Neutral Citation Number: [2019] EWFC 65

Case No: FD19F00044

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2019

Before:

MRS JUSTICE THEIS

- -

Between:

	PQ	**Applicant**
	- and -	
	RS	**1 st Respondent**
	- and -	
	T & V **(by their Children's Guardian** **Jane Powell)**	**2nd & 3rd Respondents**

- -

Ms Dorothea Gartland (instructed by **Tees**) for the **Applicant**
Ms Ruth Kirby (instructed by **Nockolds**) for the **Respondent**
Mr Tom Wilson (instructed by **Goodman Ray**) for the **3rd & 4th Respondents**
Mr Martin Kingerley (instructed by **Mills & Reeve LLP**) for **Bourn Hall ('The Clinic')**

Hearing date: 10th October 2019
Judgment date: 15th October 2019

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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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MRS JUSTICE THEIS

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 cross applications for a declaration. PQ applies for a declaration of parentage; RS cross applies for a declaration of non-parentage. Both applications are made pursuant to s 55A Family Law Act 1986 (FLA 1986).

2. The orders are sought in relation to two children, now age 6. They were conceived following fertility treatment at Bourn Hall ('the Clinic') with donor sperm. At the time of conception in 2012 PQ and RS were in a relationship, they married two years later and separated in 2017.

3. PQ and RS agree (as recorded in the order dated 15 August) that prior to any treatment they both believed they were consenting to PQ becoming a parent of any child born as a result of treatment at the Clinic, and they both believed they had signed whatever was legally required, to ensure they both became parents. Additionally, they both agree that they continued to believe this after the birth of the children and after they had jointly registered the children's birth, naming PQ as the children's father on the birth certificates.

4. In 2014 the Human Fertilisation and Embryology Agency ('HFEA') required registered clinics to carry out an audit of the consents to parenthood required by the provisions in the Human Fertilisation and Embryology Act 2008 ('HFEA 2008') as a result of the issues that arose in *AB v CD [2013] EWHC 1418 (Fam).* This resulted in a number of cases coming to court where declarations of parentage have been sought and guidance has been given in a series of cases, in particular by the former President, Sir James Munby. For example, *Re HFEA 2008 (Re A and others) Legal parenthood; Written consents [2015] EWHC 2602 (Fam); Re HFEA 2008 (cases P and others) [2017] EWHC 2532 (Fam) and Re Y and others [2017] EWHC 784 (Fam))*).

5. In this case the audit resulted in the Clinic contacting PQ and RS in 2014 informing them that one of the forms ('Your consent to being a legal parent' - Form PP) had been incorrectly completed. The Clinic wrote to PQ and RS explaining the consequences and what support they offered. Following a meeting with the Clinic in October 2014 PQ and RS decided to take no further steps in relation to this.

6. After their separation in March 2017, and PQ's application for a child-arrangements order in October 2017 to spend time with the children, PQ issued his application seeking a declaration of parentage in April 2019. The Children Act proceedings were adjourned pending determination of PQ's application for a declaration. The Clinic agreed to pay the legal costs for both PQ and RS in relation to their respective applications for a declaration, although this was not confirmed in relation to PQ until January 2019, and for RS in August 2019.

7. This court made directions on 15 August 2019 and heard submissions from counsel on 10 October. PQ's application for a child arrangements order is listed back before HHJ Lewis on 15 October.

8. The declaration sought by PQ is supported by the Children's Guardian and the Clinic, it is opposed by RS. No other party supports RS's application for a declaration of non-parentage.

Relevant Legal Framework

9. Sections 35 to 41 HFEA 2008 provide a framework for the acquisition of parenthood by a non-biological father whose partner undergoes fertility treatment at a licenced UK clinic, which the Clinic was.

10. The importance of there being certainty in legal parenthood for those creating a family in this way is set out by Sir James Munby in *Re HFEA 2008 (cases A, B etc) Legal Parenthood: Written consents [2015] EWHC 2602 (Fam)* paragraph [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 – the issue which confronts me here – is dealt with in Part 2, sections 33-47, of the 2008 Act. It 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?"*

11. Section 36 HFEA 2008 provides a mechanism by which an unmarried male partner of a woman ("W") can acquire legal parenthood for a child conceived and born using donor sperm and in circumstances where *'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'* (S 36 (a)).

12. Section 36(b) HFEA 2008, provides that for the male partner to acquire legal parenthood, the 'agreed fatherhood conditions' must be satisfied. These conditions are contained within section 37 HFEA 2008, the relevant parts provide as follows:

> *(1) The agreed fatherhood conditions referred to in section 36(b) are met in relation to a man ("M") in relation to treatment provided to W under a licence if, but only if,—*
>
> *(a) M has given the person responsible a notice stating that he consents to being treated as the father of any child resulting from treatment provided to W under the licence,*
>
> *(b) W has given the person responsible a notice stating that she consents to M being so treated,*
>
> *(c) neither M nor W has, since giving notice under paragraph (a) or (b), given the person responsible notice of the withdrawal of M's or W's consent to M 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 she consents to another man being treated as the father of any resulting child, or

(ii)a notice under section 44(1)(b) stating that she consents to a woman being treated as a parent of any resulting child, and

(e) W and M 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.

13. The effect of the statutory framework is that, if the conditions are fulfilled, legal parentage is crystallised at the point at which the fertility treatment takes place and the child is subsequently conceived. This was confirmed by Sir James Munby in *Re HFEA 2008 (Cases A, B, C, D, E, F, G and H)* [2017] 1 FLR 366, at [65]:

'In two cases (Cases B and D) the parties have separated since the birth of the child. Everyone is correctly agreed that this is legally irrelevant to anything I have to decide, for in each case (as in all the other cases) the legal status of all the parties finally and irrevocably crystallised at the moment when the embryo or the sperm and eggs were placed in the mother, or the mother was artificially inseminated, and this treatment resulted in the birth of the child.'

14. This reflects the intention behind sections 35 to 41 HFEA 2008, which, on any view, is to ensure legal certainty as to parenthood at the time of a child's birth.

15. According to a series of cases following these mistakes being discovered the following principles have been established:

(1) The court can, in appropriate cases, correct mistakes on the face of the documents.

(2) This is permissible if the mistake is *'obvious on the face of the document and it is plain what was meant'* (see *In the matter of HFEA 2008 (cases A-H, Declaration of Parentage) [2015] EWHC 2602 (Fam))*

(3) The court can do this by way of construction or rectification (see *Re Y, Z, AA, AB and AC [2017] EWHC 784 (Fam) [11]*).

(4) In either case (correction or rectification) the fact of the parties separation is *'legally irrelevant…for…the legal status of all parties finally and irrevocably crystallised at the moment when the embryo or the sperm and eggs were placed in the mother, or the mother was artificially inseminated, and this treatment resulted in the birth of the child'* (see *Re Y, Z, AA, AB and AC [2017] EWHC 784 (Fam) [65]*)

16. The facts in this case are very similar to those in Case AA in *In the matter of HFEA 2008 (cases Y and others) [2017] EWHC 784 (Fam)* where Sir James Munby

described the errors in the Form PP as *'obvious'* and the transposition of names can be corrected by way of rectification and the error in section 5 of the form *'irrelevant'* as the signature at the foot of the second page is sufficient to satisfy the statutory requirement.

17. Ms Kirby, on behalf of RS, laid great emphasis on what she regards as PQ's 'conduct' after the parties separation including the delay in bringing his application, and that PQ has, at times, sought to deny he is a parent and this denial has been relied upon by third parties. As a result, she submits, if the court is considering rectification, which is a discretionary equitable remedy, it should be denied. I will consider those submissions in more detail below.

Relevant Background

18. PQ and RS have helpfully been able to agree a schedule of chronological facts.

19. The parties' relationship commenced in 2008, and they started living together in 2010. RS had a child from a previous relationship. Having consulted the Clinic in 2011 they were informed in early 2012 that PQ was unable to have children. As a result, they agreed to embark on fertility treatment at the Clinic.

20. They both signed the necessary consent forms, in particular Forms WP and PP regarding consent to PQ being a parent, prior to treatment starting.

21. Treatment followed with the children being born in 2013.

22. PQ and RS married in mid-2014 and later that year were contacted by the Clinic informing them of an error in the paperwork (Form PP) they had completed prior to treatment. Having been advised of the steps they could take they decided to take no further action having been alerted to this issue and confirmed that position at a meeting with the clinic in October 2014.

23. In 2015/2016 PQ and RS approached the Clinic to explore the viability of using frozen embryos still held by the Clinic. The Clinic have confirmed no further fertility treatment took place.

24. PQ and RS separated in March 2017. In late March/early April an exchange of correspondence between the parties' solicitors showed a dispute between PQ and RS about the extent of PQ's involvement in the care of the children.

25. Having confirmed with the Clinic that there was no change in PQ's position in April 2017 RS, without the knowledge of PQ, changed the children's names by deed poll.

26. In mid-2017 there were cross allegations by the parties that the other was informing others about the issues concerning PQ's status with the children. PQ's solicitors wrote asking RS to desist from informing anyone that he was not the father of the children. RS states that as a result of PQ's behaviour she informed the children about *'how they had been born'* telling them PQ was not their biological father, but he had been living with them at the time they were born.

27. In October 2017 PQ issued an application for a child-arrangements order to spend time with the children and for a specific issue order for the children to be known by

the surname on their birth certificates. Following a Cafcass report PQ had five occasions of direct contact with the children in late 2018/early 2019. RS refused to agree any further time PQ could see the children and directions were made for that decision to await the outcome of PQ's application for a declaration of parentage, which was issued in April 2019.

28. After their separation RS applied for child maintenance through the CMS. An assessment was made for PQ to make payments, which was subsequently successfully challenged by PQ on the basis that he is not the father of the children. As a result, the assessment was cancelled, and PQ was entitled to be repaid the sums he had paid. PQ explains his actions in his statement as being caused by the financial pressure the parties were under at the time and his wish to maintain the mortgage payments on the family home.

29. Financial proceedings took place between the parties following their divorce. At the hearing in November 2018 counsel on behalf of PQ sought to suggest that the children should not be treated as children of the family, the court ruled otherwise and made orders taking account of that consideration.

30. At the directions hearing before me on 15 August 2019, on the father's application for a declaration of parentage, the parties agreed the following matters (as set out in the recitals to that order):

    (1) Both PQ and RS believed they were consenting to PQ becoming the parent of any child born as a result of the treatment at the Clinic, and

    (2) Both PQ and RS believed they had signed whatever was legally required, to ensure they both became parents, and

    (3) Both PQ and RS continued to believe the above, after the children's birth and after they jointly registered the children's births naming PQ as the children's father on their birth certificates,

    (4) PQ wrote to the CMS on 10.11.17 stating that he had obtained written confirmation from the Clinic that he was not the legal parent of the children. He enclosed the Clinic's letter dated 8.11.17.

31. Directions were made for the filing of evidence by the Clinic, PQ and RS, RS to issue her application for a declaration of non-parentage, and the HFEA and Secretary of State for Health and Social Care (SSHSC) to be given notice of both applications.

32. In September the HFEA and SSHSC confirmed in their respective letters they did not wish to make any representations or apply to intervene in these applications.

33. The evidence filed by the Clinic, from Dr X (Medical Director) and Dr Y (Chief Executive), produced the documents held by the Clinic and gave a history of the Clinic's contact with PQ and RS.

34. PQ and RS filed statements setting out their evidence of the background of their relationship and their respective accounts of the relevant history concerning the children.

35. The children were joined as parties and a Children's Guardian, Jane Powell, was appointed to represent them. Ms Powell has considerable experience of these applications and it was agreed her report would be limited to addressing issues of parentage.

36. In September, the Children's Guardian saw the children with RS, and with PQ separately on a subsequent date. In her report dated 26 September 2019 she notes at paragraph [26] *'Both say they intended (to) have the joint parentage of any child born following the fertility treatment. To some extent both have used the clinic error in their ongoing private law dispute'* and concludes as follows:

> *'From the welfare perspective of T and V, if the legal and technical issues surrounding the forms and consent can be resolved, I have no hesitation in recommending that a Declaration of Parentage be made. This is a declaration that is important and necessary for the children for the rest of their lives, not just during their minorities. A declaration will serve to resolve the uncertainty about PQ's legal position and will afford both children the permanence and security of having two legal parents. It will also give effect to the legal relationship that had always been intended when their parents embarked on the fertility treatment.'*

37. The court has the benefit of clear and helpful submissions, both written and oral, from Ms Gartland on behalf of PQ, Ms Kirby on behalf of RS, Mr Wilson on behalf of the Children's Guardian and Mr Kingerley, on behalf of the Clinic.

Submissions

38. Ms Gartland, on behalf of PQ, submits this case is very similar to the case of *AA* in the applications heard in 2017 (see *Re Y, Z, AA, AB and AC [2017] EQHC 784 (Fam)).* In those circumstances the court should correct the mistake made by both parties in the Form PP and make the declaration sought by PQ. She relies on the point made by others that the legal position crystallises at the time the consents were submitted in the context of the subsequent treatment and birth of the child and, as a result, the subsequent conduct as relied upon by RS is not relevant.

39. Ms Kirby, on behalf of RS, initially sought to suggest PQ's application should be adjourned for a period of six months, so that the court can consider at the adjourned hearing whether the PQ had demonstrated commitment to the children. At the end of her oral submissions she made clear that position was not being pursued. Ms Kirby also raised in her written submissions there was no evidence PQ or RS received appropriate opportunities for counselling. That was not pursued in her oral submissions as the documentation from the Clinic in the Medical Consultation Checklist demonstrated counselling was offered

40. Ms Kirby's submissions focussed on PQ's conduct which she submitted, if the court was considering rectification, should be taken into account, as rectification is an equitable remedy for which PQ did not have clean hands due to his conduct, with the result that he should be denied the relief sought.

41. The factual foundation about PQ's conduct Ms Kirby relied on focussed on two matters.

42. Firstly, delay. It was not until April 2019 that the application for a declaration was made. Ms Kirby submits PQ knew as long ago as late 2014 that the Clinic would pay for legal advice about this issue and he delayed nearly four years before making this application. Ms Gartland points to the fact that in 2014 it was a joint decision of the parties not to take the matter any further and they relied on what the Clinic had said that his status as a parent would not be affected unless a challenge was subsequently made. Additionally, it was not until January 2019 that the Clinic confirmed it would pay for PQ's legal costs in making an application for a declaration.

43. Secondly, PQ had actively and consistently relied on his lack of parenthood (for example to the CMS and the court in the financial remedy proceedings) for his own interests, contrary to the children's interests. Ms Gartland submits in his written evidence PQ has explained the reasons for the steps he took. It was a joint decision in 2014 to take no further steps, and since their separation both parties have sought to question PQ's status regarding the children and his actions with the CMS was in the context of the difficult financial situation between the parties and his wish to maintain the mortgage on the family home.

44. Mr Wilson, on behalf of the Children's Guardian, and Mr Kingerley, on behalf of the Clinic, unite in emphasising that the court should be concerned with what the parties' intentions were at the time the consents were signed, the treatment took place and the children were born as a result. That is when the legal status of all parties crystallises. It is accepted by both PQ and RS their common intention at the time was that they both believed they were consenting to PQ becoming the parent of any child born as a result of the treatment at the Clinic.

45. They submit post-separation conduct is not relevant to the determination of the parties' common intention at the relevant time. Whilst an analysis of this may be relevant within the Children Act proceedings, they submit it has no place within the statutory framework relating to a declaration of parentage.

46. Mr Kingerley submits it could only arise in the context of the statutory framework if it can be argued that to grant the declaration sought would be manifestly contrary to public policy, in accordance with s 58 (1) FLA 1986. That would require the court considering the conduct of both parties, which when considered within the circumstances of these proceedings, is unlikely to lead the court to the conclusion that the declaration sought would be manifestly contrary to public policy.

Discussion and Decision

47. In this case the effect of ss 35 – 37 HFEA 2008 requires the following to have taken place:

(1) PQ must have given a notice (s 37 (1) (a)) stating that he consents to being treated as the father of any child resulting from treatment provided to RS (in this case Form PP 'Your consent to being the legal parent').

(2) RS must have given a notice (s 37 (1) (b)) stating that she consents to PQ being so treated (in this case Form WP 'Your consent to your partner being the legal parent').

(3) The notices must be in writing and signed by the person giving it (s 37 (2)).

(4) The notices must have been signed before the treatment took place (s 36 (b)).

48. There is no issue that the Form WP is in writing, is signed by RS and gives the necessary consent under (2) above.

49. In *Re A (ibid)* at [28] Sir James Munby set out the detail in Form PP.

50. In this case the Form PP has been filled in incorrectly so that PQ's name and RS's name are in the wrong parts. RS, rather than, PQ's details are in section 1, PQ's rather than RS's are in section 2. PQ has completed section 3 and ticked the box which provides *'I consent to being the legal parents of any child born from my partner's treatment'* and has signed the declaration underneath. RS incorrectly signed section 5 (it should have been PQ) and her date of birth was inserted, rather than the date when the form was signed.

51. There is no evidence to suggest this was other than a mistake by both PQ and RS and the error was not picked up by the Clinic at the time. This is confirmed by the matters the parties were able to agree, as set out in the order dated 15 August 2019 ([31] above).

52. It was only as a result of an audit directed by the HFEA that this error was picked up. Following the Clinic notifying PQ and RS of this, they informed the Clinic in October 2014 they were not going to take any further steps.

53. After the parties' separation in early 2017 their relationship deteriorated. RS changed the children's name by deed poll without informing PQ and, unbeknown to PQ, told the children of the circumstances of their birth. PQ relied on the lack of his parental status in avoiding liability for child maintenance and to support arguments to reduce his liability within the financial proceedings. Each say none of the actions taken by the other was child focussed.

54. I agree with the submissions on behalf of the Children's Guardian and the Clinic that those matters that arose post separation are not relevant in determining what the parties' common intentions were at the relevant time. They may, or may not, have a bearing on welfare related matters in the Children Act proceedings, that will be for another court to determine.

55. There is no dispute between the parties that the court can correct errors in a form (such as Form PP) either by rectification where the requirements for that are satisfied, or where the mistake is obvious on the face of the document, by a process of construction without a need for rectification (see *In the matter of HFEA 2008 etc [2015] EWHC 2602 (Fam) para 63 (ii)).* The distinction between correction by construction and rectification is, to a large extent, an unnecessary exercise, as it does not matter whether PQ succeeds on one basis or the other (see *Re G (HFEA 2008) [2016] EWHC 729 (Fam)* [21]).

56. On the evidence the court has, the errors in the form are clear and obvious mistakes, the Form PP does not reflect the agreement of PQ and RS at the time, as recorded in the agreed recital in the August order (see [31] above). The corrections required are

equally clear, namely placing the details in the correct boxes by transposing the names in sections 1 and 2 (in accordance with Case AA).

57. PQ, the Children's Guardian and the Clinic all agree the declaration of parentage should be made, that it can be made on either basis (construction or rectification) and do not consider the facts of this case, even taken at their highest in favour of RS, justify rectification as a remedy being refused. They rely on what Sir James Munby said in *Re G (HFEA 2008) [2016} EWHC 729 [18]* when he expressed *'some difficulty'* in the context of the HFEA 2008 a claim for rectification if otherwise made out *'could ever properly be refused on any of the discretionary grounds identified by Lord Neuberger'* namely delay, change of position or third party reliance (see *Marley v Rawlings [2014] UKSC2 at paragraph [40])*. They submit rectification in these circumstances, where it seeks to give effect to the intention of the parties at the relevant time; being the time of implantation and successful conception. It is in that context that the parties' conduct post separation has little connection with the relief sought, as the legal status crystallises at the relevant time. The purpose of rectification is to permit equity to rectify the terms of the written instrument, namely the Form PP, so as to make it accord with the true agreement of the parties (namely the acquisition of legal parenthood by PQ).

58. I agree with those submissions. In the context of PQ's application, the focus of the court is the common intention at the time the form was submitted, and the subsequent treatment that resulted in the birth of the child. The position of status crystallises then. As set out in the directions order in August, the common intention and agreement at that time was they were consenting to PQ becoming the parent of any child born as a result of the treatment at the Clinic and they both believed they had signed whatever was legally required to ensure that they both became parents. In those circumstances the fact that Form PP was completed incorrectly by them was clearly an error. In the absence of any matter being raised regarding public policy in the terms provided in s 58 FLA 1986, which Ms Kirby did not suggest the conduct she complained of did, it is difficult to see in the circumstances of this case that the conduct raised by Ms Kirby has any relevance to the issue this court has to determine.

59. For those reasons I am satisfied that the errors in the Form PP in section 1 and 2 are obvious and can be corrected by way of rectification in the same way as they were in Case AA in *In the matter of the HFEA 2008 (Re Y and others) (ibid) [11]*. In those circumstances I will make a declaration of parentage in relation to both children in favour of PQ and, for the avoidance of doubt, I dismiss RS's application for non-parentage.