



Neutral Citation Number: [2016] EWHC 2356 (Fam)

Case number omitted

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30 September 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 V)**

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**Ms Deirdre Fottrell QC** (instructed by Michelmores LLP) for the applicant (X)  
**Mr Andrew Powell** (instructed by Bevan Brittan LLP) for Homerton University Hospital NHS  
Foundation Trust

Hearing date: 16 September 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. Since I handed down judgment in *In re A and others (Legal Parenthood: Written Consents)* [2015] EWHC 2602 (Fam), [2016] 1 WLR 1325, I have had to consider a number of cases raising issues very similar to those which confront me here. The most recent judgment was in *Re the Human Fertilisation and Embryology Act 2008 (Case O)* [2016] EWHC 2273 (Fam). That was the fourteenth of these cases in which I have given a final judgment. This is the fifteenth.
2. For the purposes of this judgment I shall take as read the analysis in *In re A* and the summary of the background to all this litigation which appears in *Case O*.

The facts

3. For reasons which will by now be familiar, I propose to be extremely sparing in what I say of the facts and the evidence in this case.
4. The applicant, who I will refer to as X, is a woman who is and 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 Homerton Fertility Centre, operated by Homerton University Hospital NHS Foundation Trust, a clinic which is and was regulated by the Human Fertilisation and Embryology Authority, Y gave birth to their child, who I will refer to as Z. X seeks a declaration pursuant to section 55A of the Family Law Act 1986 that she is, in accordance with sections 43 and 44 of the Human Fertilisation and Embryology Act 2008, the legal parent of Z. Y is wholeheartedly supportive of X's application.
5. 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 was represented, although not joined, none has sought either to be joined or to attend the hearing. The clinic's position is set out in a witness statement by the consultant gynaecologist who is the "person responsible" within the meaning of section 17(1) of the Human Fertilisation and Embryology Act 1990 and in the position statement prepared by Mr Andrew Powell, who appeared before me on its behalf. Given the nature of the issues (see below) I decided that there was no need for Z to have a guardian appointed. The hearing took place on 16 September 2016. X was represented by Ms Deirdre Fottrell QC.
6. I had written evidence from X and Y. Neither was required, and neither asked, to give oral evidence. Each however, at their own request, which I readily granted (for it is vital, in my view, that parents in these emotionally very difficult cases should be able to speak for themselves if they wish, whether or not they are represented and whether or not there is a need for further evidence), addressed me from the well of the court. Their words were powerful and moving.
7. Just as in each of the other cases I have had to consider, 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 Z 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 X and Y that X would be a legal parent of Z. 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 X and Y believed that X was the other parent of the child. That remained their belief when Z 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 Z to be, showing both of them on the birth certificate as Z's parents, as they believed themselves to be.
  - v) The first they knew that anything was or might be 'wrong' was when, some while later, they were contacted by the clinic.
8. 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.
9. At the end of the hearing I indicated that I was making the orders sought. I now (30 September 2016) hand down judgment explaining my reasons.

### Parentage

10. 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, although X signed, at the appropriate time, a Form PP in proper form, no Form WP signed by Y can be found in the clinic's records relating to Y's treatment.
11. It is clear, both from their evidence and from the clinic's records, that all the forms signed by X and Y were signed at the clinic and on the same day. It is also clear that, on this occasion, X and Y first saw the doctor and then the nurse. The doctor's clinical notes contain an entry "Review consent forms." X and Y and the doctor each signed the clinic's *Pre Assessment Checklist*. So far as material, this reads as follows:

"The treatment has been discussed with us today. The following aspects have been explained and discussed, ...

8 Consent forms (a) Explanation of all consent forms (b)  
Explanation that consents can be changed or withdrawn at any  
time

...

10 Legal Parenthood information."

12. X and Y's recollections are that all the forms which were signed were signed when they were with the nurse.
13. It would seem that it was the nurse's function, amongst much else, to complete the relevant parts of the clinic's *Pre Assessment Form*. Page 2 of this document, headed "Nurses Pre Treatment Appointment", and signed at the foot by both Y and the nurse, contains a long checklist listing the "Following Discussed with Patient", including what is important for present purposes, two items "Consent to Legal Parent" and "Consent to Your Partner being the Legal Parent." These obviously refer to, respectively, the Form PP and the Form WP. Against each are printed the words "YES / NO". In the case of the "Consent to Legal Parent", the Form PP, the word YES has been circled in manuscript. In the case of the "Consent to Your Partner being the Legal Parent", the Form WP, neither word has been circled. Page 3 of the document contains the following:

"Consents complete **Female** including Photo ID

Consents complete **Male** including Photo ID"

Against each there is a box containing the words "YES/NO". These boxes have been bracketed together in manuscript, with the word "Yes" and the date and the nurse's initials inserted in manuscript. (The reference to **Male** will surprise no-one familiar with the case-law. The clinic, like many others, was still using old forms which did not contemplate treatment of same-sex couples. Nothing turns on the point.) The nurse's clinical notes of what occurred on this occasion include the words "Consent forms completed + signed."

14. In all the circumstances, and having regard to all the evidence I have heard, I am entitled to conclude, and I find as a fact, that the records sufficiently evidence a Form WP, signed by Y at the appropriate time and in proper form. The Form WP, I find, has been lost or mislaid.
15. In these circumstances, given the facts and my findings, the application of the principles set out in the earlier authorities is simple and the answer is clear: X gave the relevant consent, so did Y, and X is entitled to the declaration she seeks. Analytically, and so far as material for present purposes, the circumstances in the present case are indistinguishable from those in Case A and Case F, so X is entitled to the relief she seeks: see *In Re A*, paras 86-87 and 102-104.
16. There is a quite separate ground on which X is entitled to the relief she seeks. Both Y and X signed a Form IC which, in all material respects, was in the same form as the Forms IC I have considered in previous cases. The key part, headed "Female Partner's Acknowledgement" and signed by X, reads:
- "I am not married to [Y] but I acknowledge that she and I are being treated together, and that I will become the legal parent of any resulting child."
17. In these circumstances, given the facts and my findings, the application of the principles set out in the earlier authorities is again simple and the answer clear: X is, in principle, entitled to the declaration she seeks: see *In re A*, para 63(iii).

### Outcome

18. I shall accordingly make a declaration in the terms sought by X.

### Costs

19. X and Y are unstinting in their praise for the clinic's medical and nursing staff. X describes the staff as being "professional, kind and organised, affording a feeling of comfort" and treating them with "respect [and] courtesy." Y, when she addressed me in court, spoke movingly of their gratitude to the clinic for its role in "creating our family." X also referred to the approach of the clinic's "person responsible" after the error was discovered as having been "professional, kind and supportive." Y recalls that he apologised, an apology he repeated in his witness statement. They were grateful to the clinic for having put them in touch with specialist solicitors and for having agreed, in principle, to pay their costs. Unsurprisingly, when they were told of the legal issues and the doubt about X's parentage they reacted in a way which is distressingly familiar in these cases. In her witness statement, X says that "knowing I did not have legal rights to be [Z's] parent was completely overwhelming and rocked me to the core." For the first time ever in her life she suffered depression. When addressing me in court she described the information as "truly heartbreaking" and repeated how she had been "rocked to my core." Y described the news as "devastating."
20. It is only fair to record at this point that in his position statement and orally in court Mr Powell acknowledged that "Any words of regret expressed to [X, Y and Z] cannot make up for the uncertainty and distress that has already been occasioned." He went on to note, as indeed the "person responsible" had made clear in his witness statement, that positive steps had been taken by the clinic to ensure that there can be no repetition of what had happened in this case.
21. So far, so good. But unhappily, there is another aspect of the case to which I must now turn. There was initial delay on the part of the clinic in disclosing the medical records, which generated unnecessary legal costs. Thereafter, most unhappily, and despite the clinic's assurance that their costs would be paid, X and Y have suffered considerable and needless anxiety as a result of the practical difficulties their solicitors have had in extracting payment.
22. I do not propose to set out the depressing history in detail. It suffices to make reference to four matters. (1) In an email dated 27 April 2016, the clinic's solicitors told X and Y's solicitors that they would receive payment of outstanding invoices "shortly." In fact, payment was not made until 20 July 2016. (2) On 20 May 2016, the clinic's solicitors said that "These are NHS processes and very slow." (3) On 2 June 2016 X and Y's solicitors felt it necessary to put the clinic's solicitors on notice that "Your client's continued non-payment is generating additional legal costs which will fall at your client's door to be paid." They had also made clear to the clinic's solicitors on 20 May 2016 that X and Y were making payments on account of costs. (4) These delays continued even after I had made an order on 20 July 2016 providing that "the clinic will pay the reasonable costs of this application within 14 days of the making of this Order." (The order went on to provide a mechanism for resolution of any dispute.)

23. I was told by Ms Fottrell on instructions that, at the end of the day, some 24% of the overall costs were generated by these and other costs issues.
24. X describes the non-payment of their costs as daunting, distressing and disappointing. “It has made us both feel angry and exasperated.” Ms Fottrell in her position statement refers to X and Y as having “a genuine fear and anxiety that they will be left with legal costs they cannot afford” and “a strong sense of disappointment that the issue of costs has been so problematic.” At the date of that document – 15 September 2016 – the unpaid shortfall was some £13,000. Mr Powell in his position statement – also dated 15 September 2016 – stated that “payment is being made today.” Y, when she addressed me in court, eloquently described how this had added to the stress and their feeling of unfairness and how they had become fearful of being left with a substantial financial burden. She said, in words reflecting what many parents have said to me in other cases, that she did not want this to happen to any other parent ever again.
25. By the time the case was before me, the parties had reached agreement as to the amount of the final outstanding balance of the costs. Ms Fottrell sought, and Mr Powell did not resist, the inclusion in my order of a direction that the clinic pay the agreed sum within 21 days.
26. I have, sadly, had occasion in the past to criticise clinics for the way in which they have responded in these cases. In *Re the Human Fertilisation and Embryology Act 2008 (Case G)* [2016] EWHC 729 (Fam), paras 32-33, I commented that “If ever there was a situation calling for empathy, understanding, humanity, compassion and, dare one say it, common decency, never mind sincere and unqualified apology, it is surely this”; and I drew attention to Pauffley J’s observation in *F v M and the Herts and Essex Fertility Centre* [2015] EWHC 3601 (Fam), para 14, that in these circumstances clinics should be “supporting and assisting parents.” In *Re the Human Fertilisation and Embryology Act 2008 (Case N)* [2016] EWHC 1329 (Fam), para 22, I emphasised the requirement of “immediate, full and frank disclosure by the clinic of all the relevant files as soon as they are requested by the parents.” I went on to observe (para 23) that  

“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 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.”
27. I appreciate that part of the problem in the present case may have been the consequence of what the clinic’s solicitors referred to as the “very slow” NHS processes. But I doubt that everything can properly be laid at that door. The bureaucrats, administrators, and lawyers involved need to understand the immense emotional impact on the ordinary people unwillingly caught up in these cases of the sudden and profoundly disturbing discovery that something has gone ‘wrong’. We must, everyone involved in the process must, do everything appropriate to ensure that,

once the proceedings have started, these cases are dealt with as quickly and smoothly as possible. It may be that, as part of the approach, the court should in future be invited to make costs orders ‘as the case goes along.’