

High Court Approved Judgment:



Neutral Citation Number: [2021] EWHC 1750 (Fam)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2021

Before:

MR JUSTICE POOLE

Between

A

1st APPLICANT

and

B

2nd APPLICANT

and

BOURN HALL CLINIC

RESPONDENT

**MS E ISAACS QC and MS N GAMBLE (instructed by NGA Law) for the Applicants
MS H MARKHAM QC and MS A STARNES (instructed by Mills & Reeve LLP) for the
Respondent**

JUDGMENT

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MR JUSTICE POOLE:

1. This is my ex tempore judgment. This is an application by the first applicant A and the second applicant B for a declaration of parentage in favour of the first applicant in respect of their son, C.
2. The applicants are an unmarried same-sex couple. C was conceived through artificial insemination using donated sperm at Bourn Hall Clinic, the respondent, a Human Fertilisation and Embryology Authority (HFEA) licensed fertility clinic.
3. B carried the pregnancy and is C's legal mother. Given that the applicants were not married or in a civil partnership at the time of the treatment, they needed to have complied with the agreed parenthood conditions that are set out at Sections 43 to 44 of the Human Fertilisation and Embryology Act 2008, in order for the first applicant to be C's second legal parent.
4. The applicants' case is that the clinic advised them on the process and paperwork, including the so-called WP and PP forms, which were completed and signed prior to treatment. During an HFEA audit, the clinic discovered that the forms were missing.
5. The clinic has agreed to pay for the applicants' legal advice and for the costs of this application. It has worked collaboratively with the applicants. The procedures adopted in this application are those set out in guidance in *Re D and others (Practice: Declaration of Parentage)* [2017] EWHC 1782 (Fam).
6. I am sorry that there was delay in a sealed order made by me on 8 October 2020 being received by the applicants' solicitors. As a consequence of that order the papers were served in accordance with directions on Bourn Hill Clinic, on the HFEA, the Attorney General and the Secretary of State for Health.
7. The clinic is now a respondent following my earlier direction of 12 November 2020 and has filed and served statements from Dr W, Dr X, and Dr Y. No other potential party has applied to be joined to the proceedings, although I have received a letter from the HFEA dated 18 February 2021, attaching details of the authority's response to legal parenthood cases in general - there have been many involving a number of clinics - and non-compliance by this respondent clinic in particular. There is an inspection report within the hearing bundle, which has been very well-prepared for this Court hearing, beginning at page 489. I have also received evidence in the form of witness statements from each applicant.
8. The respondent supports this application. No other potential party has sought to be joined. The applicants remain in a close, loving relationship and no other adult or child is involved.
9. The evidence, say the applicants, can be assessed without the need to call witness evidence. The applicants therefore submit that the declaration of parentage can be made at today's hearing, which is the first substantive hearing of this application. The declaration of parentage sought may be made under Section 55A of the Family Law Act 1986, which provides that, subject to the following provisions of the Section, any person may apply for a declaration as to whether or not a person named in the application is or was the parent of another person so named. Conditions are set out for the declaration to be made and those are not an issue in this case. However, I should note under subsection 5 that where an application is made and one of the persons named in it, for the purposes of the 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.
10. This application follows a line of similar cases involving administrative errors at fertility clinics, including the leading decision of Munby LJ, then President of the Family Division, in *Re A and others (Legal Parenthood: Written Consents)* [2015] EWHC 2602 (Fam). In that case and others he referred to the lamentable failings of clinics and the supervision of clinics, which resulted in a slew of cases coming before the courts.

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11. The question of who in law are the parents of a child born as a result of artificial insemination, as in the present case, is governed by Sections 33 to 47 of the Human Fertilisation and Embryology Act 2008. Two fundamental prerequisites to the acquisition of parenthood by the partner, ‘P’, of a woman, ‘W’, receiving such treatment are that consents must be given by both P and W in writing before the treatment, the authority requiring completion of forms WP and PP, and that W and P must be given adequate information and offered counselling. The WP and PP forms are, as I say, missing in this case.
12. The President observed in *Re A* at paragraph 12:

“It is elementary that a declaration cannot be granted by consent or by default. There must be a proper examination by the court of the relevant facts, assessed in the light of the applicable law, before a judge can be satisfied, as he must be if the relief sought is to be granted, that the claim for the declaration is indeed made out.”
13. Sections 43 and 44 of Part 2 of the 2008 Act are relevant to the present case. By Section 43:

“43. 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 sets out the agreed parenthood conditions. They are:

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

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- 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 [a provision that does not apply to the present case].’
- 14. The then President concluded, as a matter of principle, that 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. He identified a number of common factual themes in the cases in which he heard evidence, which he set out at paragraph 71 of his judgment. Having considered the evidence in this case, I recognise those themes.
- 15. It seems to me that the questions I have to consider, when reviewing the evidence provided to me, are whether, on the balance of probabilities, adequate information and counselling was given to the applicants; and whether the forms PP and WP had been signed by the applicants prior to the treatment, only to be mislaid by the respondent clinic subsequently. If so, the parenthood conditions under the 2008 Act have been satisfied.
- 16. As a generality, the fact that the relevant forms are missing is consistent with them never having been completed or having been completed but subsequently lost. In the latter case, it is not self-evident that if the forms were completed, they were completed prior to treatment. Therefore, I have to consider the evidence as a whole to make determinations as to the facts on the balance of probabilities.
- 17. In the absence of the completed forms themselves, the Court will look for evidence of usual practice, patterns of conduct in this particular case, specific recollections, contemporaneous corroborative evidence, evidence of administrative practices including failings of the kind that might make it more or less likely that completed forms were mislaid, and of anything that tends to show that the forms were not signed or were not signed at the correct time.
- 18. I have been provided with a full and very helpful chronology, as well as a case summary and skeleton arguments on behalf of the applicants and the respondent. The key dates for present purposes are as follows:
 - a. the initial nurse appointment took place with a nurse called Ms S.
 - b. there was the first doctor’s consultation with Dr Y.
 - c. the applicants attended counselling with Ms T.
 - d. The next nurse appointment was with Nurse U.
 - e. Ms B telephoned the clinic on day one of her cycle and spoke to Nurse U.
 - f. Nurse V appears to have completed a checklist of forms, that checklist being within the bundle and being entitled a pre-treatment checklist.
 - g. Dr X performed the IUI treatment.
 - h. a positive pregnancy test happened.
- 19. Dealing then with usual practice, Dr Y says that she would usually discuss legal parenthood and would have provided the WP and PP forms at the first doctor’s consultation, for those forms to be completed and signed by the applicants at the next nurse appointment. This is, therefore, what she should have done and would normally have done at the appointment. It was her standard practice. She infers, at paragraph 6 of her statement, that it is most likely that, “I did not have that discussion nor provide the forms to them, since otherwise I would have documented that in the notes”.
- 20. Usual practice on being informed of day one of W’s cycle would have been for Nurse V to check the requisite forms had been completed. Dr X says that usual practice would have been

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to check the forms had been completed before performing IUI treatment. Had there been missing forms, he says, "It is likely that this would have been flagged up as an issue in the paperwork that I would review prior to carrying out the IUI procedure".

21. Looking at patterns of conduct at the time, the evidence firmly establishes that the applicants approached the clinic together and made it clear that they wished to be treated as a couple having treatment together. They went through the whole process together. Their conduct and communications with the clinic would have left no room for doubt that the WP and PP forms were required and were an important part of the whole process. The totality of the evidence shows that they completed many other forms and were compliant with requests to fill in forms and documents as requested. The evidence shows that they were diligent and attentive to the requirements of the process. They are unlikely, given their conduct, to have disregarded important parts of that process, such as the WP and PP forms, had they been given to them. The applicants wanted the first applicant to have legal parenthood. They discussed this at counselling and at other times. Their conduct was directed towards achieving that particular goal amongst the other goals.
22. In terms of specific recollections, Dr Y has no independent recollection that she provided the WP and PP forms to the applicants. Nurse U is no longer with the clinic and unable to give evidence. The same applies to Nurse V. The applicants have each said, very frankly, that they did not recognise blank copies of the standard WP and PP forms when they were shown to them subsequently, although B is able to say that she specifically remembers ticking a box to consent to something which felt:

"much more significant than everything else that I was filling in. It looked like the tick box, which does appear on the WP form, which I have subsequently seen, although I cannot say categorically that this was the form I signed".

That is at paragraph 28 of her statement, page 100 of the bundle. Both applicants recall having to swap NHS numbers to complete a set of forms and that is, indeed, a requirement of the WP and PP forms. B recalls discussing legal parenthood with the nurse.

23. Looking for contemporaneous corroboration, there is no record in Dr Y's notes of her having given the WP and PP forms to the applicants. The doctor wrote to the applicant after the appointment in a letter, which says, "You would like to have treatment together". After the counselling appointment with Ms T, she wrote an email to the applicants, in which she asked them to confirm that the topics list she attached to her email was covered at the session and that list. The list included, "discuss parental rights, both married and unmarried, and legal parenthood/ responsibilities from the perspective of parents, donor and child" and it continued, "consider legal parenthood". The first applicant responded by email and said, "Yes, they were all covered". Nurse U noted, "All consents signed with PPC [those are the initials of Dr Y]. All complete". The clinic has produced a standard checklist form, which would have been used at this consultation. Under other details is a box headed, "Circle required consent forms" and amongst the forms are the PP and WP forms. It says in brackets afterwards "unmarried, using donor sperm".
24. That completed checklist is not in the records, nor even is a blank checklist within the records. I have been provided separately with a pro forma. However, the record that was made by Nurse U shows that on that date she wrote, "all consent signed, all complete". She must have had in mind the PP and WP forms, amongst others, because they are amongst the consent forms and there is a section on the checklist headed "Consent forms", as I have just indicated, in which they are included. She must have known that the applicants were unmarried and using donor sperm and that the consent forms were relevant and required.

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25. Looking at administrative errors, Dr X tells the Court that the practice was to attach a hard copy of the WP and PP forms to the patients' medical notes prior to them being scanned into the computer system. To scan them, they would be physically removed from the medical notes and there were times when the hard copies of the forms became separated from the medical notes as part of that process.
26. I take into account that, as Ms Markham QC's skeleton on behalf of the respondent says, the clinic concedes that this is not the first case in which the central forms have been misplaced or lost by them, and that the Court should be aware that the respondent was one of the clinics named in the *Re A* case to which I have already referred. The HFEA inspection report, following inspection, highlights a critical area of non-compliance and "the PR [the responsible person] should ensure that proper consent to legal parenthood is obtained". A number of other areas of non-compliance or requiring improvement were identified in the report, including what might loosely be called administrative failings. At page six of the report [page 424 of the bundle] the report discloses previous cases where the clinic's management of consent to legal parenthood has been deficient. At page 23 of the inspection report [page 441 of the bundle] there is set out an audit of 15 sets of records where patients have been provided with treatments with donor sperm or embryos created with donor sperm. In 12 of them consent to legal parenthood was required. A number of failings were identified, including what I take to be the present case. There was one other case where legal parenthood consent forms were missing: they were not in the records. There was another case of an amendment in a WP form not having been signed or initialled. Otherwise, there were a number of errors in completion of some forms.
27. The checklist form which Nurse U should have used is also, as I have already noted, missing from the records. This is an important form that draws together the other forms and provides confirmation of completion and receipt. It is an important means of ensuring that processes, which are required, have been completed. Finally, there is no evidence positively showing that the forms were given out to the applicants but not signed by them, or that they were not signed at the requisite time before treatment.
28. Considering the evidence as a whole, I am satisfied, on the evidence, that the applicants were provided with information about legal parenthood and counselling prior to their treatment, including a pack of information that included a document headed, "Treatment using donor sperm", which they recall reading together and which advises that the partner can be named as the second parent on the birth certificate. The email exchange with Ms T, and the fact that she had a session with the applicants, also serves to establish the fact that the relevant information and counselling was given before treatment.
29. I am also satisfied that, on the balance of probabilities, the applicants completed the WP and PP forms, but that those forms were subsequently mislaid and so are not now available.
 - a. The fact that practitioners do not specifically recall handing out the forms or receiving the completed forms is, in my judgment, of little consequence. Indeed, I would treat with great caution evidence from a nurse or doctor that they recalled seeing a particular form regarding a particular woman and could recall that it was given back to them or received, whether signed or otherwise.
 - b. Likewise, although some applicants may be sure they recall dealing with what are significant forms, it is not surprising that these applicants, as I am sure many others in the same position, have no certain recollection of having signed and handed in these particular forms amongst the many they had to complete.
 - c. The applicants' conduct and their evidenced contact with the clinic was always as a couple. Clearly, they were aiming for the first applicant to become a legal parent of the child if the treatment was effective. As I have found, they received the information

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and counselling relevant to legal parenthood prior to treatment and, as such, it is very likely that they were made aware of the requirements to complete the particular WP and PP forms.

- d. The clinic's standard practice was to give out and receive the completed forms prior to treatment. Their standard procedures rendered this likely to happen in each case, including the applicants' case.
 - e. If the WP and PP forms were handed to the applicants, I am very confident that they would have completed them. They would have signed them and returned them to the clinic. All the evidence shows that they were diligent in completing the required paperwork.
 - f. The evidence about the applicants exchanging NHS numbers is not very persuasive in my judgment, because I note that NHS numbers for each of them were included in other forms, including, for example, a consent to disclosure form which they each had to complete.
 - g. Corroborative evidence from the contemporaneous note is sparse, but what is noted, as I have already observed, is that all consents had been signed. This was at the appointment when the forms would usually be collected and checked. Although the checklist is missing, it is highly unlikely, in my judgement, that the record of "all consents signed" would have been made had the important WP and PP forms not been completed and handed in.
 - h. Dr Y's reasoning that because she did not document giving out the forms she likely did not hand them out, is familiar to any litigator who has conducted cases involving clinical practice. The mantra is "if it is not noted, it did not happen." However, it is an easier oversight to fail to record that certain forms had been given to the patient than to actually fail to hand over the forms which she accepts was her usual practice. I also note that she used a pro forma and did not tick the entry for "donor sperm to be used", that is at page 348 of the bundle. In fact, donor sperm was to be used, so this shows that her record keeping was not perfect. I am not dissuaded from my conclusion by the inference that she draws for herself.
 - i. In any event, there were later opportunities for the applicants to be given the forms if she did not get them out, as Dr W's evidence establishes. One of those would have been when or shortly after the applicants had counselling with Ms T. Given that she was faced with an unmarried same-sex couple, who wished to go through the process together and that they discussed with her issues of legal parenthood, as is clearly established by the evidence I have referred to, it stretches credulity to believe that she would not have touched on the question of legal parenthood and, therefore, the necessity for WP and PP forms to be completed. I am sure that if they had not already been given out and completed, she or the applicants would have been alerted to that deficiency and would have addressed it.
30. It is true to say that the evidence does not all point one way, but on the balance of probabilities, I am satisfied that the WP and PP forms were provided to the applicants. As I have already found, this couple were diligent in meeting the requirements asked of them. They were not casual about this process. They completed other forms when required and it is highly likely, in my judgement, that if they had been given the WP and PP forms, they would have completed and returned them.
31. There would have had to have been a series of failings in the usual standard system for it not to have been noticed that the completed forms had not been received by the clinic prior to treatment. The system, as explained in the witness evidence, was set up to check, and to double-check that the forms had been completed and returned. Likewise, the treatment should

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not have started had Dr X noted or been alerted to the fact that the forms were missing and his witness evidence is telling in that respect. Of course, caution has to be exercised because this clinic has been guilty of administrative error. The authority's inspection report is highly relevant in disclosing a number of administrative errors in relation to administration generally and legal parenthood consent in particular. I can see from page 415 of the bundle that there are records on a checklist of certain consents having been received, such as consent communicate. There is a tick box for consent forms PP and WP, but it was not ticked. Given that this appears to have been completed, before the treatment by Dr X, it might indicate that he should have been, but was not, alerted to the absence of those forms. As I say, the evidence does not all point one way. Dr X however does provide evidence that the WP and PP forms could be separated and, indeed, were in his experience separated from other documents for the purpose of scanning. There is no evidence of scanned versions of either form in this case being in the records or having been produced, but his evidence does give an explanation of how the forms might have been separated and then mislaid. I also take into account that the inspection report does refer to missing forms relating to legal parenthood in one other case, as well as more general administrative error.

32. Standing back and looking at the broad picture, I am sufficiently sure that the applicants would have completed and returned the WP and PP forms given to them, such that I am faced with two alternatives, either the clinic mislaid the forms after they were signed or they overlooked giving out the forms. The weight of the evidence, as I have said, is that they would probably have given out the forms. Hence, since the applicants would, I am satisfied, have completed and returned them, I regard the former explanation as the more likely, especially given the fact that these applicants presented as a couple who always wanted legal parenthood for the first applicant. The issue of legal parenthood was expressly addressed with these parents and given the note about consent forms signed by Nurse U, I am quite satisfied that, on the balance of probabilities, the applicants were given the WP and PP forms. They did complete and return them but the forms have subsequently been mislaid. The inspection report does not show a pattern of failure to hand out consent forms for legal parenthood, but it does reveal lapses in administration in relation to dealing with those forms.
33. In all the circumstances, as I say, I find that the forms were handed out to the applicants. They completed them. They returned them to the clinic. They did so after having received relevant information and counselling and that this all occurred before treatment. Those findings allow me to make the declaration sought and I shall make that declaration.
34. The applicants put forward an alternative case that the other internal clinic consent forms could operate as effectively forms PP and WP if properly completed and signed before treatment. Given my finding that they probably did sign those forms before treatment, I shall deal with the alternative case only very briefly. However, in doing so, I can say that I adopt the approach set out in the extremely helpful skeleton argument of Ms Isaacs QC and Ms Gamble for the applicants.
35. The authorities demonstrate that it is possible for alternative consent documentation to stand in the place of the WP and PP forms 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 identify seven documents, eight are mentioned in the skeleton argument of Ms Isaacs QC and Ms Gamble, but in opening this case at the hearing, Ms Isaacs QC resiled from the reliance on the document referred to at paragraphs 68D of her skeleton argument. 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

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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 am satisfied that, taken together, that is the effect of the seven documents.

36. In the circumstances, I am satisfied that I can and should make the declaration sought on both the primary case and the alternative case. There is no need for detailed arguments in those circumstances on the effect of the Human Rights Act. As Ms Markham QC has said in her skeleton on behalf of the respondent:

“From any reading of the applicants' statements, L was clearly a child born of a joint decision and born to a couple in a loving and enduring relationship. It is in his interests that his birth certificate reflects that reality”.

37. I am satisfied there is no welfare reason on which I could refuse this application. Accordingly, I shall make the declaration sought and I shall do so today on the basis of the written evidence and for the reasons given.
38. Before I conclude, I should note that the clinic has taken steps to correct its past failings. Dr W has set those out at paragraph 24 of his statement. The clinic has appointed a quality control co-ordinator who checks all the relevant consents are in place and are completed correctly. Prior to parents undergoing treatment an e-consenting platform has been introduced to allow patients to access information videos at home. Internal and external training has been provided and, a formal checklist for consent was introduced. He says, and I accept, that the authority has carried out monthly audits on consent since the inspection, which have shown 100% compliance.
39. This is a serious and a formal process. The fact that I have dealt fairly summarily with the evidence and, in particular, the alternative argument relied upon, should not belie the care that has been taken in assembling the case, which is presented with great knowledge and skill on behalf of the applicants. The declaration of parentage is a highly significant step. It is not one that the Court takes lightly. However, I can say now that I am delighted to be able to make the declaration. It is a significant declaration for this family. I have seen the lovely photographs of the applicants with C and I have read about his delightful character. I wish the applicants and him the very best for their future together.

End of Judgment

Approved; Mr Justice Poole

Approved.
Nigel Poole 10th June 2021

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Anonymisation approved:

Nigel Poole 26/7/21

Mr Justice Poole

This transcript has been approved by the judge.