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.

Case No: FD18F00037

Neutral Citation Number: [2019] EWHC 648 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/2/2019

Before:

MRS JUSTICE THEIS

- -

Between:

M	**Applicant**
- and -	
W	**1st Respondent**
- and -	
C	
(a child, by his Guardian, Jane Powell)	**2nd Respondent**
- and -	
Secretary of State for Health	**Intervener**

- -

Ms Marisa Allman (instructed by **Mills & Reeve LLP**) for the **Applicant**
Ms Elizabeth Issacs Q. C. (instructed by **Natalie Gamble Associates**) for the **1st Respondent**
Ms Deirdre Fottrell Q. C. (instructed by **Russell-Cooke) 2nd Respondent**
Ms Dorothea Gartland (instructed by **Bevan Brittan**) for the **Life Centre Newcastle**
Mr Leon Glenister (instructed by **Government Legal Department)** for the **Secretary of State for Health**

Hearing date: 22nd January 2019
Judgment: 12th February 2019

- -

Judgment

Mrs Justice Theis DBE:

Introduction

1. The court is concerned with an application for a declaration of parentage pursuant to s 55A of the Family Law Act 1986 ('FLA 1986') in respect of the child, C. There is currently a child-arrangements order in place regulating the time he spends with the applicant ('M') and first respondent ('W'). That order gives W parental responsibility.

2. C was conceived following IVF treatment at the Life Centre at Newcastle ('the Clinic') with donor sperm. The transfer of embryos to M took place after the Human Fertilisation and Embryology Act 2008 ('HFEA 2008') came into effect at a time when M and W were in a same sex relationship and had been receiving treatment from the clinic for a number of years. M and W subsequently separated.

3. M made the application to provide clarity for C regarding his status in relation to W.

4. The issue has arisen as a result of an administrative error made by the Clinic at the time the family were treated. There is no evidence that M or W signed the prescribed HFEA forms (Forms WP and PP) but there is an Internal Consent form signed in March 2008 which may constitute the requisite notice to comply with ss43 and 44 HFEA 2008. The question is therefore whether the court can make a declaration that W is the legal parent of C on the basis of a form signed by M and W before the changes introduced under the HFEA 2008 which made it legally possible for W to be the parent of C from birth.

5. W and the Clinic are neutral in relation to the application, it is supported by the Children's Guardian, on behalf of C, and although the Secretary of State for Health ('SSH') left any factual matters to the court his position was that the requirement for consent in s 44 HFEA 2008 did not require a consent form from a same-sex partner to have been signed after the HFEA 2008 came into force. The SSH is an intervener, the Clinic participated in the proceedings and the Human Fertilisation and Embryology Authority ('HFEA') were given notice of the application but did not seek to intervene or participate in the proceedings.

6. Issues concerning C's legal parentage have arisen several times since M and W's separation. M made an application for a maintenance assessment which was closed following W questioning whether she was a parent. An application for a child arrangements order concluded with an order for C to spent time with W, parental responsibility was granted on the basis that W was not a legal parent. Following this M made a further application to the CMS for a maintenance assessment in the light of the parental responsibility order, an assessment was made which W appealed. The Child Support Appeal First Tier tribunal has now adjourned the appeal pending determination of this application.

7. The court has comprehensive written evidence, including statements from both M and W, as well as the Person Responsible at the Clinic under the HFEA 2008, a

specialist doctor and a specialist nurse from the Clinic. In addition, there has been extensive disclosure of the medical records. The Clinic have accepted that this is a case in which administrative error by them in relation to the non-completion and/or retention of up to date parenthood consent forms has arisen which has caused the uncertainty over legal parenthood regarding C. To their credit the Clinic accepted responsibility at an early stage, have funded M's and W's legal costs and Ms Gartland, on behalf of the Clinic, repeated at this hearing its sincere apologies for this situation, for which it accepts full responsibility.

8. No party or intervener sought for any oral evidence at this hearing, it proceeded on oral submissions based on the written evidence and the detailed skeleton arguments that had been submitted. At the commencement of this hearing the parties agreed the following additional facts:

   (i) The Applicant and 1st Respondent believed that they were consenting to the 1st Respondent becoming the parent of any child born as a result of the treatment at the Clinic.
   (ii) The Applicant and 1st Respondent believed they had signed whatever was legally required to ensure they both became parents
   (iii) The Applicant and 1st Respondent continued to believe this after C's birth, at least until the point at which they attempted to register W as C's parent.

9. The court would like to express its gratitude for the comprehensive written and oral submissions from the parties and the interveners.

10. The background to this case is that following the decision of *AB v CD [2013] EWHC 1418 (Fam)* the HFEA undertook an audit of licensed fertility clinics as a result of concerns around the arrangements in place for conferring legal parenthood under the HFEA 2008. This has a resulted in a number of cases coming to court where declarations have been sought and guidance has been given, in particular by Munby P in *Re A and Others [2017] 1 FLR 366.*

Relevant background

11. There is no real dispute about the background. M and W commenced their relationship, began living together and were referred by their GP to the Clinic for fertility treatment for M. Following sessions of IUI treatment involving donor insemination, which were unsuccessful, they were referred for IVF treatment.

12. On 6 April 2009 the HFEA 2008 came into force, which permitted W to be nominated as a legal parent, pursuant to ss 43 and 44.

13. After the HFEA 2008 came into force an embryo transfer to M took place, this was successful and resulted in C's birth.

14. The detailed medical records demonstrate that M and W were treated as a couple throughout. They were seen together at appointments, letters were jointly addressed, and they were written in a way that addressed them jointly.

15. The Clinic consent forms expressly state the couple were being treated together and the Clinic has confirmed that they did not treat women seeking donor treatment as single women unless they are. This position was echoed in the statements from M and W, for example W confirms this was a *'joint enterprise'* and that they both entered into the treatment as *'joint partners seeking to jointly parent a child and we were always treated as such by the clinic and professionals'.*

16. In 2006 M alone signed a 'Consent to donor Insemination' form consenting to insemination with the sperm of an anonymous donor. This was for the purpose of donor insemination treatment, not IVF. It confirmed M had been given an opportunity to take part in counselling about the implications of the proposed treatment. W did not countersign.

17. The medical records show that when M and W were first offered implications counselling in 2006 there is likely to have been a discussion around W adopting any child born as a result of the treatment. As M said in her statement *'I do not think that either of us really understood that [W] would not be a legal parent if she did not adopt our child. I think we both thought that [W] would still be on the birth certificate.'*

18. Having undergone cycles of IUI treatment NHS funding was granted for IVF. M and W were placed on the waiting list and an appointment was made for them to attend the clinic in March 2008.

19. At that appointment with a doctor M and W signed the forms headed *'Consent to Donor Insemination'* and *'Consent to treatment involving egg retrieval and/or egg or embryo replacement'.* M signed to confirm her consent to the procedure, that she had discussed the proposed treatment with a doctor and that the couple had been given a suitable opportunity to take part in counselling about the implications of the proposed treatment. W signed the following statement on the form '*I am the partner of [M] and I consent to the course of treatment outlined above. I understand I will become the legal father of any resulting child'* The space for 'Male partner's signature' was crossed out and replaced with 'Female partner's signature' on both forms. On that date M and W, also both signed the 'Consent to Disclosure of Identifying Information' form.

20. When asked to confirm whether couples signing this form would have been told that it superseded previous forms they had signed the Clinic responded in a letter *'I cannot confirm the precise advice that would have been given. The previous forms were superseded because a new treatment was involved. It was rather accepted than made explicit'.* In her statement M confirms when she signed these forms, she did not know that it would not be possible for W to be C's legal parent. In the child arrangements proceedings W confirmed they were unaware it was not possible for same sex couples not to be legal parents and they signed all necessary paperwork at the clinic *'that we thought would make us legal parents of our forthcoming child.'.*

21. Following the signing of these forms M and W embarked on cycles of IVF, prior to the last cycle M and W changed their donor and further consents to treatment were taken with W named as M's partner but only M signing.

22. It is accepted by the Clinic that all of the appointments after 6 April 2009, when the HFEA 2008 came into force, would have been opportunities to discuss the new law and the signing of WP and PP forms. There is no evidence this was done and the relevant people who saw M and W at the clinic all confirm they do not remember this couple and are reliant on the medical records. The medical records do not include WP or PP forms or any reference to their existence.

23. Following C's birth M and W attended the Registry Office to register W on C's birth certificate. M recalls being told that this was not possible as they were not civil partners and W states that the Registrar indicated they should ask the clinic for the relevant forms. Neither M or W took any further steps in relation to W's status with C.

24. M and W remained living together with C until they separated. Only then did issues regarding child arrangements and maintenance arise.

25. In late 2013/early 2014 M wrote to the Clinic requesting information from the hospital records, in particular whether she and W signed a co-parenting agreement form. The Clinic responded with some documents from the file by letter dated 14 February 2014, it provided limited information and did not refer to the audit the HFEA had written to clinics about seven days earlier. The letter did not offer any further assistance or any recommendation to take legal advice.

26. No further communication was received from the Clinic until received by M's solicitors who were instructed in 2018.

27. M contacted the CMS to apply for child maintenance for C. W's solicitors wrote to the CMS indicating that W was not a parent.

28. W issued an application for a Child Arrangements Order within those proceedings she asserted she was not the legal parent of C due to the failure of the parties to sign Forms WP or PP. A final order was made by consent, providing for C to spend extensive time with W, granting W parental responsibility and neither party invited the court to deal with the issue of parentage.

29. M made a fresh application to the CMS and a substantive order was made, this was the subject of an appeal by W on the basis that she is not C's legal parent. That appeal has been stayed pending the outcome of this application.
30. M made an application to vary the Child Arrangements Order and a final order was made. The issue relating to C's parentage was again raised during the currency of those proceedings, although it was not an issue within the proceedings.

31. This application for a declaration of parentage was issued on 8 May 2018 with directions being made on 18 May 2018, 12 July 2018 and 13 December 2018 leading to this hearing.

Relevant Legal Framework

32. M and W have never been married or in a civil partnership. They underwent treatment in a UK licensed clinic.

33. The provisions that determine whether W could become C's legal parent is pursuant to ss 43 and 44 HFEA 2008. They provide as follows:

> *"Section 43: Treatment provided to woman who agrees that second woman to be parent*
> *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, subject to section 45(2) to (4), the other woman is to be treated as a parent of the child.*
> *Section 44: The agreed female parenthood conditions*
>
> *(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

(e)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.

(3) A notice under subsection (1)(a), (b) or (c) by a person ("S") who is unable to sign because of illness, injury or physical disability is to be taken to comply with the requirement of subsection (2) as to signature if it is signed at the direction of S, in the presence of S and in the presence of at least one witness who attests the signature."

34. Munby P provided a summary of the fundamental features of these provisions in *Re A and Others (ibid)* at paragraph [25] as follows:

(i) M or P, as the case may be, must have given a notice (ss37(1)(a), 44(1)(a), as the case may be), stating that 'he [or P, as the case may be] consents to being treated as the father [or a parent] of any child resulting from treatment provided to W.

(ii) W must have given a notice (ss37(1)(b), 44(1)(b), as the case may be), stating that 'she consents to M [or P, as the case may be] being so treated'.

(iii) The notices must be (ss 37(2), 44 (2), as the case may be) 'in writing' and 'signed by the person giving it'.

(iv) The notices must have been signed before the treatment took place: see the words 'at the time when…[etc]' in ss 36(b) and 43 (b).

35. On 20 February 2009, in anticipation of the changes brought in by the HFEA 2008, the HFEA first directed that the consent of any person whose consent is required under s 44 must be recorded in Form WP or PP.

36. In *Re A and Others (ibid)* Munby P expressly considered whether consent and/or notice other than in Forms WP and PP could be valid. He concluded they were not statutory requirements capable of invalidating consent that had been provided in another form. He stated at paragraph [57]

'These sections [s37 or 44] do not prescribe a specific form. What is required is a 'notice' and that is not defined, although I would agree with Miss Broadfoot that, given the context, what is required is a document of some formality.'

He continued at paragraph [63]

"I conclude, therefore, that, in principle:
(i) the court can act on parol evidence to establish that a Form WP or a Form PP which cannot be found was in fact properly completed and signed before the treatment began.
(ii) The court can 'correct' mistakes in a Form WP or a Form PP either by rectification, where the requirements for that remedy are satisfied, or, where the mistake is obvious on the face of the document, by a process of construction without the need for rectification.
(iii) A Form IC, if it is in the form of the Barts IC or the MFD Form IC as I have described them above, will, if properly completed and signed before the treatment began, meet the statutory requirements without the need for a Form WP or a Form PP.
(iv) It follows from this that the court has the same powers to 'correct' a Form IC as it would have to 'correct' a Form WP or a Form PP.'

37. In her excellent skeleton argument Ms Allman sets out a helpful summary of the relevant considerations and differing situations which have been held to satisfy either the notice or consent requirements of ss 43 and 44. I cannot improve on her analysis of the guidance that has emerged from the cases and the relevant part of her skeleton is set out below:

a) Relevant considerations in a number of the cases [most recently in Case AL [2018] EWHC 1300] have been;

(i) Whether the treatment was embarked upon and carried through jointly with full knowledge by both the woman and her partner

(ii) Whether it was the intention of both from the outset that the woman's partner would be a legal parent

(iii) Whether each knew this required legally the signing of consent forms

(iv) Whether each believed that they had done whatever was legally required to ensure they would both be parents

(v) Whether when the pregnancy was confirmed and the child was born they each believed the woman's partner was the other parent of the child

(vi) Whether they registered the child in the belief that they were both parents

(vii) When they first knew anything was wrong.

(viii) Whether the consent was fully informed consent.

(ix) Whether there was any failure or omission by the clinic in relation to the provision of information or counselling.

(x) Whether the application is made with the support of the Respondent [e.g. Case M [2016] EWHC 1572]

b) Where Forms WP and PP are not present, but there is an internal consent form signed, such a form is capable of satisfying the requirements for notice (subject to

the wording of the form), even where signed before the 2008 Act came into force: Case I [2016] EWHC 791 / Case AL [2018] EWHC 1300 / Case M [2016] EWHC 1572

c) *The following wording in an Internal Consent form (which matches the wording in this case save for use of the word 'father' rather than 'parent') suffices to meet the requirements of s.37 (equivalent to s.44) in an appropriate case: "I am the partner of [Y] and I consent to the course of treatment outlined above. I understand that I will become the legal parent of any resulting child" Case AL [2018] EWHC 1300*

d) *Where there is a single Internal Consent form which is signed by both the woman and her partner, it is capable of operating both as Form WP and PP complying with the requirements of both s.37(1)(a) and 37(1)(b): Case M [2016] EWHC 1572*

e) *Intention, although necessary, is not sufficient. It is the presence or absence of consent in writing given before the relevant treatment which is ultimately determinative: Cases P, Q, R, S, T and U [2017] EWHC 2532*

f) *The fact that the parties have separated since the child was born is irrelevant: Case AK [2017] EWHC 1154 / Re M [2016] EWHC 1572*

g) *A single consent may well apply to a series of cycles, traversing the advent of the 2008 Act: B v B [2017] EWHC 599*

38. The transitional provisions which applied to the commencement of the HFEA 2008 are set out in the Human Fertilisation and Embryology Act 2008 (Commencement No 1 and Transitional Provisions) Order 2009. The new Schedule 3ZA to the HFEA 1990 specifies the relevant treatment services and the events in connection with which counselling must be offered. The transitional provisions are also reflected in s 13 HFEA 1990 as amended by HFEA 2008 specifying conditions of licences for treatment and were supported by the HFEA Chair's letter CH (09) which specified the steps to be taken in transitional cases.

39. The combination of these provisions and guidance set out what could and could not be done, particularly in transitional cases. The provisions were not aimed at determining legal parentage and do not impose requirements on the individuals being treated or their partner. They provide that in the event of a notice under s44 (WP or PP form) counselling had to be offered, but there is no requirement to take it up.

The circumstances in this case

40. It is accepted in this case the following features mean that it is not specifically covered by the principles outlined above:

41. First, none of the reported cases concern the signatures on an Internal Consent form by a same-sex couple prior to the HFEA 2008 coming into force on 6 April 2009, where the relevant treatment was carried out after it came into force.

42. Second, in only one of the cases (*Re K (Human Fertilisation and Embryology Act 2008) [2017 EWHC 50)* was the co-parent not registered on the child's birth certificate at birth, and this was held to have been an error of law in the light of *Re A and Others.* That was a case concerning opposite-sex parents.

43. Third, in none of the cases was there a factual issue regarding what the parties' understanding had been at the time of signing such consent forms and/or whether consent was informed consent. This issue resolved as set out the agreed facts above, in that the parties agree that up until the time when they attempted to register W as C's parent, both M and W believed W was one of C's parent.

44. Fourth, in none of the other cases was there any issue as to whether the parties had received appropriate information and counselling relative to the implications of the treatment in question.

Submissions

45. Ms Allman, on behalf of M, skilfully set out in her written skeleton argument a route to a declaration. That helped provide a focus for the other parties as how M's case was advanced. Put simply, she relies upon the Internal Consent forms signed by M and W in March 2008, which, she submits, satisfy the requirements of s 43 and 44 HFEA 2008.

46. She relies on the following factual foundations on which she rests her submissions:

    (i) At all times M and W embarked on fertility treatment jointly and as a couple with the intention that any child born as a result of the treatment, they would both be the child's de-facto parents.
    (ii) All treatment was carried out with them jointly, as a couple, and that is how the Clinic treated them. They were offered implications counselling, it was carried out in 2006 and when they progressed to receive IVF treatment in 2008.
    (iii) Both M and W signed two Internal Consent forms in March 2008 both of which expressly stated that W would become the legal father of any resulting child. At that time, they were unaware that it was not possible for W to be the legal parent of any resulting child.
    (iv) Both M and W would have wanted W to be the other legal parent of any child conceived following the treatment. If M and W had been asked to sign a WP and PP form, they would have done so.
    (v) Following on from their understanding about W's legal status they attempted to register W as C's parent, as they both wanted W to be registered as C's legal parent and understood that to be the position.
    (vi) The refusal by the Registrar to register W on C's birth certificate was the first indication they had that anything was wrong, although M and W remained unclear what the legal position was regarding W's status in relation to O.

47. At this hearing it was further agreed that:

(i) *The Applicant and 1st Respondent believed that they were consenting to the 1st Respondent becoming the parent of any child born as a result of the treatment at the Clinic.*
(ii) *The Applicant and 1sT Respondent believed they had signed whatever was legally required to ensure they both became parents*
(iii) *The Applicant and 1st Respondent continued to believe this after C's birth, at least until the point at which they attempted to register W as C's parent.*

48. Ms Allman places reliance on the fact that the Internal Consent forms signed in March 2008 were in the context of the move to IVF treatment, the 'Consent to Donor Insemination' forms were signed by both M and W (in 2006 only W had signed the consent) and they both signed the 'Consent to Treatment' form. The Clinic operated on the basis that these forms superseded the previous forms and there was no suggestion that M and W had reached any other conclusion. The wording of the forms themselves make it very clear that W was signing to make sure she became recognised as a parent of any child born as a result of the treatment they had jointly embarked upon.

49. Importantly, Ms Allman submits, the actions of M and W in seeking to register W as a parent on the birth certificate can only be on the basis that they both considered they had taken the necessary steps to make W a legal parent. In her initial statement in the first Children Act proceedings W stated that when they had signed all of the necessary paperwork at the clinic *'that we thought would make us both legal parents to our forthcoming child'.*

50. Set against that background Ms Allman submits that the wording of the Internal Consent forms in this case, namely '*I am the partner of [M] and I consent to the course of treatment outlined above. I understand I will become the legal father of any resulting child' is* sufficient to satisfy the requirements of s44 of the HFEA 2008 as to the content of the notice required by that provision. Insofar as the wording provides for W to be the 'father' of any resulting child she submits it is well established that erroneous wording can be corrected under the principle of rectification (see *Re A and Others (ibid) paragraph [63**)***

51. Ms Allman continues that there is nothing in the HFEA 2008 which invalidates the effect of the Internal Consents. In particular, there is no requirement in s 44 HFEA 2008 that the notice required to be given by that provision should have to be given after the commencement of that Act. When looking at other decisions of this court it has been satisfied that the conditions in s 44 are met by Internal Consent forms signed before the commencement of the HFEA 2008 (see for example *The matter of HFEA (Case I) [2016] EWHC 791 (Fam)*).

52. Ms Allman tackles the issue as to whether the consent given in March 2008 is in any way invalidated by asserting the fact that at the time of giving it, it could not have been effective to achieve parentage for W in the following way. She relies upon what Munby P said in *Re A and Others* at paragraph [60] in support of her submission that this court should be cautioned against finding that the consents given in this case are not capable

of meeting the requirements of s 44 by reason of some factor which has not been spelt out by Parliament. In paragraph [60] Munby P states:

'Parliament has very carefully defined in ss 37 and 44 the conditions that have to be satisfied if the consequences identified in ss36 and 43 are to follow. If Parliament had intended that those consequences were not to follow, even though the consents specified in ss 37 and 44 had been given, merely because there had been a non-criminal breach of some term in the licence or a non-criminal breach of a requirement imposed by a HFEA direction, then surely it would have spelt that out. But that sanction is not to be found set out in ss 37 and 44 nor, as I have already pointed out, elsewhere in the legislation'.

53. Ms Allman submits it is of note that the Clinic considered the consent forms signed in March 2008 covered the issue, in their letter dated 23 November 2018 they stated:

'The signature of the partner was meant as confirmation of intention of the partner to be/become the 2nd parent. We did believe that the form covered the required consent for legal parenthood, although we introduced the WP and PP forms as required in April 2008 in addition, we did not expect that those forms were to be the ONLY format in which that consent could be given. We did feel that since our forms covered the issue, (they always intended to be the legal parent – it would not alter the couple's intention just made life easier for them), we did not need to call all of our couples in to complete the forms, but that we would identify them as they came through. In this couple's case unfortunately that did not happen.'

It is clear, Ms Allman submits, that the position M and W find themselves in is due to the actions of the Clinic rather than any steps they were required to take themselves.

54. In a similar situation in *X and Y and St Bartholomew's Hospital Centre for Reproductive Medicine [2015] EWFC 13* I stated at paragraph [47]

'..a restrictive interpretation of s 37 in these cases makes paternity 'precarious'. This is because, in reality, the uncertainty is almost entirely outside the control of X and Y. Although s 37 puts the onus on the prospective parents to give the requisite notice, the law does not expect them to know in advance what the law is or to be aware of this particular duty but places a prior onus on the clinic to inform and counsel them and to provide them with the appropriate forms. Parents have no effective control over the clinic's compliance with the conditions of its licence or its retention of the necessary consents.'

55. The transitional provisions and Guidance set out what should happen if a notice pursuant to s 44 was given. Here it wasn't given so Ms Allman submits there was no requirement for counselling triggered. In any event she submits Munby P made clear in *Re A and Others (ibid)* that failure to comply with an HFEA direction as to forms does not of itself invalidate what would otherwise be a valid consent. The same rationale applies to counselling.

56. Whilst Ms Allman accepts that as a matter of good practice M and W ought to have been provided with specific information relating to the issue of W becoming the parent of a child after the implementation of the HFEA 2008 and offered counselling in connection with that, there is no evidence this took place. All the evidence points towards the Clinic considering that their forms signed in 2008 covered the issue and using the new forms would not alter the couple's intention. It is of note that the information provided by the Clinic concerning this case following the HFEA audit specified that consent was completed prior to treatment and counselling was offered prior to consent.

57. Ms Allman urges the court to take a purposive construction of the relevant provisions relying on what the Children's Guardian set outs about the declaration as being *'important and necessary for C for the rest of his life, not just during his minority'.*

58. Without such a declaration being made C's rights under Article 8 United Nations Convention of the Rights of the Child (UNCRC) to have his legal relationship with his parent legally recognised would be infringed. In *R ex parte Johnson v Secretary of State for the Home Department [2016] UKSC 56* Baroness Hale stated at paragraph [26] *'It is well established that a person's social identity is an important component of his private life, which is entitled to respect under article 8. This includes the recognition of his biological relationships, even if the refusal of recognition has no noticeable impact upon his family life.'*

59. In this context Ms Allman submits that Parliament, in enacting ss 43 and 44 HFEA 2008, clearly intended to enable for the first time the children of same sex couples who attended licensed clinics for treatment to be able to achieve the security of a legal relationship with both parents for their child where consent to this has been given by both women. In previous cases the courts have striven to ensure a child of opposite sex parents has the benefit of two legal parents where this was the intention and desire of the parents at the time the child was conceived. For C to be deprived of that benefit and protection because his parents are of the same sex and therefore could not have achieved that before the HFEA 2008 would appear to run counter to the provisions of ss 43 and 44, and also risks, Ms Allman submits, a discriminatory result.

60. Finally, Ms Allman submits that the outcome in this case sought by M does not require the court to reach a conclusion contrary to parliamentary intention, or the express provisions of the HFEA 2008. It requires the court to have regard to the circumstances as a whole, including the overall statutory scheme relating to the issue of informed consent, the particular information and counselling that was offered in this case and decide whether the declaration can be made notwithstanding any deficiencies in the process. In undertaking this task Ms Allman urges the court to focus on the s 44 criteria and not on procedural errors of the Clinic, for which these parties bear no responsibility.

61. Put shortly, Ms Allman's submissions can be summarised as follows. The Internal Consents signed in March 2008 were understood and intended to mean that W would be regarded as C's legal parent. That is the effect of what is said in the documents signed, it accurately reflects the joint approach by M and W to the treatment and the way they were

treated by the Clinic as a couple jointly pursuing the treatment that took place. There is nothing in s 44 HFEA 2008 or any of the transitional provisions or the relevant parts of the Code of Practice produced by the HFEA that required M and W to sign fresh consents after the implementation of the HFEA 2008. In the light of that the court can be satisfied that the March 2008 consents were sufficient to meet the requirements of s 44 HFEA 2008, with the result that W should be regarded as C's legal parent and the court should make the declaration of parentage sought.

62. None of the parties took issue with Ms Allman's analysis. Ms Fottrell Q.C. on behalf of the child submitted the court must first consider whether the terms of the HFEA 2008 have been complied with by applying the analysis set out by Munby P in *Re A and Others (ibid)* at paragraph 25, namely:

    (i) P [W] has given notice that she consents to being treated as the parent of any child resulting from the treatment on the form signed in March 2008;
    (ii) W [M] has given notice that she 'consents' to P being so treated on the same form;
    (iii) The notices are in writing and are signed by the person giving them
    (iv) The notices were signed before treatment.

63. As Ms Fottrell states *'it is important not to overcomplicate the question which the court has to determine, which is whether the notice requirements were met at the time of the treatment. As a matter of fact and law the requirements of the Act are met by the IC signed in March 2008.'*

Discussion and Decision

64. As has been set out in previous cases a person's identity is a fundamental part of who they are. An integral part of that identity can include who that person's parents are. On one view this is more important for the child, as the status of individuals in relation to them will not only have an impact on their identity but may also be relevant in determining any obligations or rights that an individual and the child may have in relation to each other. This application for a declaration needs to be viewed in that important context.

65. As set out by the Guardian in her very perceptive report

> *'What C needs is an end to private law and ensuing financial disputes. I suspect he is far more aware of the difficulties than either [M] or [W] would like to believe. I can see that the issue of legal parentage has continued to surface throughout the litigation after [M] and [W] separated and indeed in the maintenance case which is yet to conclude. [W] has made it clear through her representations that she is not C's legal parents. It seems to me essential to resolve that particular uncertainty. Like any other child C needs the security of a lifelong legal relationship with both parents. Although it will not in itself resolve any future disputes, it will remove one obstacle to future resolution.'*

I wholeheartedly agree with this analysis of C's needs.

66. As this court has rightly been reminded, the importance of a child's identity is confirmed by Article 8 United Nations Convention on the Rights of the Child, which provides:

    1. *States parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without lawful interference.*
    2. *Where a child is illegally deprived of some or all of the elements of his or her identity, states parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*

67. Baroness Hale in *ZH (Tanzania) v Secretary of State for the Home Department UKSC 2011 4* confirmed the courts in this jurisdiction and decision makers must have regard to the key principles of the UNCRC.

68. What is not in dispute is the requirements in ss 43 and 44 that prior to treatment W must have consented in writing, signed by W, to being treated as the parent of any child resulting from treatment to M and M must have given notice that she consents to W being so treated. There is no issue that the written consents signed by M and W in March 2008 do this, save in one respect where it states that W agrees to being treated as the *'legal father'* of any resulting child. No issue is taken on the jurisdiction of this court to correct any erroneous wording by way of rectification, which would entail reading the consent to read *'parent'* rather than *'father'*. Having considered the evidence it is obvious on the face of the document that was a mistake, as earlier in that part of the form *'husband'* had been deleted and *'partner'* left in, and further down *'Male'* was crossed out and *'Female'* put in manuscript in its place. These changes apply to both Internal Consent forms, the *'Consent to Donor Insemination'* and *'Consent to treatment Involving egg retrieval and/or egg or embryo replacement'.* In my judgment they should both be read as replacing the words *'legal father'* with *'parent'.* This accords with the principles Munby P outlined in *Re A and others* at paragraph [105].

69. The critical question is whether a consent signed prior to the HFEA 2008, at a time when the law did not permit a second female partner to become a parent following the use of donor sperm, is valid for the purpose of s 44. It has been established that the equivalent consent given by a male prior to the implementation of the HFEA 2008 is valid consent (see *Re I [2016] EWHC 791 [16]-[19]).*

70. There is no requirement in ss 43 or 44 for the relevant notices or consents to post-date implementation of the HFEA 2008. There is no reference to timing, other than requiring them to be in writing and signed before the treatment took place. The legislation puts the emphasis on the written consent, which is ultimately determinative. The undisputed evidence in this case is that such consents were in place prior to the treatment taking place, they were in writing and signed. The provisions of ss 43 and 44 required no more. These sections do not prescribe a specific form or an earliest date, apart from the requirement for them to be in place before treatment took place. The wording of the Internal Consent forms in this case is not significantly different from that which was approved by Munby P in *Re A and Others* at paragraphs [30] and [31] and in *Re AL [2018] EWHC 1300* at paragraph [11]. The key is the fact that the document which is signed makes clear it establishes legal parenthood.

71. In looking at the construction of the relevant provisions of ss 43 and 44 the court can take into account the purpose behind the changes that were brought about. As the White Paper for the HFEA 2008 set out in paragraph 2.69

> *'....the Government proposes to revise the status and legal parenthood provisions of the HFE Act to enable a greater range of persons to be recognised as parents following assisted reproduction..'*

The purpose of the changes was to enable those in stable relationship to become parents. It did not discriminate between same sex or heterosexual couples. To interpret the Act in a way that differentiates between same sex and heterosexual couples would not address the mischief the legislation sought to address.

72. Any analysis that treated consent given to be a parent differently prior to the coming into force of the HFEA 2008 depending on whether the second parent is male or female is potentially discriminatory and falls within a parent's Article 8 and 14 rights. I agree with the submissions of Mr Glenister, on behalf of the SSH, that in such a situation the difference in treatment between male and female consent prior to the HFEA 2008 is solely on gender. When read against Articles 8 and 14 of the ECHR there has to be objective and reasonable justification, which he submits can only be that prior to the HFEA 2008 a consent of a female partner could not be given effect to in law. However, that cannot be a basis for treating the consent itself differently, as consenting to something is independent of whether it can be given effect to.

73. I accept the invitation from Mr Glenister on behalf of the SSH to emphasise the message that the issue of parentage should be brought before the court as soon as reasonably practicable. As Munby P made clear in *Re P, Q, R S, T and U [2017] EWHC* 2532 at paragraph [14]

> *'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?'*

At paragraph [16] he continues

> *' ...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 parents as being, indeed, his legal parent.'*

74. I therefore make the declaration of parentage sought.

75. An issue arose that in the event of a declaration being made what the position would be regarding W's parental responsibility. Section 4ZA (1) (a) Children Act 1989 provides that where a child has a parent by virtue of section 43 HFEA 2008 that person shall acquire parental responsibility for the child if the court, on her application, orders that she shall have parental responsibility for the child. There is no issue that in the event of

the court making a declaration of parentage in favour of W she should have parental responsibility under that section. I therefore make an order that W shall have parental responsibility for C.