqualified assurance that it would pay their reasonable costs. Even worse, and despite earlier correspondence in which they had sought disclosure, the solicitors X and Y instructed had to make an application to the court before the clinic finally disclosed the relevant records.

21. In *F v M and the Herts and Essex Fertility Centre* [2015] EWHC 3601 (Fam), Pauffley J was, as it seems to me with every justification, unsparingly critical of the behaviour of the clinic in that case after their mistakes had been discovered. Referring to guidance issued by the HFEA following the judgment of Cobb J in *AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357, Pauffley J observed (para 14):

> "The underlying message was clear. Clinics should have been supporting and assisting parents. They have an obligation to be open and transparent – most particularly with those whose parenthood was potentially disturbed by administrative incompetence. The parents were (and are) the individuals in most need of advice and assistance; they are entitled to and should have been treated with respect and proper concern."

I repeat what I said I have said previously (*Case G*, para 33), I agree with every word of that. Pauffley J went on to criticise in particular the tardiness of the clinic in that case in disclosing the relevant patient files to the parents.

22. What is required in all these cases, I emphasise, is immediate, full and frank disclosure by the clinic of all the relevant files as soon as they are requested by the parents. Legal professional privilege apart, which can hardly apply to the original medical files, there can be absolutely no justification for refusing such a request.

23. I have now had the experience of watching too many parents in these cases sitting in court, as they wait, daring to hope for a happy outcome. The strain on them is immense. If the process is delayed because of obstruction on the part of the clinic, that is shocking. The original administrative incompetence in these cases is bad enough; to have it aggravated by subsequent delay, prevarication or obstruction on the part of the clinic merely adds insult to injury. Ms Fottrell, on instructions, tells me that her

clients were shocked and upset by the clinic's conduct and experienced great distress and anguish in the weeks and months following the initial telephone call. I am not surprised. The only mitigation is that when the clinic came to file its evidence, the "person responsible" who made the statement adopted a more seemly and appropriate stance, expressing "sincere apologies" for the clinic's error and for its effect on X and Y.

24. The clinic must pay X and Y's reasonable costs in full: both the costs of the solicitors they originally instructed and who obtained the order for disclosure of the documents, and the costs of the solicitors they subsequently instructed to bring their substantive claim to court.