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In the matter of HFEA 2008 (Cases A, B, C, D, E, F, G and H Declaration of Parentage) [2015]

[2015] EWHC 2602 (Fam)

11/09/2015

Barristers
Deirdre Fottrell KC
Dorothea Gartland KC
Andrew Powell

Court
Family Division

Practice Areas
Public Children Law

Summary
Applications for declarations of parentage in accordance with section 55A of the Family Law Act 1986 where children had been born following donor insemination but statutory requirements had not been complied with as a result of failure by the relevant clinic. Declarations granted.

Facts
Munby P considered seven cases (case G having been adjourned) in which the applicant couples had undergone successful fertility treatment, but where the consents to treatment, required by Part 2 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008), had either since gone missing or were not in accordance with the consent forms mandated for use by the Human Fertilisation and Embryology Authority (HFEA), namely Forms WP and PP.

There fell to be considered three general issues of principle:

i. Whether it is permissible to prove by parol evidence that the forms mandated by use by the HFEA namely, Form WP or Form PP (but which could not be found) had in fact been executed in a manner complying with Part 2 of HFEA 2008, and whether, if that is permissible, and the finding is made, the fact that the form cannot be found prevents it being a valid consent.

ii. The extent to which errors in completed consent forms can be "corrected", ether as a matter of construction or by way of rectification.

iii. Whether a consent form that is in a form other than Form WP or PP is capable as operating as consent for the purposes of sections 37 and 44 of the 2008 Act.

Held

In respect of the first issue, Munby P, agreeing with the reasoning set out by Theis J in X v Y (St Bartholomew's Hospital Centre for Reproductive Medicine Intervening) [2015] EWFC 13, concluded that whether or not a consent form was signed prior to treatment (it being uncontroversial that a consent form signed after treatment had commenced would be invalid) is a matter of fact that may be established by parol evidence. If that fact is established, the fact that the form could not be found would not operate so as to invalidate that previously given consent [paragraphs 45, 63]. Munby P [at paragraph 42] cited paragraph 61 of X v Y:

"(1) It is agreed that the notice required under s 37(1)(a) in PP form needs to be completed prior to treatment provided to Y.

(2) It follows that if that requirement is complied with (along with other requirements such as completion WP form, counselling etc) then at the time of the birth of the child X is treated as the legal father of the child (by operation of s.36 HFEA 2008).

(3) If that is the case it would be wholly inconsistent with that provision, and the underlying intention to provide certainty, if that status could then be removed from the father and the child in the event of the clinic mislaying the consent in PP form, possibly many years later."

In respect of the second issue, Munby P found "no reason at all why a Form WP or Form PP should not be said to be, of its nature, a document which cannot be rectified", applying the equitable doctrine of rectification [paragraph 47]. Alternatively, "the court can, as a matter of construction, 'correct' a mistake if…the mistake is obvious on the face of the document and it is plain what was meant" [paragraph 48].

It was the third issue that required the greatest analysis. In several of the cases the couples had signed their clinic's own internal consent form (referred to in the judgment as Form IC), rather than forms WP or PP. Munby P reasoned that the first question to ask was "whether, as a matter of its content and construction, a Form IC is apt to operate (a) as a Form WP and/or (b) as a Form PP" [paragraph 50]. Munby P then carried out a comparative exercise, considering on the one hand the words contained in the two Form ICs in question, and the requirements of the statute. He concluded that, having regard to the particular words used, that "both the Barts Form IC and the MFS Form IC – is, as a matter of content and construction, apt to operate both as a Form PP and a Form WP and complies with the requirements of" the relevant sections of the 2008 Act [paragraph 53].

However, the issue did not end there. Munby P then went on to consider a second question. Is a properly completed Form IC, which as a matter of content and construction complies with the requirements of the 2008 Act, precluded from operating as a valid consent because of the requirements in HFEA's directions that consent "must" be recorded in their specified form? Does non-compliance with that direction effectively meant that the clinic was not operating "under a licence" and therefore outside the scope of Part 2 altogether?

Munby P concluded that failure to comply with HFEA's direction would not invalidate a consent that would otherwise be valid for the purposes of sections 37 or 44 [paragraph 57]. Taking a different view from Cobb J in AB v CD and the Z Fertility Clinic [2013] EWHC 1418 (Fam), Munby P reasoned that failing to comply with a HFEA direction did not meant that a clinic was not operating "under a licence" – that licence remaining in force and not having been revoked by HFEA. He reasoned that consent would only be invalid if outside the scope of any licence, and not for any breach of compliance with that licence [paragraph 58].

In light of these decisions of principle, Munby P considered the facts of each case and accordingly made declarations of parentage in all seven cases. However, in doing so he robustly criticised the “widespread incompetence across the [fertility] sector on a scale which must raise questions as to the adequacy if not of the HFEA’s regulation then of the extent of its regulatory powers” [paragraph 8]. He also made it clear that nothing he had said in his judgment “should be treated as any encouragement to anyone not to use Form WP and Form PP” [paragraph 63].