Neutral Citation Number: [2017] EWHC 2532 (Fam)

Case numbers omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 October 2017

Before:

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the matter of the Human Fertilisation and Embryology Act 2008 (Cases P, Q, R, S, T and U) (No 2)

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Ms Deirdre Fottrell QC (instructed by Goodman Ray) for the applicants
Ms Sarah Morgan QC and Ms Sharon Segal (instructed by DAC Beachcroft LLP) for Care Fertility Group Manchester
Ms Eleena Misra (instructed by Blake Morgan LLP) for the Human Fertilisation and Embryology Authority
Ms Fiona Paterson (instructed by Berryman Lace Mawer) for Dr X

Hearing date: 18 July 2017

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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. I gave judgment in these six cases, Cases P, Q, R, S, T and U, on 19 January 2017: *Re Human Fertilisation and Embryology Act 2008 (Cases P, Q, R, S, T, U, W and X)* [2017] EWHC 49 (Fam). In each of these six cases the treatment had been given by Care Fertility Group Manchester (the clinic). I recorded (judgment, para 6) that an additional point arose which did not bear on the primary relief being sought in any of these cases and which, it had been agreed, should be dealt with at a separate hearing. In the event, that hearing took place on 18 July 2017. I now (13 October 2017) hand down judgment.

2. The point, which is one of general public interest, arises in this way.

3. It will be recalled (see my judgment, handed down on 11 September 2015, in *In re A and others (Legal Parenthood: Written Consents)* [2015] EWHC 2602 (Fam), [2016] 1 WLR 1325, paras 4, 5) that, following the handing down by Cobb J on 24 May 2013 of his judgment in *AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357, which had brought to public attention and, more particularly, to the attention of the Human Fertilisation and Embryology Authority (the HFEA) the lamentable shortcomings in a clinic which, in the judge's view, had fallen "far short" of its obligations and had failed to comply with the conditions of the licence granted to it by the HFEA, the HFEA, having undertaken various investigations, decided to require all 109 licensed clinics to carry out an audit of their records. For present purposes the relevant direction was in a letter from the Chief Executive of the HFEA dated 10 February 2014, requiring the audit to be completed within three months.

4. So far as concerns the clinic, the subsequent events, which are not in dispute, can be summarised as follows, for there is no need for me to go into the detail. The clinic's audit was initiated in March 2014 and completed the next month. The task was delegated to others by the clinic's "person responsible", at that time Dr X. Dr X did not undertake any personal checks. It is sadly all too apparent that the audit, which identified four cases in which there were anomalies, was undertaken without proper supervision and in an inadequately robust and probing manner. Thus, it is conceded by the clinic that the audit considered only whether the relevant forms were present or absent and did not consider the accuracy of, or whether there were any defects in, those forms which were present.

5. On 1 March 2016, the HFEA carried out a routine unannounced inspection of the clinic. A sample of 10 files were examined; anomalies were detected in two. This obviously raised concerns as to the robustness of the audit undertaken by the clinic in 2014. Following this, and before the HFEA's planned re-inspection on 16 March 2016, the clinic carried out its own audit, completed on 14 March 2016. This revealed a further 17 cases where anomalies were detected.

6. These events are obviously concerning, though they are not the focus of this judgment. Their significance for present purposes is what happened next.

7. On 15 March 2016, after the clinic had completed its audit and the day before the HFEA's re-inspection was due, Dr X drafted and arranged the sending to each of the affected couples of a letter which, he accepts, he prepared and sent out without

consultation with colleagues and without having obtained specific legal advice as to the content. The letters took the following form:

> "My reason for contacting you is that we have recently undertaken an audit of all consent forms undertaken in treatment such as yours and we have noted that the PP and WP forms necessary to confirm legal parenting are not dated on all of the pages. I enclose copies of the forms so that you can see this. Although this may seem to be a little 'nit-picking' and obviously the intent to being legal parents is there, I would be grateful if you could look through your records to see if you have an appropriately signed and dated copy of the PP and WP forms. If so I would be grateful if you could forward this to us in the stamped addressed envelope provided.
>
> An alternative would be for you to sign the enclosed declarations, which confirm that you are aware of the implications of being legal parents.
>
> Whilst I am sorry to bother you, these forms have been used in some legal cases in the past and therefore I think it very important that we get it right to avoid any ambiguity in this regard. Should you have any questions or queries please don't hesitate to let me know."

8. Enclosed with the letter was a declaration in the following terms:

> "I [name] confirm that I completed and signed the Consent to Legal Parenthood form WP (copy attached) on [date]. The form was completed before sperm, egg or embryo transfer which took place on [date]. I confirm, before completing this form, I was provided with all the relevant information needed to make a full informed decision about my partner being the legal parent of any client born from my treatment including information about:
>
> - The different options set out in the WP form
> - The implications of me giving my consent
> - The consequences of withdrawing this consent, and
> - How I can make changes to, or withdraw, my consent
> - I was also provided with the opportunity to have counselling.
>
> I acknowledge in completing the WP form I have, in error, omitted to date any of the boxes on the consent form. I confirm that in signing this form on [date] it was my first intention to consent to my partner being the legal parent of any child born from my treatment."

9. Later the same day, 15 March 2016, senior management at the clinic discovered what had happened, but by then the letters had already been sent out. Subsequently, steps, which there is no need for me to describe in detail, were taken by the clinic, in consultation with the HFEA, to remedy matters. The clinic wrote again to all the affected couples on 29 March 2016. This letter included the following:

> "In the time since we contacted you we have been speaking to our legal advisors. They have recommended that we should contact you again to explain in more detail the options that are open to you (including completing a declaration as you were advised in our original correspondence) but before we do that, we want to get their opinion on the specific anomalies that we have found in your records and how they are likely to impact on your partner's status as legal parent."

10. Following the obtaining of further legal advice, the clinic wrote again to the affected couples on 28 April 2016. These letters were tailored to the circumstances of each couple. I need not go into the details except to note that the form of letter sent in cases where the declaration on the third page of Form PP had not been signed included this:

> "You may wish to complete a statement clarifying what your intention was at the time you completed the form. I have attached a statement to this letter should you wish to consider and complete this. The statement explains that omitting to sign the declaration on page 3 of the PP form was a simple error and you intended to consent to legal parenthood on the date when the form as [sic] completed.
>
> Completing the statement will clarify what your intention was at the time of when the WPP [sic] form was completed. However this statement may not give you legal certainty or resolve any potential problems with legal parenthood. It cannot guarantee that there will be no future challenges to your legal parenthood. For this reason we suggest obtain your own independent legal advice for certainty."

11. During the course of the re-inspection on 16 March 2016, the inspectors having expressed concern at the content of the letters that had been sent out, Dr X told them that he would be resigning as the clinic's person responsible. Dr X's successor as the clinic's person responsible took over in June 2016 (the delay resulting from the need for Dr X's replacement to be ratified by the HFEA).

12. No-one before me seeks to justify, either in terms of their tone or in relation to their legal content, the letters sent out by Dr X on 15 March 2016. I also have concerns about the form of letter sent out on 28 April 2016. My concerns relate to (i) the focus on "clarifying" the parent's "intention" and (ii) the indication that a statement "clarify[ing] what your intention was … *may* not give you legal certainty or resolve any potential problems with legal parenthood" (emphasis added). The point is very simple. Although "intention" is a necessary it is not a sufficient condition for acquiring parenthood. For, as I very recently observed, in *Re the Human Fertilisation*

and Embryology Act 2008 (Case AK) [2017] EWHC 1154 (Fam), para 20, it is the presence or absence of consent in writing – and, I should emphasise, such a consent given *before* the relevant treatment – which is ultimately determinative:

> "As *In re A* demonstrates, the ultimate question is whether X has, within the meaning of sections 44(1)(a) and 44(2) of the 2008 Act, "given … a notice [in writing .. signed by [X]] stating that [X] consents to [X] being treated as the parent of any child resulting from treatment provided to [Y]."

Moreover, the word "may" was, it seems to me, insufficient in circumstances which surely demanded plain words rather than "Nods, and becks, and wreathed smiles."

13. My real concern is that there appears to be an impression in some quarters that the kind of problems which have characterised all the many cases which I have had to deal with – *Re the Human Fertilisation and Embryology Act 2008 (Case AK)* was the thirty-fifth such case in which I have given judgment – can sometimes be resolved appropriately without obtaining an order of the court. This, in my judgment, is a highly problematic, indeed dangerous, view. I need briefly to explain why.

14. I venture to repeat at this point what I said in in *In re A and others (Legal Parenthood: Written Consents)* [2015] EWHC 2602 (Fam), [2016] 1 WLR 1325, para 3:

> "The question of who, in law, is or are the parent(s) of a child born as a result of treatment carried out under this legislation … is, as a moment's reflection will make obvious, a question of the most fundamental gravity and importance. What, after all, to any child, to any parent, never mind to future generations and indeed to society at large, can be more important, emotionally, psychologically, socially and legally, than the answer to the question: Who is my parent? Is this my child?"

15. *Legally* the issue has the potential to arise – possibly, I emphasise, years or even decades in the future – in a variety of contexts. Family lawyers will of course be alert to the risk of future breakdown in the parental relationship, perhaps triggering private law proceedings under the Children Act 1989 in which the precise legal status of a parent may be challenged. But we need also to be aware that the existence or otherwise of the *legal* relationship of parent and child may become relevant in the future in relation to such matters as citizenship and nationality or – and possibly decades in the future when both parents are dead and therefore unable to give evidence – in relation to matters of succession and inheritance.

16. In what is now a long line of cases involving applications for parental orders in accordance with section 54 of the 2008 Act, Theis J has emphasised the importance of the need for such orders. There is, of course, a significant difference between the two types of case, because whereas a parental order has, as has been said, a "transformative" effect, and creates legal rights, the declaration granted in the present type of case is, as the word suggests, merely declaratory of existing legal rights. But that does not mean that there is no advantage to be gained by obtaining such a declaration. Far from it: a declaration of status granted by the High Court after

appropriately stringent investigations, and after, as is invariably done, notice of the proceedings has been given both to the Attorney General and to the Secretary of State, has an effect in law and reality which far transcends any purely private transaction or agreement between the parents. To adopt, mutatis mutandis, some words used by Theis J in *J v G* [2013] EWHC 1432 (Fam), para 28, quoting from the parental order reporter in that case:

> "A parental order allows the reality for [the children] to be formalised now and bestows a sense of finality and completeness. It closes the door on official challenges to the intended parents' authority and paves the way for the future without … further anxiety."

Similarly, a declaration puts matters on a secure legal footing. It affords both child and parent lifelong security. It puts beyond future dispute, whether by public bodies or private individuals, the child's legal relationship with the parent as being, indeed, his legal parent.

17. There is one final matter to which I need to draw attention. The witness statement filed on behalf of the HFEA by Nick Jones, its Director of Compliance and Information, included the following:

> "Ms Walsh [she was the Senior Inspector who, with colleagues, undertook the inspection of the clinic in March 2016] has set out in her statement the facts and circumstances surrounding Care Manchester's ill-advised decision to try resolving the parenthood issues by getting patients to sign a declaration. As Ms Walsh has said, we were not aware that the clinic intended doing this until after they had already sent out a number of those declarations to patients. Whilst we were not aware of Care Manchester's intentions to use this declaration, following the judgment in the Alphabet case [*In re A*] we had been informed by a number of clinics that on legal advice, they were asking a small number of patients to complete declarations.
>
> These clinics told us that some patients had, having been fully informed of the potential consequences and impact of the consent failings, said that they did not wish to go through any legal process in order to become the legal parents of their own children. Understandably, some patients were affronted at the suggestion that they were not legally the parents of their children. In such cases, a small number of clinics informed us that on legal advice, they had asked these patients to complete a declaration. These clinics and a legal advisor acting for several clinics, told us that the purpose of this declaration was to record the intentions of the couple at the time of their treatment, that is, a way of confirming that at the time that the couple had treatment, and notwithstanding any anomalies in their consent forms, they had intended to have treatment together and for

> both to be the legal parents of the children born from such treatment.
>
> Clinics told us that this was a measure their legal advice suggested they put in place in order that in the future, should these couples separate, for example, and have to grapple with issues around the custody and care of their children, the clinics would have these signed declarations which could be relied on at that time, albeit with uncertainty as to the status of such a declaration. Whilst I expressed some concern about such an approach, and felt unease, I was assured the clinics did so on the basis of legal advice, and then only in those cases where patients had said that they did not wish to go through a court process in order to become the legal parents of their children. Having advised clinics to take their own legal advice, and now having done so, I felt we were not in a position to question that advice. Similarly, not having any method of communicating with this group of patients directly and also taking it on trust and good faith that the legal advice was sound and that clinics were acting in the interests of their patients, we felt we could not question the clinic's approach and the decision these patients had taken to sign declarations."

18. For reasons which by now will be apparent, Mr Jones was, as it seems to me, well justified in having those concerns and feeling that unease. But I am bound to say that it seems, and not merely with the priceless benefit of hindsight, unfortunate that the HFEA was not more questioning of what it understood was the advice being given at a time, I emphasise, *after* I had given judgment in *In re A*. I appreciate that the HFEA was not privy to the detail of any of that advice, but in the light of its understanding, as explained by Mr Jones, of what advice was being given, it might be thought that alarm bells should have been ringing and that the HFEA should have been more questioning, both privately and more publicly, as to the appropriateness and wisdom of the advice it understood was being given. I do not suggest that the HFEA should necessarily have commissioned legal advice itself on the point, but might it not have been better if it had circulated guidance to clinics, setting out what it understood to be happening, stressing that it was for individual clinics to obtain such legal advice as they might think appropriate, but saying that it did have concerns about the appropriateness of the advice which it understood certain clinics had received and perhaps briefly explaining why.