



Neutral Citation Number: [2024] EWHC 2126 (Fam)

Case No: ZC24P00622

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/08/2024

**Before:**

**MRS JUSTICE KNOWLES**

**Between:**

**S**  
**- and -**  
**T**

**Applicant**

**Applicant**

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**Re K (Declaration of Parentage: Absence of Written Consent)**  
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**James Lawford Davies** (instructed by **LDMH Partners**) for the Applicants

This matter was determined on the papers

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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 14 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**MRS JUSTICE GWYNNETH KNOWLES**

This judgment was delivered in private [and a reporting restrictions order OR transparency order is in force]. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

**Mrs Justice Knowles:**

1. This is S's application for a declaration of parentage pursuant to s. 55A of the Family Law Act 1986 ("the FLA 1986") in respect of K, a little boy, born in June 2023. The application is supported by T who is K's biological mother and S's partner.
2. This application has been determined on the papers as there is no opposition to the order sought. I have read a position statement and case summary on behalf of the Applicants as well as a chronology and draft order. I have also considered other assorted documents including a witness statement from S as well as one from Ms Campbell from The Evewell Harley Street, a gynaecology and fertility clinic in London ("the Clinic").
3. I considered carefully whether I should name the Clinic which provided treatment for S and T and concluded that, in the interests of transparency, I should. I observe that the Clinic has apologised to S and T and agreed to pay the legal costs of this application. That is, if I may say so, entirely right and proper given the factual background.

Relevant Background

4. S and T met in 2012 and have lived together since September 2015. They always intended to have a family together and decided to start the process in 2019. S and T hoped to have more than one child, each having treatment and carrying a child if possible. After discussing treatment with their GP and visiting a number of different IVF clinics, they decided to pursue treatment at the Clinic. The couple purchased six vials of donor sperm with the intention that this would be sufficient for both of them to have treatment and for their children to be genetically related.
5. S and T first attended the Clinic in December 2019 and spoke with a consultant obstetrician and gynaecologist. It was agreed that S would undergo a natural cycle of intrauterine insemination using donor sperm. The doctor's note indicated that she discussed counselling and consent forms which needed to be signed. A follow-up letter sent to the couple also made reference to the need to sign consent forms. They were also sent information leaflets on the process, all of which included sections on legal parenthood to a greater or lesser extent. About a fortnight after the first appointment, S and T attended a nurse consultation at the Clinic, during which they each completed a number of pro forma consent forms published by the Human Fertilisation and Embryology Authority ("the HFEA") and internal forms produced by the Clinic. S provided her consent to undergo fertility treatment using donor sperm, naming T as her partner. T similarly completed consent forms, naming S as the patient and consenting to the proposed treatment.
6. Notably for the purpose of this application, the couple completed pro forma HFEA consent to legal parenthood forms for this first treatment cycle. Thus, S completed a pro forma HFEA WP form called "*Your consent to your partner being the legal parent*", naming T as her partner and consenting to T being the legal parent of any child born as a result of her treatment. T completed a pro forma HFEA PP form called "*Your consent to being the legal parent*", naming S as her partner and consenting to

being the legal parent of any child born from S's treatment and consenting to being posthumously registered as legal parent.

7. The couple attended an online counselling appointment with a counsellor in mid-January 2020. The report of that session confirmed that its purpose was to discuss the ethical, legal and social implications of using donor sperm in treatment and that it specifically included a discussion of the legal implications of treatment and legal parenthood. Happily, S's treatment was successful and she gave birth to a baby girl in March 2021.
8. In June 2022, the couple contacted the Clinic via email to enquire about having a second treatment cycle. In July 2022, they attended for a consultation with a consultant gynaecologist and fertility expert who understood that the couple were seeking treatment together. There were no notes of the consultation but there was a follow-up letter. It was agreed that T would have treatment with sibling sperm as both she and S had intended and this was recorded in the treatment plan.
9. A nurse consultation took place in early September 2022 prior to which S and T had been provided with an updated version of the General Patient Information sheet and a Patient Information leaflet. Following the consultation, the nurse wrote to S and T to confirm their discussion. The letter stated that the couple had been sent the necessary consents via an electronic platform and were advised to check their junk mail in case these documents had gone into the spam folder. T was told to complete the consent first and then this would be sent to S to complete. T was also spoken to by an embryologist on the same day as the nurse consultation and the note of the discussion included discussion of the intrauterine insemination process.
10. The couple completed and signed a number of additional consent forms prior to the second cycle, including pro forma HFEA forms and internal Clinic forms. These included consent to treatment forms naming T as the patient and S as her partner.
11. T underwent an intrauterine insemination cycle using donor sperm in mid-October 2022. This was successful and a baby boy, K, was born in June 2023. His birth was registered and both S and T were registered as his parents on the birth certificate.
12. In January 2023, the Clinic conducted a routine audit of legal parenthood consent forms and identified that, although the couple had correctly completed pro forma HFEA WP and PP forms for the purpose of their first treatment cycle when S was the intended birth mother, there were no WP or PP forms in their medical records for the second treatment cycle where T was the intended birth mother.
13. It is possible that the couple did complete further WP and PP forms and these were subsequently misplaced. However, the Clinic's evidence is that it is more likely that they were not asked to complete new forms. Either way, S wishes to apply for a declaration of parentage in respect of K with T's full support.

#### Law and Guidance

14. I am grateful to Mr Lawford Davies for the comprehensive summary of the law, guidance and case law set out in the written submissions filed on behalf of S and T. I have adopted it for the purpose of this judgment.
15. The FLA 1986 provides by paragraph 55A for declarations of parentage to be made on application to the High Court. Section 55A reads as follows:

1) *Subject to the following provisions of this section, 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.*

2) *A court shall have jurisdiction to entertain an application under subsection (1) above if, and only if, either of the persons named in it for the purposes of that subsection—*

*a. is domiciled in England and Wales on the date of the application, or*

*b. has been habitually resident in England and Wales throughout the period of one year ending with that date, or*

*c. died before that date and either—*

*i. was at death domiciled in England and Wales, or*

*ii. had been habitually resident in England and Wales throughout the period of one year ending with the date of death.*

3) *Except in a case falling within subsection (4) below, the court shall refuse to hear an application under subsection (1) above unless it considers that the applicant has a sufficient personal interest in the determination of the application (but this is subject to section 27 of the Child Support Act 1991).*

4) *The excepted cases are where the declaration sought is as to whether or not—*

*a. the applicant is the parent of a named person;*

*b. a named person is the parent of the applicant; or*

*c. a named person is the other parent of a named child of the applicant.*

5) *Where an application under subsection (1) above is made and one of the persons named in it for the purposes of that subsection is a child, the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child.*

6) *Where a court refuses to hear an application under subsection (1) above it may order that the applicant may not apply again for the same declaration without leave of the court.*

7) *Where a declaration is made by a court on an application under subsection (1) above, the prescribed officer of the court shall notify the Registrar General, in such a manner and within such period as may be prescribed, of the making of that declaration.”*

16. The Human Fertilisation and Embryology Act 2008 (“the 2008 Act”) provides relevantly as follows:

“Section 33

**Meaning of “mother”**

- 1) *The woman who is carrying or has carried the child as a result of the placing within her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.*
- 2) *Subsection (1) does not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child.*
- 3) *Subsection (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.*

#### *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, 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 the 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 requirements 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.”*

17. In addition to the legislation cited above, it is also noteworthy that the HFEA publishes directions pursuant to section 23 of the 1990 Act. It is a condition of all treatment licences granted to UK clinics by the HFEA that they comply with directions issued by the HFEA. HFEA Directions 0007 titled “*Consent*” require licenced clinics to use the pro forma consent forms published by the HFEA, including the WP and PP forms relating to legal parenthood. The same Directions provide that e-consenting platforms are acceptable, either as a supplement to paper-based consent or as a routine replacement for such consents.

#### Case Law

18. There have been numerous applications for declarations of legal parenthood arising from problems regarding a failure to correctly complete or from an absence of pro forma HFEA legal parenthood forms.
19. In Re A and Others [2015] EWHC 2602 (Fam), the then President of the Family Division, Sir James Munby, dealt with a large group of cases, some of which concerned situations in which the correct HFEA forms were missing but alternative, internal clinic consent forms were accepted by the court as satisfying the statutory requirements.
20. In the more recent case of A & B v Bourn Hall Clinic [2021] EWHC 1750 (Fam), Mr Justice Poole dealt with a case in which both the pro forma WP and PP forms were found to be missing from the patients’ records during a clinical audit. In that case, Mr Justice Poole found that, on the balance of probabilities, the WP and PP had in fact been completed was subsequently mislaid. The applicants, however, had put forward an alternative case that other internal clinic forms could operate as effectively as WP and PP forms. Dealing with this comparatively briefly (having found that the forms had been completed and mislaid), Mr Justice Poole stated as follows:

*“The authorities demonstrate that it is possible for alternative consent documentation to stand in place of the WP and PP such as to meet the statutory requirements in Sections 43 and 44 of the 2008 Act. The alternative documentation must be in writing and signed by both W and P before conception and must demonstrate informed consent.*

...

*The applicants contend that the seven documents meet the requirements. The documents exist. They are in writing. They are signed and they are all signed before insemination treatment. I have already found that the applicants received information and counselling prior to treatment and the seven*

*documents can be interpreted in that context. The applicants' expectation was that the signing of these forms, and for the present I am assuming the alternative case that the WP and PP forms were not signed, had the desired effect; the effect they had been counselled about and given information about and which they plainly wished to bring about of making them both legal parents. It is fair to note that the documentation does not spell out consent to legal parenthood explicitly, but I'm satisfied that, taken together, that is the effect of the seven documents."*

21. In these circumstances, Mr Justice Poole made the declaration sought on the basis of the primary and alternative cases.
22. Recently, in the case of X v Z [2023] EWFC 217, Mrs Justice Theis was asked to make a declaration in a case where the Herts and Essex Fertility Clinic had discovered that a completed PP form was missing from the medical records. It was submitted on behalf of the Applicant that the court could rely upon other available evidence to satisfy the legal parenthood requirements of the 2008 Act. Referring to A & B v Bourn Hall Clinic above, Mrs Justice Theis found that the combination of the properly completed HFEA WP form by the patient, together with various other internal consent forms completed by the patient's partner (which were all in writing and signed by him prior to treatment), were sufficient to satisfy the notice requirements of the 2008 Act.
23. In previous cases, the court has also accepted that WP and PP forms completed at an earlier stage of treatment can remain valid in future cycles. In the case of Re P and Ors [2017] EWHC 49 (Fam), in relation to Case U, the then President found that a legal parenthood consent completed prior to the conception of an older child remained valid in relation to the legal parenthood of every child subsequently conceived. This approach would logically extend to the circumstances of this case.
24. A similar approach (albeit in relation to different circumstances) was taken in Re C (Declaration of Parentage: Written Consent) [2019] EWHC 648 (Fam) in which Mrs Justice Theis held as follows (at paragraph 70):

*"There is no requirement in ss 43 or 44 for the relevant notices or consents to postdate 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 for treatment took place."*
25. Finally, the court has also accepted that there are circumstances where WP and PP forms may be corrected. In Re A & Ors [2015] and Re G [2016] EWHC 729 (Fam), the parents had completed their WP and PP forms the wrong way round. The President held that the forms were nonetheless valid for conferring legal parenthood to the non-birth mother.
26. Most recently, in the case of Y and Z [2024] EWHC 649 (Fam), a same-sex couple had embryos created using Z's eggs and donor sperm. Y and Z completed the HFEA WP and PP forms for their initial treatment cycles at Complete Fertility with Y as the patient and Z as her partner. After a number of unsuccessful cycles, it was decided to transfer the next embryo to Z, but the clinic did not ask the couple to complete new WP and PP forms to reflect this change. Mrs Justice Theis found that the court could look at the evidence as a whole to determine what the applicants were consenting to,

and documents other than the WP and PP forms could constitute a valid notice for the purposes of the 2008 Act. She further found that the court could accept WP and PP forms signed at an earlier stage as valid in future treatment cycles, enabling the court to rely upon the WP and PP forms signed for the initial transfer to Y as authority for the subsequent transfer to Z, “... notwithstanding the lapse of time or change of treatment plan” (paragraph 19). Consequently, on this analysis, the WP and PP forms which the Applicants initially signed remained valid for the later embryo transfer.

27. Further, Mrs Justice Theis found that the court could correct errors in paperwork, as in Re A & Ors [2015], above. She held in paragraph 21 as follows:

*“In effect, this means that the court can, in an appropriate case, read the WP and PP forms completed by the applicants as if they had been completed the other way round, correcting the error made in this case of failing to update the forms and to sign them the other way round following the decision to try an embryo transfer to Z rather than Y”.*

### Submissions

28. Pursuant to s.33 of the 2008 Act, T is K’s mother as she gave birth to him following treatment at the Clinic. Since neither S nor T were married to each other at the time T had treatment, S could only become K’s legal parent through the operation of the legal parenthood provisions in ss 43 and 44 of the 2008 Act.
29. With respect to section 43, the following criteria were met:
- a) no man was treated by virtue of s. 35 as the father of the child and no woman was treated by virtue of s. 42 as the parent of the child since T was not married or in a civil partnership;
  - b) T underwent treatment provided by a licensed clinic in the UK;
  - c) S was alive at the time T had treatment.
30. The problem in this case arises from the requirement in s. 43(b) that the legal parenthood conditions set out in s.44 of the 2008 Act must be met at the time when treatment took place. The WP and PP forms are missing for the couple’s second treatment cycle and it appears more likely that they were not completed for this cycle.
31. The Applicants submit that, in line with the reasoning in Re A & Others [2015], this is a case in which alternative, internal forms should be accepted as satisfying the statutory requirement. Further, and in line with the reasoning in A & B v Bourn Hall Clinic [2021], this is a case in which the forms completed for the second treatment cycle should stand in place of the WP and PP forms even though these forms do not explicitly spell out consent to legal parenthood. Additionally, the court could rely on the forms completed for the first treatment cycle as these demonstrated S and T’s express intention that they both be the legal parents of any child born as a result of treatment, a principle which has been accepted in previous cases. These forms had not expired and thus could be deemed to apply to the second cycle of treatment. Finally, the court may also correct the error made by the clinic in failing to update the forms when T became the patient – in effect, the forms can be read as if they had been completed the other way round.

### Determination

32. I am satisfied on the undisputed evidence before the court about the following matters:



- a) S and T embarked on both treatment cycles at the Clinic together and repeatedly confirmed they were a couple seeking treatment together. This was a joint enterprise;
  - b) they both attended appointments together, regardless of who was receiving treatment;
  - c) they always intended to have more than one child and intended that their children should be genetically related;
  - d) they purchased sufficient donor sperm samples to enable each of them to have treatment;
  - e) from the outset, it was always their intention that they would both be the legal parents of any children born as a result of fertility treatment;
  - f) the couple attended counselling during their first treatment cycle and specifically discussed the legal implications of treatment and legal parenthood;
  - g) the Clinic's evidence was that, if staff were concerned that the couple were not being treated together and/or that they had not consented to S being the parent of their second child, the matter would have been referred to the Clinic's multi-disciplinary team for discussion and, in most circumstances, the Clinic would not have agreed to provide treatment;
  - h) both S and T believed they had done all they needed to meet the statutory and regulatory requirements for both treatment cycles, including those relating to legal parenthood, and had completed all the documents provided by the Clinic;
  - i) the couple assumed reasonably that they had been provided with all the necessary forms to enable treatment and ensure they were both the legal parents of children born as a result of treatment;
  - j) the couple filled in all the forms correctly and were diligent and prompt in responding to all requests and requirements from the Clinic;
  - k) the couple only became aware of a problem after T was pregnant with K;
  - l) both were registered as the legal parents of K after his birth, reflecting their wishes at the time of treatment and subsequently;
  - m) and S's application is wholeheartedly supported by T.
33. I have also considered carefully the forms completed by S and T and what those forms signify in terms of compliance with the parenthood requirements of the 2008 Act.
34. First, the forms relating to S's treatment in 2020 were correctly and consistently completed and were sufficient to ensure that both S and T were the parents of the child born to S as a result of treatment at that time. Both also completed a large number of other forms which demonstrated their shared wish to be treated together and for them both to be the legal parents of any child born as a result of that first treatment cycle.
35. Second, with respect to the subsequent treatment cycle, the couple completed all the forms and signed them prior to treatment taking place. Those forms were completed after the Clinic had provided the couple with detailed information which included an

explanation of legal parenthood. Both women consistently stated on the completed forms that they were patient and partner respectively; were cohabiting at the same address; and were not married or in a civil partnership.

36. Third, S also completed a number of internal Clinic forms at the outset of the first treatment cycle which confirmed her intention to be treated as T's partner. Some of these forms were relevant to legal parenthood such as a form titled "*Consent to use donor sperm*". Amongst other matters, that form confirmed that the chosen sperm donor would not be the legal parent of any child born as a result of T's treatment and that both S and T had understood that the use of donated sperm had implications relating to legal parenthood and those implications had been identified and explained to them. That form also confirmed that S and T had received, read and understood patient information leaflets including one from the HFEA called "*Becoming the legal parents of your child*".
37. Fourth, T also completed and signed numerous forms prior to her treatment confirming that S be treated as her partner. Some of these forms referred specifically to legal parenthood such as an internal Clinic form called "*Consent to Intrauterine Insemination*" which T signed, naming S as her partner.
38. It follows that I am satisfied that the internal Clinic forms should be accepted as satisfying the statutory requirements in ss43(b) and 44 of the 2008 Act. Further, the WP and PP forms completed for the couple's first treatment cycle demonstrated their intention that both should be the legal parents of any child born to them as a result of treatment. There is no good reason not to accept those forms as valid for the second treatment cycle as they were signed prior to treatment taking place and have no time limit rendering them invalid for this purpose.
39. Given all of the above and the facts about which I am satisfied, I am more than content to make a declaration of parentage pursuant to s. 55A of the FLA 1986 that S is the legal parent of K in accordance with s.43 of the 2008 Act. I have the jurisdiction to do so as both S and T have been habitually resident in this jurisdiction throughout their lifetime and certainly for one year preceding their application as required by s.55A(2)(b) of the FLA 1986. This application falls within one of the excepted cases under s.55A(4) and thus I do not have to determine whether or not S has a sufficient personal interest in the determination of the application.
40. Finally, I am satisfied that making the declaration sought is not manifestly contrary to public policy pursuant to s.58(1) of the FLA 1986 as it does no violence to the 2008 Act (see *Re A & Others* [2015]). In that context, I observe that neither the HFEA, the Attorney General or the Secretary of State for Health has intervened in these proceedings despite being given notice of them.
41. I make the declaration of parentage naming S as the legal parent of K. I wish both S and T and their children all the very best for the future and regret that they have had to experience any anxiety about K's legal parentage.
42. That is my decision.