SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 79

F1276/15

JUDGMENT OF SHERIFF WENDY A SHEEHAN

In the cause

L

Pursuer

Against

B

Defender

Pursuer: Malcolm;
Defender: McAlpine;

Edinburgh, 12 September 2017

Findings in Fact

The sheriff having resumed consideration of the cause finds in fact:

(1) The parties were in a relationship with each other from November 2006 until August 2014. They cohabited between August 2007 and August 2014. They were not married or in a civil partnership.

(2) This case relates to twins who were conceived as a result of Intra Uterine Insemination (IUI), on 29 June 2009 and were born on 26 February 2010. (Hereinafter referred to as "the twins") Their birth certificates are numbers 5/1/1 and 5/1/2 of process.

(3) The pursuer is the biological and birth mother of the children and is their mother in terms of section 33 of the Human Fertilisation & Embryology Act 2008 (hereinafter "the 2008 Act").

(4) The parties and the children are habitually resident in *

(5) The parties' relationship was long-term and committed. They shared a home (and a bed) for seven years, had a shared domestic life, joint belongings including a car, went on holidays together and socialised with family and friends together. Their family and friends regarded them as a committed couple.

(6) The parties first discussed starting a family together in late 2007.

(7) The pursuer identified a friend as a potential sperm donor. He agreed to assist the parties. The pursuer made two attempts to conceive informally using donor sperm without medical assistance. This was unsuccessful.

(8) The parties decided to seek advice and assistance from the Glasgow Nuffield Hospital Assisted Conception Service (hereinafter "the Nuffield"). They attended a consultation with a consultant obstetrician, Dr Michael Haxton on 6 February 2008. At that consultation they discussed the option of either of the parties conceiving. The consultant advised that the pursuer, being the younger of the parties, had a better chance of success. They discussed proceeding with Intra Uterine Insemination (IUI). The record of that consultation is in process (6/1/28).

(9) The Nuffield is a licenced clinic in terms of the Human Fertilisation Embryology Act 1990 and the 2008 Act.

(10) The defender was registered by the Nuffield as the pursuer's partner throughout the treatment process. The parties attended appointments, counselling and treatment together. The treatment which ultimately led to the birth of the children

was embarked upon and carried through by them jointly. The staff at the Nuffield treated the parties as a couple.

(11) The Nuffield provided the parties with counselling prior to the IUI insemination of the pursuer and, in particular, the parties attended an initial "implications meeting" on 16 August 2008 and counselling with an independent counsellor on 3 October 2008. The parties also attended a further nurse consultation on 30 March 2009.

(12) Treatment began in early 2009. At a scan appointment on 5 March 2009 attended by both parties, the pursuer discussed with clinicians her wish to donate her eggs to the defender if her treatment failed.

(13) The pursuer underwent 4 cycles of treatment on a monthly basis. Two IUI insemination attempts were made on 16 March 2009 and 9 April 2009. Both were unsuccessful. A third attempt scheduled for May 2009 was cancelled for medical reasons. The last IUI insemination procedure took place on 29 June 2009. The consent forms for that procedure were signed by both parties (6/1/80 of process). That procedure resulted in the pursuer's pregnancy with the twins.

(14) On 30 March 2009 the parties attended a nurse consultation prior to their scan appointment. At that appointment the parties were issued with "Welfare of the Child" forms and a package of other forms. Those packages of forms included a form WP issued to the pursuer and a form PP issued to the defender. The nurse conducting that consultation explained to the parties that there had been a legal change which meant that by the completion of forms the defender could become the legal parent of any children born as a result of the treatment.

(15) The pursuer completed form WP on or about 30 March 2009.

(16) The defender completed form PP on or about 7 April 2009.

(17) From the outset of the treatment it was the intention of the pursuer and the defender that the defender would be the parent of any child or children born as a result of that treatment.

(18) It was the intention of the pursuer and defender prior to the IUI procedure on 29 June 2009 that the defender would be the legal parent of any child or children born as a result of the treatment.

(19) Forms WP and PP were returned to the Nuffield prior to the IUI treatment on 29 June 2009 and were lost or mislaid by the staff at the Nuffield.

(20) From the moment when the pregnancy was confirmed the pursuer and the defender believed that the defender was the other parent of the children. That remained the parties' belief when the children were born.

(21) On 6 January 2010 the pursuer completed a second form WP and returned it to the Nuffield (6/1/36 of process).

(22) The parties were delighted when the pursuer became pregnant. They shared their excitement about the pregnancy with family and friends and prepared for the births together. Their families and friends understood them to be embarking upon parenthood together.

(23) The twins were born by caesarean section on 26 February 2010. The defender was present at the birth. The pursuer and the children remained in hospital for approximately two weeks after the births. * was in the special care baby unit during that time. The defender was at the hospital every day during that period.

(24) The parties attended the office of the Registrar of Births, Deaths and Marriages with the children on 19 March 2010. They registered the children's births jointly,

acting in good faith. The resulting certificates show both of them as the parents of the children (5/1/1 and 5/1/2 of process).

(25) The parties visited the Nuffield with the children when they were approximately a year old. They did so as proud parents showing off their children to the staff who had assisted and treated them.

(26) On 27 July 2014 the Nuffield sent a letter to the parties (6/1/20 of process) notifying them that as a result of an audit requested by the HFEA, that some discrepancies had been identified with their consent to legal parenthood forms. This was the first intimation they received of any difficulty. They were invited to attend a meeting at the Nuffield to discuss matters.

(27) The parties attended a meeting on 18 July 2014. An accurate summary of that meeting is set out in the letter of 23 July 2014 (6/1/20 of process). Both parties confirmed to the Nuffield during that meeting that at the time of treatment in June 2009 it was their intention that the defender would be the legal parent of the children.

Findings in Fact and Law

(i) The requirements of sections 43 and 44 of the Human Fertilisation and Embryology Act 2008 having been complied with, the pursuer is not entitled to the declarator of non-parentage sought; said crave should accordingly be refused.

Accordingly;

Dismisses the pursuer's first crave; reserves all questions of expenses and assigns a hearing on expenses on a date to be afterwards fixed.

NOTE

The Law

[1] I am grateful to counsel for their detailed submissions (14 and 15 of process) to which I have given careful consideration.

The relevant statutory provisions are found in sections 43 and 44 of part 2 of the Human Fertilisation and Embryology Act 2008 (hereinafter "the 2008 Act"). These provisions came into force on 6 April 2009.

> "**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.
>
> **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".

[2] In the circumstances of this case, the foregoing statutory provisions set out the following requirements of the parties in order to meet the agreed female parenthood conditions;

(i) The defender must have given notice (in terms of section 44(1)(a)) stating that she consented to being treated as the parent of any child resulting from the treatment provided to the pursuer;

(ii) The pursuer must have given notice (in terms of section 44(2)) stating that she consented to the defender being so treated;

(iii) The notices must have been in writing (in terms of section 44(2)) and have been signed by the person giving the consent;

(iv) The notices must have been signed before the treatment took place (i.e. prior to insemination) (in terms of section 43(b)).

[3] The relevant notices, in terms of directions issued by the Human Fertilisation and Embryology Authority (hereinafter "the HFEA") in terms of its statutory powers (direction 2009/1) are for the defender a form "PP" and for the pursuer a form "WP". The 2008 Act does not itself, prescribe the use of any particular forms.

[4] The issue which the court requires to determine in this case is whether the parties, timeously, and in compliance with sections 43 and 44 of the 2008 Act, signed forms WP and PP prior to treatment (IUI insemination) which in this case was on 29 June 2009.

[5] There are no Scottish reported cases on sections 43 and 44 of the 2008 Act. In the unreported case of ***A* v *B* CSOH on 15 February 2016 Lord Brailsford** considered a case

where an unmarried couple were given fertility treatment using donor sperm. The treating clinic had not presented A and B with forms WP and PP for completion prior to the implementation of an embryo created using B's eggs and donor sperm. Evidence from medical staff, the fertility counsellor who counselled the couple and the couple themselves all established that the couples' clear intention was that A should be the father of any child resulting from the treatment. Following the birth of their child, A and B registered the birth together. Subsequently, following the clinic's audit of their records, they were advised of an absence of forms WP and PP and that this called into question the status of the father of the child. In the course of their treatment, and prior to the implementation of the embryo, A and B had both signed a form relating to the treatment. The first part of the form provided for the mother's consent to various stages of the IVF process and was signed by B. The final page contained a section headed "Male Partner's Acknowledgement" which read: "I am not married to * but I acknowledge that she and I are being treated together and that I will become the legal father of any resulting child". The question for the court when considering the male partner's application for a declarator of parentage, was whether the agreed fatherhood conditions were met, specifically whether prior written notice of consent to A being treated as the father had been given by A and B to the clinic prior to insemination.

[6] There has been litigation in the English courts in relation to sections 43 and 44 of the 2008 Act. Lord Brailsford was invited by the parties to follow the approach taken by Sir James Munby in the case of *In Re A (Human Fertilisation & Embryology Act 2008: Assisted Reproduction: Parent* [2015] EWHC 2602 (Fam) (hereinafter "*in Re A*"). That case dealt with eight separate cases where mistakes were made by the clinics providing IVF treatment which had resulted in doubt about legal parenthood. The difficulties arose from administrative failures in providing couples with appropriate forms to sign, errors in their

completion and completed forms being lost/mislaid by clinics. Various factual positions were considered by the court including situations where forms WP and PP had been partially or incorrectly completed, where forms WP and PP had been completed but subsequently lost or mislaid and cases where no forms WP and PP had been completed but other forms which predated the requirements of the 2008 Act had been completed.

[7] Sir James Munby concluded at paragraph 63 of his judgment "that in principle*:*

> "(i) the court can act on parole 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."

[8] At paragraph 71 his Lordship noted:

> "A number of common themes emerged from the evidence. In each case, having regard to the evidence before me, both written and oral, I find as a fact that:
> (i) the treatment which led to the birth of the child was embarked upon and carried through jointly and with the full knowledge by both the woman and her partner;
> (ii) from the outset of that treatment, it was the intention of both the woman and her partner that her partner would be the legal parent of the child. Each was aware that this was a matter which legally, required the signing of each of them of consent forms. Each of them had believed that they had signed the relevant form as legally required and, more generally, had done whatever was needed to ensure that they would both be parents;
> (iii) from the moment when the pregnancy was confirmed, both the woman and her partner believed that her partner was the other parent of the child. That remained their belief when the child was born;
> (iv) the woman and her partner, believing that they were entitled to and acting in complete good faith, registered the birth of the child, as they believed the child to be, showing both of them on the birth certificate as the child's parents as they believed themselves to be;
> (v) the first they knew that anything was or might be "wrong" was when they were subsequently written to by the clinic.
> (vi) the application to the court is wholeheartedly supported by the applicant's partner or as the case may be, ex-partner.
> (vii) they do not see adoption as being a remotely acceptable remedy. The reasons for this will be obvious to anyone familiar with the number of recent authorities which there is no need for me to refer to. As it was put in the

> witness box by more than one of these parents, as they thought of themselves "why should I be expected to adopt my own child?"

[9] At paragraph 72 it was also noted that none of the cases raised the issue of whether informed consent was given nor was there evidence of any failure or omission on the part of the clinics in relation to the provision of information or counselling.

[10] Following the decision *In Re A* Lord Brailsford was invited to hold that another form signed by both parents was apt to function as forms WP and PP. While observing that it does not necessarily follow that both jurisdictions should always follow one another in relation to the interpretation and application of a UK wide statute, Lord Brailsford held that it was desirable on a matter of this nature that there should be unanimity and consistency across both jurisdictions. He indicated that he considered that Sir James Munby's reasoning was based on sound legal analysis, his approach to be one of common sense and that he would consequently be reluctant to disrupt the approach taken in the case of ***in Re A*** and would be concerned if the Scottish courts were to take a different approach. Following the reasoning of Sir James Munby, he accepted that the form completed by A and B was apt to constitute the necessary consent and granted the declarator sought. Lord Brailsford commented that cases of this nature ought to be dealt with as expeditiously as possible, however, that did not mean that declarators were simply to be granted with the court acting as a rubber stamp. The court required to see full proof by way of affidavit evidence before orders could be made given the importance of the subject matter and its sensitivity.

[11] I understand there to have been four subsequent actions in the Court of Session in which declarators or parentage have been granted in similar situations since the case of *A* v *B supra***.** While I have seen some of the relevant interlocutors**,** none of the cases have been reported or published on the Scottish Courts and Tribunals Service (SCTS) Website.

[12] The individual case dealt with in the report of *In Re A supra* which most closely resembles the present case in its facts and circumstances is the case of *E* which is referred to at paragraphs 94-97 of Sir James Munby's judgment. In that case the forms WP and PP were signed after the treatment had taken place. They were therefore ineffective in terms of the legislation. The evidence was that the mother and her partner had signed both forms WP and PP previously and at the relevant time. Their evidence was that they had been presented with "a pack of forms" like "a conveyor belt". They recalled their response when asked to sign the ineffective form WP and PP was "I have signed those already" (the mother) and "I knew I had found them before" (her partner). Sir James Munby concluded:

> "In all the circumstances and having regard to all of the evidence I have heard, I am entitled to conclude and I find as a fact, though I have to say only after much reflection and with some hesitation, that this sufficiently evidences the signature by the mother and her partner, at the appropriate time and in the proper form, of both a form WP and a form PP. The form WP and the form PP, I find, have both been lost or mislaid. It follows that the applicant in the case of E is entitled to the declaration sought".

[13] The decision in *Re A* has been endorsed and applied in subsequent cases. The most recent of these were dealt with together in a batch: *In the matter of the Human Fertilisation and Embryology Act: cases AB, AE, AF, AG and AH* [2017] EWHA 1026 (Fam).

[14] The case law makes it clear that it is permissible for the court to consider evidence in order to determine whether the relevant forms were signed timeously. Accordingly the issue which determines this application for declarator is an evidential one.

[15] This case may be distinguished from the English reported cases in which a declarator of parentage was sought and granted by the court and (as far as I am aware) may similarly be distinguished from the undefended and unreported cases in the Court of Session in which declarators were granted. In this case the pursuer seeks a declarator of non-parentage. This case does not proceed on the basis of affidavit evidence where each party

wholeheartedly supports the others' position. The parties' positions in this case are polarised. The court requires to determine whether, on the balance of probabilities, the parties completed forms WP and PP prior to insemination on 29 June 2009. The parties received advice, counselling and treatment from the Nuffield. The Nuffield do not have completed WP and PP forms, which predate insemination, in their records. The full medical records are lodged in process (6/1). Three members of staff from the Nuffield Hospital gave evidence (which I will refer to in more detail in due course). In a nutshell, the position of the clinic was that there were significant issues with their administrative procedures following the coming into force of the 2008 Act on 9 April 2009. They are unable to say whether forms WP and PP were issued to the parties prior to 29 June 2009. They may have been. The fact that they are not with the parties' records does not determine whether the forms were completed and returned by the parties – they may have been lost or mislaid. Certain records pertaining to the parties including the counselling notes regarding *inter alia* the legal implications of the treatment have been lost or destroyed following a flood at the hospital. Consequently, I require to consider the evidence of the parties on the issue of whether they completed forms WP and PP prior to 29 June 2009. That brings into question the sharp issues of reliability and credibility. In order to set out my reasoning for reaching conclusions in terms of reliability and credibility of the witnesses, it is necessary to look at evidence beyond the simple issue of signature of the forms. This is also consistent with the approach of the English court in paragraph 71 of **In *Re A*** (which I have referred to at paragraph 8 of this note).

[16] The parties entered into a relationship in November 2006 and cohabited from August 2007. The relationship endured until August 2014. It was a committed one. The parties shared the same home (and the same bed) for seven years. They were accepted into each

other's families and viewed by their families as a committed couple. I did not accept the pursuer's evidence that the relationship was not a committed one and that it was only a "partnership of sorts". The pursuer's evidence disclosed a level of disappointment and bitterness stemming from the difficulties between the parties in the latter part of their relationship and the breakdown of their sexual relationship. It was evident that she gave her evidence with an element of revisionism as to the nature of the parties' relationship which was not borne out by the other evidence in this case. I preferred the evidence of the defender. While the parties' finances were not intermingled, they shared a home, a domestic life and a mutually supportive relationship. They enjoyed holidays together, purchased a car together and socialised as a couple. They attended special events such as weddings, civil partnerships and birthday celebrations together. The pursuer's mother (who demonstrated a high level of antipathy towards the defender in her evidence) said "you couldn't invite one without the other" (when asked about attendance at social events). The parties had a flatmate * He was a reluctant witness in this case and did not align himself to the position of either party. At paragraph 4 of his affidavit he said; "it was evident to me that I was residing with a couple as this was how they represented it to me. They shared a bedroom and had shared belongings. They were referred to as a couple by their friends. I remember them going out together to restaurants and concerts and going on camping holidays together". I accepted the evidence of *(affidavit 24 of process at paragraph 3), *(affidavit 23 of process at paragraph 3) and *(affidavit 22 of process paragraph 3) as regards this aspect of the evidence. I found the pursuer's evidence, which was given in an attempt to persuade the court that the parties' relationship was anything other than a long term and committed one, slightly baffling.

[17] There was evidence that each of the parties had, separately, decided that they wanted to have children before they entered into a relationship in November 2006. They each acknowledged that to be the case in their evidence. The pursuer's evidence (affidavit 28 paragraph 2) was that she first consulted her GP in March 2007 but that she could not secure IVF treatment on the NHS. Her evidence was also that a single gay female friend of hers had warned her that she may encounter difficulties in being treated by a fertility clinic if she presented as a single woman. The defender was unaware of these facts. Her evidence was that the parties first began discussing starting a family together in late 2007. This was supported by a number of other witnesses who recalled the parties telling them that they were "trying for a baby". I accepted the evidence that the parties discussed being lifelong parents at that stage.

[18] The pursuer identified a friend as a potential donor. He was empathetic to the parties' wish to become parents. The pursuer made two attempts to conceive informally using donor sperm without medical assistance. This was unsuccessful.

[19] The parties decided to seek advice and assistance from the Nuffield and they did so in terms of finding in fact 8.

[20] The parties attended a meeting at the Nuffield on 16 June 2008. They completed "disclosure of information forms" (6/1 33 and 34 of process). A registration form was completed (6/1/2 of process). That form includes both parties' details. The clinical notes record this meeting as the parties having attended for "implications counselling". The section on the form entitled "reason for treatment" records the reason being "same sex couple" (as opposed to single women with fertility issues). The evidence of the staff from the Nuffield was unequivocal – that the parties presented to the clinic and were treated as a couple. Had this not been the case then the disclosure of information form would have held

only the pursuer's details and the defender would not have been asked to complete any subsequent forms prior to the treatment. The pursuer's evidence was initially that the defender simply accompanied her to appointments as a supportive partner. She then referred to her understanding of the requirement to present to the clinic as a couple in order to secure the treatment. Ultimately, in response to cross examination, she accepted that the parties were treated by the Nuffield at all times as a couple and that this may have also been the defender's understanding. There was evidence that the parties discussed embarking upon treatment jointly with their close friends. The evidence very clearly pointed towards the parties having discussed having a child together and to them jointly attending the Nuffield at the outset of that treatment as a couple.

[21] On 3 October 2008 the parties attended a counselling session at the Nuffield. That session covered, *inter alia*, the parties' legal rights and responsibilities and their roles as parents (defender's affidavit at paragraph 7 and letter 6/1/44 from counsellor). No issues were raised in this case as to any alleged failure or omission on the part of the Nuffield regarding the provision of information or counselling to enable informed consent to be provided by the parties.

[22] The treatment began in early 2009. At a scan appointment on 5 March 2009, attended by both parties, the pursuer discussed with clinicians her wish to donate eggs to her partner the defender if her treatment failed. This was referred to by both parties in their evidence and is noted in the medical notes (7/1/72).

[23] The parties received treatment (as set out in finding in fact 13). In the pursuer's affidavit at paragraph 14, she refers to signing a consent for the IUI procedure and states that by signing this form she thought that "I was consenting to being a parent". The form in question provides consent to treatment and evidence that parties were treated as a couple

but no more. It cannot be construed as a written record of the parties' intentions that the defender would become a legal parent to any child born as a result of the treatment.

[24] Part 2 of the 2008 Act came into force on 6 April 2009 (after the pursuer's first IUI insemination and before the successful IUI insemination procedure on 29 June 2009). The Nuffield issued forms WP and PP to the parties. There is a letter from the Nuffield (6/1/20 of process) which refers to the forms being provided to the parties at their appointment on 30 April 2009. There is no entry in the medical notes of an appointment on 30 April 2009. The parties attended a scan appointment on 30 March 2009. They also attended a nurse consultation on that day and were issued with forms including "Welfare of the Child" forms which they each completed – the pursuer on 30 March 2009 and the defender on 7 April 2009. Those forms are held in the medical notes (6/1/45-50 of process). The pursuer's evidence regarding the completion of forms at that point in time was vague. In her affidavit at paragraph 4 she simply states "* did sign some forms at the Nuffield. I did not think anything of that at the time". This contrasts with the very detailed information contained in the defender's affidavit. The evidence of the nursing staff who treated the parties at the time did not assist in corroborating either party's evidence. The defender's evidence (given both orally and in paragraph 15 of her affidavit) was that the parties received a package of forms each on 30 March 2009 from a nurse, immediately before their scan appointment. The defender was able to describe clearly her recollection of the room, the nurse who conducted the meeting and the discussion which took place. This was a meeting of some importance to the defender as it was the first occasion on which she was told that due to an impending change in the law, that by the completion of forms, she could become a legal parent of any child born as a result of the treatment. While at that stage the parties had discussed at counselling their intention to jointly parent any child born, this was the first discussion of

the defender having legal parental rights and responsibilities. The defender's evidence was that the parties confirmed their intention to complete the relevant forms at that consultation and that they took the forms home with them.

[25] The pursuer's evidence was that she had no recollection of any such discussion and that she did not receive or complete a form WP at that point in time. The parties met with staff at the Nuffield on 18 July 2014 (once the discrepancy in their records was discovered after an HFEA audit). The record of that meeting (letter of 23 July 2014 – 6/1/20 of process) provides "both forms would have been provided to you at your appointment on 30 April 2009 and should have been completed prior to your treatment in June 2009. However, we do not have a copy of a PP signed by *, though you confirmed during your meeting that it was the intention of you both that B would be the legal parent of * and *, as reflected in your joint registration as their parents following the birth. You also mentioned that you remembered attending an appointment with the independent counsellor prior to the start of treatment and the concept of legal parenthood would have been one of the items discussed during that appointment". I am unable to reconcile the pursuer's evidence with the account which she gave to the Nuffield as recorded by their staff.

[26] This contrasts with the defender's careful and meticulous evidence both in her affidavit (paragraphs 15-17) and in her parole evidence. I do not accept Ms Malcolm's submission that this affidavit was carefully crafted from an overview of the medical records and did not form part of her own recollection. The witness was able to contextualise her evidence, to orientate it in time and place and to provide vivid detail. The defender recalled the pursuer filling in the WP form; "it was night time and she was sitting on the bed. I was in the room with her. I was working on my laptop for a work deadline. I remember getting my passport number for her". (The WP form and no other – required a passport number).

She specifically recollected the questions in the welfare of the child form and a discussion which the parties had about that. Her evidence was "I remember filling out my PP consent form at the desk in the bedroom. It was about a week later. It was daytime. It was a very straightforward form with tick boxes. It was unlike the other Nuffield forms which were photocopied. The PP was colour printed. I put both L and I's passport numbers on it". This evidence was entirely credible.

[27] The defender's evidence was that she remembered taking all of her forms back to the Nuffield in the clear plastic file they had been given to her in and that she gave the forms to one of the nurses involved in their treatment at a scan appointment. She stated that the pursuer would have returned her forms at the same time (as is evidenced by the fact that the Welfare of the Child forms are contained in the records (6/1/45-49) and are dated 30 March 2009 and 7 April 2009).

[28] The evidence of the staff from the Nuffield was that the forms may have been returned and lost/mislaid. Following the HFEA audit, it had been identified that this had been the case with a number of patients. The nurse *' evidence was that she could not understand why the "Welfare of the Child" forms would have been completed by the parties on different days, as they would normally have been completed with the nurse during the consultation on 30 March 2009. The pursuer founded on an entry in the medical records made on 5 November 2009 (6/1/68) noting that there was no passport number noted in the records for the defender (passport numbers are recorded on a PP and WP form). The registration details for the parties held in their records (6/1/2 of process) have the defender's passport number noted on the form. It was put to * that this may have been added to the registration form later. Her evidence was that had this been the case the updated information should have been initialled (as had been done with another piece of updated

information on the form). She could not confirm whether the staff member looking for the passport number on 5 November 2009 had checked the registration form 6/1/2 of process before making the entry requesting the passport number. This evidence is neither here nor there. If forms WP and PP were completed and handed in prior to the 29 June 2009 and lost/mislaid by 5 November 2009 then the passport numbers would not have been available from those documents. One would like to believe that a clinic operating under strict licensing and recording requirements would have been scrupulous in their record keeping and procedures. The evidence of the staff is clear – that this was not the case in 2009 and that thereafter clear checklists and protocols were introduced. I cannot infer that just because "Welfare of the Child" forms are held with the records that any WP or PP forms returned to the clinic by the parties at the same time would equally have been held in the records. The evidence from the staff at the Nuffield was that the forms WP and PP were issued prior to treatment and that they cannot confirm whether or not they were returned and if they were returned whether they were lost or mislaid but that it was entirely possible that this was the case.

[29] A friend of the pursuer, *, gave evidence to supplement his affidavit (24 of process). He is a senior human resources manager for NHS Lothian and was an impressive witness. At paragraph 11 of his affidavit he recalled having a specific conversation with the defender and her telling him that the parties had signed paperwork during treatment at the Nuffield in order to ensure that she would be recorded as a parent to any children born as a result of treatment. He commented that he assumed that the appropriate paperwork would have been completed and filed by the clinic and that as an NHS employee he is acutely aware of how important it is for clinicians to record and maintain accurate and full patient records.

[30] On 6 January 2010 (when 7 months pregnant) the pursuer completed a WP form and returned it to the Nuffield. It is held in the medical notes (6/1/36). This form is ineffective as it was completed after insemination. The pursuer founds on this as evidence that the WP and PP forms were not issued to the parties prior to that (as there would be no need to issue them a second time). However, this is equally consistent with a situation where the forms were sent to the parties, returned by them and then lost/mislaid by the clinic. The evidence from the Nuffield (letter 6/1/20) was that a first set of forms were issued to the parties prior to the IUI insemination procedure on 29 June 2009. The pursuer's evidence was that she completed and signed a WP form in January 2010 (paragraph 4 of her affidavit). She states in the same paragraph of her affidavit that at this time, the defender told her that she did not want the responsibility of being a parent. It simply does not make sense that if this were the case that the pursuer would have then signed the WP form consenting to the defender being the legal parent of any child born as a result of the treatment. It is also inconsistent with the pursuer telling the Nuffield on 18 July 2014 (once the discrepancy with the forms was ascertained) that it was the intention of both parties that the defender would be the legal parent of any children born as a result of the treatment. Her evidence does not provide any coherent narrative. The only logical interpretation of the evidence as a whole was that having identified the absence of a WP form in the records, the clinic sent the form to the pursuer who completed and returned it – the context of that being consistent with the parties' joint intention throughout the treatment and the pursuer's pregnancy. The fact that the Nuffield staff did not send a second PP form to the defender at the same time (which was also missing from the records) and that they failed to appreciate that the signature of forms PP or WP after insemination were legally ineffective in any event is a further indication of their shambolic administration at that point in time.

[31] The parties were delighted when the pursuer became pregnant. Their relationship was a happy one at that point in time. They shared their excitement with family and friends. They discussed names and made preparations for the birth. This was spoken to by a number of the defender's witnesses. The pursuer and her family glossed over this in their evidence. The pursuer's mother claimed that she could not remember whether the defender was at the birth. The defender's evidence (which is confirmed by the medical notes) was that the caesarean section was deliberately scheduled by the parties for the defender's birthday. It took place a week earlier for medical reasons. The text message communication between the pursuer's mother and the defender (5/7/1) demonstrates the extent to which her evidence about the parties' relationship at this juncture cannot be relied upon. The pursuer's evidence was that by the time of the boys' birth the parties' relationship was an unhappy one and that there was no intention that the defender would equally parent the boys. The evidence of * (affidavit 25 of process paragraphs 7-8) was that the parties were excited about the impending birth of the twins and that they were both very much involved in parenting the children from the outset. The twins remained in the special care baby unit at * for the first two weeks after the birth. The defender was there all day every day. The parties were visited by family and friends including their donor *. The evidence clearly points to the parties being happy and excited on the birth of the children, to them operating as a family unit and to all of their friends and family regarding them as such. The parties attended all hospital appointments, GP appointments, immunisation clinics and breastfeeding clinics together. The defender is recorded as a parent by the children's GP and the records clearly demonstrate her high level of involvement with aspects such as the children's immunisation. The pursuer's evidence was that the defender put her name in the

children's medical records and that she "did not stop that" – in fact the relevant form (5/2/3) is in the pursuer's handwriting.

[32] The children's births were registered on *. The registrar provided an affidavit (24 of process) and gave parole evidence to supplement this. She had limited recollection of the registration but recalled the pursuer's occupation (being an unusual one) and the pursuer having confirmed that the parties had received treatment together in a recognised fertility clinic. The pursuer's evidence was that the defender did not want the responsibility of parenting the boys at the time of their birth. She then said that she felt pressured to register the children's births jointly recording the defender as a parent. This is nonsensical. If the defender felt strongly about her involvement in the registration of the children's births then that can only point towards it being important to her to have parental rights and responsibilities. There was quite simply no evidence of any confrontation or influence being brought to bear regarding the registration of the children's births. In answer to questions put to her in cross examination the pursuer said "I didn't think much about it… it wasn't a big consideration... I was tired after the birth and looking after the boys". She then referred to her having a conversation with the defender about what would happen to the boys if either of the parties died. She gave multiple accounts which directly contradicted one another in relation to this chapter of her evidence which was consequently entirely lacking in any reliability or credibility. The evidence of the registrar was that parents attending to register births are "normally happy and excited" and that "Everybody knows that they are signing a legal document and what this means. If I had any doubts or thought that a parent was being coerced into signing a birth certificate against their will then this would stick out in my mind as it would be rare". The defender's friend *, who was in very regular contact with the parties at this point in time, recalled a conversation with the parties immediately

following their attendance at the registrars to register the birth (affidavit 24 paragraph 12). His evidence was that the parties showed him the birth certificate "Where L's details were recorded under the section "mother" while B's details were recorded under "father". As gay and lesbian citizens, we all felt this to be another example of bureaucratic institutions not keeping pace with changes in society. We all laughed at the absurdity of B being recorded as "father" but felt at the time that it was more important the boys were recognised legally as having two parents rather than just one. L was involved in this conversation and at no point did I feel that L was uncomfortable or being forced into doing something she did not want". Other witnesses spoke to the parties being happy and excited when registering the birth. The defender's evidence at paragraph 30 of her affidavit has the ring of truth about it. "L and I were very happy, in love and excited about registering * and *'s birth. It felt like the beginning of our lives together as a modern family. For me it was like a dream come true. It was also very exciting to be amongst the first same sex couples registering our children's births and becoming legal parents. I was so happy that our children were beginning their lives within a secure and solid family unit. We had them with us when we went to the registrars to register the birth. We had taken a long time to decide on names. L and I were very proud and happy in the way that new parents are. It had been a challenging journey through fertility treatment and *'s survival in the first few weeks of his life. This journey had strengthened our relationship".

[33] The parties visited the staff at the Nuffield when the children were approximately a year old. The staff recalled in their evidence the visit as being a happy and emotional occasion where two proud parents showed off their children.

[34] By early 2014 the parties' relationship had badly broken down. They continued to cohabit until August 2014. On 27 June 2014 the Nuffield sent them the letter (6/1/24 of

process) which said "I am sorry to report that as a result of an audit requested by the HFEA, we have identified some discrepancies with your consent to legal parenthood forms. We would like to invite you both to attend a meeting at Nuffield Health, Glasgow Hospital on either Wednesday 9 or Thursday 10 July to discuss this with myself and *, matron. This meeting will allow us to outline the situation and to discuss with you any steps that may be required. I appreciate that you may be concerned by the uncertainty of the situation. I would like to take this opportunity to apologise for any anxiety that this letter may cause". The parties attended a meeting jointly with * (an operations manager for the Nuffield) and * (matron) on 18 July 2014. The hospital's summary of that meeting is set out in the letter of 23 July 2014 (6/1/20 of process). It is significant, given the context of the breakdown of the parties' relationship at that time, that the pursuer confirmed during the meeting that it was the intention of both of the parties at the time of treatment in June 2009 "that B would be the legal parent of * and *, as reflected in your joint registration as their parents following their birth".

[35] Referring back to the facts and circumstances of the cases considered In *Re A supra* at paragraph 7. I have therefore concluded from the evidence in this case:

(i) that the treatment which led to the birth of the children was embarked upon and carried through jointly and with the full knowledge of both the pursuer and the defender;

(ii) that from the outset of that treatment, it was the intention of both the pursuer and the defender that they would both be parents of any child born as a result of the treatment. Prior to 29 June 2009 it was the intention of both parties that the defender would be the legal parent of any child born as a result of the treatment. Each of the

parties believed that they had signed the relevant form as legally required and more generally had done whatever was needed to ensure that they would both be parents;

(iii) from the moment when the pregnancy was confirmed, both the pursuer and the defender believed that the defender was the other parent of her children. That remained their belief when the child was born;

(iv) that the pursuer and the defender, believing that they were entitled to and acting in complete good faith, registered the birth of the children, as they believed the children to be, showing both of them on the birth certificate as the children's parents as they believed themselves to be;

(v) the first they knew that anything was or might be "wrong" was when they were subsequently written to by the clinic on 27 June 2014;

(vi) this application is not "wholeheartedly supported by the applicant's ex-partner" but instead has involved a careful consideration of the evidence of the parties, the clinicians and other witnesses together with the medical records and other productions which have been spoken to in evidence in order to reach the findings in fact set out at pages 1-5 of this judgment.

[36] I have concluded, on a careful consideration of the evidence, that the pursuer and the defender did, at the appropriate time, and in the proper form, complete and sign both a form WP and a form PP. Those forms, I find, have been lost or misplaced by the Nuffield. It follows that the pursuer is not entitled to the declarator of non-parentage which she seeks.

[37] I was asked by counsel for both parties to reserve all issues of expenses. I will assign a hearing on a date suitable for counsel's diaries.

[38] On 5 June 2017 orders were made under Section 46 of the Children and Young Persons (Scotland) Act 1937 and the Contempt of Court Act 1981 in respect of reporting restrictions in this case.

[39] I have considered counsel's submissions when preparing the anonymised version of this judgment for publication on the SCTS website.