

Neutral Citation Number: [2018] EWFC 74

Case No: FD18F00059

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2018

Before:

MRS JUSTICE THEIS

Between:

P
- and -
Q

Applicant

Respondent

Ms Natalie Gamble (instructed by NGA Law) for the Applicant and Respondent

Hearing date: 25th October 2018

Judgment Approved

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. The court is concerned with an application for a declaration of parentage made by the applicant, P, in respect of her son, A, who was born in December 2017. The respondent, Q, supports the declaration being granted.
2. The application is necessary due to the discovery of an incorrect date on the PP form required to be signed by the applicant prior to A's conception (which states she consents to being treated as a parent of any child resulting from treatment provided to the birth mother). The mistake is it was dated with the year of the applicant's birth, rather than the year of signing.
3. This judgment is given to set out the background to the application, the reasons for the court's decision and why the court has agreed to determine this application on paper, without a hearing.
4. In support of the application the applicant's solicitor, Ms Gamble, has filed a detailed summary and skeleton argument, both of which have been of great assistance in preparing this judgment.
5. This is another example in a regrettable line of cases where mistakes in the completion of parenthood forms (which should be overseen by the clinic providing treatment) prior to the conception of children via IVF have necessitated an application to the court to secure the legal status of the applicant in relation to the child who was subsequently born. Although this application has proceeded with no opposition the joint statement of the parties describes the impact on them of being informed of this uncertainty about the applicant's status in relation to A. As they describe in the statement, as far as they are concerned there is no doubt in their minds that they are both A's parents.
6. The statement from the Director of Nursing at the London Women's Clinic which undertook the necessary fertility treatment in this case apologises for the error in the documentation that led to this application and any distress or anxiety caused to the family as a result. The statement confirms that the clinic has taken '*significant measures to ensure that this error does not happen again*'. The statement continues '*Since this issue was identified we have made a number of changes in relation to the system for ensuring consent to legal parenthood is taken properly and checked. This includes more regular auditing of consent logs. Staff are also required to initial the parenthood forms after checking to ensure accountability. We also request that the PP/WP form are only completed once unless there is a significant change in circumstances between treatment such as change in partner.*' These changes and the assurances given are to be welcomed.

Relevant Background

7. The relevant background can be summarised as follows.
8. The applicant and respondent are a same sex couple who have two children together, B, born in January 2015, and A, born in December 2017. Both children were carried by the respondent having been conceived at the London Women's Clinic with embryos created using the applicant's eggs and donated sperm.
9. The parties are not married or in a civil partnership. As a consequence, they were required to comply with the agreed parenthood conditions in s43-44 Human Fertilisation and Embryology Act 2008 (HFEA 2008) in order for the applicant non-birth mother to be a legal parent. In summary this required prior to conception the completion by the parties of two forms (i) 'Your consent to your partner being the legal parent' (WP form - confirming the birth mother's agreement to the other person being treated as a parent), and (ii) 'Your consent to being the Legal parent' (PP Form - confirming the other persons agreement to be treated as a parent to any child born resulting from treatment to the birth mother).
10. These forms were correctly completed prior to B's conception, including a WP Form completed and signed by the respondent dated 4 April 2014 and a PP Form completed and signed by the applicant dated 31 March 2014. As a result, the applicant's legal parentage in respect of B is not in question.
11. After B's birth in January 2015, the applicant and respondent approached the clinic about having a second child and attended a second baby consultation on 31 July 2015. They were provided with updated parenthood forms by the clinic which were signed by them on 26 September 2015, prior to egg collection in October 2015. Frozen embryo transfers took place in February 2016 and October 2016 which were sadly unsuccessful. A was subsequently conceived following a successful frozen embryo transfer in April 2017. He was born in December 2017.
12. An error occurred when the updated PP Form was signed by the applicant on 26 September 2015, in that she completed the date incorrectly; the applicant's Form PP was mistakenly dated 26 September 1983 (using the Applicant's year of birth) rather than 26 September 2015 (which is the date on which it was signed) on both page 2 and page 3. This error was not noticed by the clinic at the time, and the applicant and respondent believed that they had taken all necessary steps to secure joint legal parentage for A, as they had done for B. Following A's birth on 12 December 2017 the applicant was registered as A's parent on his birth certificate.
13. In January 2018, the parties were understandably shocked to be notified by The London Women's Clinic that there may be an issue in respect of the applicant's legal parentage, the clinic having identified the error with the PP Form, namely the incorrect date.
14. The applicant and respondent sought legal advice, and to resolve any possible uncertainty, applied for a declaration of parentage under Section 55A of the Family Law Act 1986. The London Women's Clinic have paid for all their legal costs.

15. The application for a declaration of parentage is dated 3 August 2018, the application form was sent to the court together with a case summary, together with an application for written directions and a joint statement signed by the applicant and respondent dated 1 August 2018. On consideration of the papers I made directions on 9 August 2018, which have been complied with as set out below:

(1) A copy of the order and the Applicant's case summary was served on the Human Fertilisation and Embryology Agency (HFEA), the Secretary of State for Health, the Attorney General and the London Women's Clinic.

(2) The HFEA, Department of Health and Attorney General have all confirmed that they do not wish to intervene.

(3) The London Women's Clinic Director of Nursing and Person Responsible filed and served a witness statement on 7 September 2018 by the Director of Nursing at the clinic, which supports and is consistent with the Applicant and Respondent's evidence. The statement accepts the error in the date on the PP form was not spotted on receipt of the consent form by the clinic.

(4) The Applicant and Respondent have not filed a further statement, they seek to rely on their statement dated 1 August 2018 which was filed with their application.

16. The matter was listed for hearing on 25 October 2018. The applicant sought further directions on 3 October 2018, in particular whether the declaration sought could be made on the papers, without the need for a hearing. Having considered the papers I concluded the application could be determined on the papers and directed that the hearing listed on 25 October 2018 be vacated. I made the declaration that day and this judgment sets out the reasons for doing so.

Legal Framework

17. The court has been greatly assisted by the detailed skeleton argument filed on behalf of the applicant.

18. The Human Fertilisation and Embryology Act 2008 (HFEA 2008) provides a legal framework allowing for the recognition of unmarried same-sex couples as joint legal parents of children conceived at HFEA licensed fertility clinics.

19. Section 43 HFEA 2008 provides that:

'If no man is treated by virtue of section 35 as the father of the child and no woman is treated by virtue of section 42 as a parent of the child but

(a) the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies,

(b) at the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed female parenthood conditions (as set out

in section 44) were met in relation to another woman, in relation to treatment provided to W under that licence, and
(c) the other woman remained alive at that time,
then... the other woman is to be treated as a parent of the child.'

20. Section 44 HFEA 2008 provides that:

- (1) The agreed female parenthood conditions referred to in section 43(b) are met in relation to another woman ("P") in relation to treatment provided to W under a licence if, but only if, -*
- (a) P has given the person responsible a notice stating that P consents to P being treated as a parent of any child resulting from treatment provided to W under the licence.*
 - (b) W has given the person responsible a notice stating that W agrees to P being so treated,*
 - (c) neither W nor P has, since giving notice under paragraph (a) or (b), given the person responsible notice of the withdrawal of P's or W's consent to P being so treated,*
 - (d) W has not, since the giving of the notice under paragraph (b), given the person responsible –*
 - (i) a further notice under that paragraph stating that W consents to a woman other than P being treated as a parent of any resulting child, or*
 - (ii) a notice under section 37(1)(b) stating that W consents to a man being treated as the father of any resulting child, and*
 - (c) W and P are not within prohibited degrees of relationship in relation to each other.*
- (2) A notice under subsection (1)(a), (b) or (c) must be in writing and must be signed by the person giving it.'*

21. As set out in *Re A and others (Legal Parenthood: Written Consents) [2015] EWHC 2602 (Fam)* at [25-31] the statutory scheme in the HFEA fundamentally relates to the provision of pre-conception notices being given by each partner which consent to the non-birth mother being the legal parent of the intended child (whereby the birth mother is referred to as W and the non-birth mother is referred to as P) and may be summarised as follows:

- (1) P must have given a notice stating that she consents to being treated as a parent of any child resulting from treatment provided to W. The standard HFEA PP form contains the following critical sections – Section 1 requiring completion of boxes giving P's name, date of birth and sex, Section 2 requiring completion of boxes giving the name and date of birth of P's partner W and Section 3 requiring completion of the box giving P's consent to being the legal parent of any child born from W's treatment. Finally, P is required to sign and date various declarations relating to the previous sections at the foot of page 2 and 3 of the PP form.
- (2) W must have given a similar notice stating that she consents to P being so treated. The HFEA WP form contains the following critical sections – Section 1

requiring completion of boxes giving W's name and date of birth, Section 2 requiring completion of boxes giving the name and date of birth of W's partner P, and Section 3 requiring completion of the box giving W's consent to her partner being the legal parent of any child born from the treatment. Finally, W is required to sign and date various declarations relating to the previous sections at the foot of page 2 of the WP form.

- (3) Each notice must be in writing and signed by the person giving it.
- (4) The notices must have been signed before the treatment took place.

22. In *Re A (and others) (ibid)* the court was concerned with various cases in which difficulties had arisen with record-keeping or completion of the relevant forms. In *Re A* three types of difficulty were identified:

Category A cases (Form WP or Form PP cannot be found)

In such cases the court has been concerned with whether it can be established on the evidence that there was a Form WP or Form PP which was properly completed and signed before the treatment began, and which subsequently could not be found.

Category B cases (Form WP, Form PP or Form IC (internal clinic form) contains obvious and plain mistakes)

In such cases the court has been concerned with whether it can be established that a mistake is obvious on the face of the document and whether it is plain what was meant. In *Re A* the court concluded that it can correct mistakes in a Form WP, a Form PP or a Form IC either by rectification (where the requirements for that remedy are satisfied), or, in cases where the mistake is obvious on the face of the document, by a process of construction without the need for rectification.

Category C cases (Form IC can operate as alternative 'consent' in place of a Form WP or a Form PP)

In such cases the court has been concerned with whether an alternative 'internal' clinic consent form can stand in the place of the standard HFEA forms. In *Re A* the court concluded that an internal clinic form (described as a Form IC) can, both as a matter of content and construction, operate as a Form WP and a Form PP if properly completed and signed before the treatment began.

23. Section 55A of the Family Law Act 1986 (FLA 1986) provides that any person may apply to the High Court or the Family Court for a declaration as to whether or not a person named in the application is or was the parent of another person so named. Jurisdiction to hear an application for a declaration of parentage pursuant to s55A FLA 1986 is dependent upon either of the persons named in it being domiciled or habitually resident for a year in England or Wales at the date of the application. Both the Applicant and the Respondent are domiciled in England, having both lived here since birth.

Previous procedural guidance

24. Sir James Munby P provided procedural guidance for declaration of parentage applications like these in *Re D and others (Practice: Declaration of Parentage) [2017] EWHC 1782 (Fam)*. In his judgment he set out the circumstances in which a declaration may be made without the need for an oral hearing at paragraphs 9 - 10 as follows:

(9) *“One of the points raised by Miss Isaacs and Mr Muzaffer is the suggestion that there may be cases where an oral final hearing can properly be dispensed with, the judge making the order on the papers. I would not rule out the possibility of proceeding in this way in an appropriate case. What such a case might be, and whether it would be appropriate to proceed in this way in a particular case, must, in the final analysis, be a matter for the judge. It is not something in relation to which it would be appropriate for me to offer any specific guidance.*

(10) *All I can properly say is this:*

i) I have difficulty in seeing how it could ever be appropriate to dispense with an oral final hearing if the claim for relief is dependent on the parties' evidence of what did or did not happen (for example, where parol evidence is relied on to prove the existence of a document which cannot be found).

ii) The kind of case in which it might be appropriate to proceed without an oral final hearing is where

(a) the application turns entirely on written documents from the clinic's file,

(b) the factual circumstances are the subject of a previous judgment which is precisely in point,

(c) there is no dispute between the parties,

(d) there has been no intervention by the Human Fertilisation and Embryology Authority, the Attorney General or the Secretary of State for Health, and

(e) the applicant and respondent both wish to proceed without an oral hearing.

Submissions, Discussion and Decision

25. In support of the application to be considered without the need for a hearing, the parties submit there are a number of features of this case, namely:

- (1) there is no dispute between the parties;
- (2) the factual circumstances align precisely with cases in previous judgments;

- (3) the application turns entirely on the written documents provided in the evidence (rather than there being any need to make findings of fact about lost documentation);
 - (4) the HFEA, Attorney General and Secretary of State for the Home Department have been notified of the application and do not wish to intervene in the proceedings; and
 - (5) the applicant and the respondent both wish to proceed without an oral hearing.
26. In the light of these features the court was invited to consider whether it is appropriate and necessary to have the hearing on 25 October. As set out above, I considered such a hearing was not necessary in the circumstances of this case, due to the features set out in the preceding paragraph. Unless otherwise provided for, the court retains a discretion as to how any hearing is managed, including not having one, although such discretion can only be exercised on a case by case basis dependent on the particular facts of the case.
27. The parties submit the court can make a declaration of parentage on either or both of the following grounds:
 - (1) That the obviously erroneous defect in the PP Form (in which the date was mistakenly completed as 26.9.83 instead of 26.9.15 on page 2 and 3) should be corrected by the court either through rectification or by a process of construction without the need for rectification, and/or
 - (2) That the PP Form signed by the Applicant on 31 March 2014 confirming her intention to be a legal parent of ‘any’ child carried by the Respondent, which was never withdrawn, is effective for the purposes of s43-44 HFEA 2008 in conferring legal parentage on her in respect of A as well as B.
28. In respect of ground (1) the facts of this case are almost identical to the facts of Case AG in *Re AD, AE, AF, AG, AH* [2017] EWHC 1026 (Fam) where the respondent completed her date of birth rather than the date of signing. Sir James Munby P ruled that he could rectify the error on the form and said at paragraph [16]: “*Both the Form PP and the Form WP were properly completed, with the sole exception that in section 4 on page 2 of the Form WP, Y filled in her date of birth where she should have inserted the date on which the document was being signed. That this obvious error is immaterial appears from Case D: see In re A, para 78. X is entitled to the declaration she seeks*”.
29. In respect of Ground (2) the facts are similar to the case of U in the judgment published as *Re the Human Fertilisation and Embryology Act 2008 Cases P, Q, R, S, T, U W and X* [2017] EWHC 49 (Fam) in which (in the context of a missing Form PP), Sir James Munby P ruled that the PP Form signed before the conception of the couple’s older child continued to be effective in respect of their younger child. At paragraph [19] he stated “*At the end of the day, the key point is the language of section 44(1)(a) [of the Human Fertilisation and Embryology Act 2008], referring to consent in relation to “any child resulting from treatment provided.” That language, unsurprisingly, is tracked in the relevant part of the Form PP [...]: “any child born from my partner’s treatment.” The point, in my judgment, is a short one. “Any” means any; and, so long as*

the consent has not been withdrawn (and that manifestly did not happen here), there is no temporal or other limitation to the quite general expressions referring to the "treatment." So the Form PP completed before the first cycle of treatment continued to operate for the subsequent cycle of treatment, and notwithstanding the birth of the first child. In these circumstances, X is entitled to the declaration she seeks."

30. In my judgment the evidence demonstrates this is what is described in *Re A* as a Category B case in which an obvious mistake has been made in that the applicant mistakenly put her year of birth, rather than the year the document was signed. The evidence from the joint statement of the parties, supported by the statement on behalf of the clinic, describes the PP form as being signed by the applicant on 26 September 2015, which was before any treatment took place. There is no dispute as to the parties' intentions and the applicant was registered on the birth certificate. The date was otherwise correct apart from the year, which mistakenly was put as the applicant's year of birth, rather than the year the form was signed. The court can correct that mistake through making the declaration of parentage sought. In those circumstances there is no need to consider the alternative ground advocated by the applicant.

31. For those reasons I will make the declaration of parentage