

# AI and AJ, Re Human Fertilisation And Embryology Act 2008 (2017)

**[2017] EWHC 3351 (Fam)**

20/12/2017

## **Barristers**

Deirdre Fottrell KC  
Dorothea Gartland KC

## **Court**

Family Division

## **Practice Areas**

Private Children Law

Applications for declarations of parentage in accordance with s.55A of the Family Law Act 1986 where children had been born following treatment at a fertility clinic but statutory requirements had not been complied with.

The President of the Family Division was concerned with the 36th and 37th cases in a “dismal line” of applications following his judgment in *In re A and others (Legal Parenthood: Written Consents)* [2015] EWHC 2602 (Fam). The two cases, AI and AJ were unrelated. In each case, the applicant, X was a man who was not, at the relevant time, married to the respondent mother, Y. X sought a declaration pursuant to section 55 of the Family Law Act 1986 that he is the legal parent of their child, C, in accordance with sections 36 and 37 of the Human Fertilisation and Embryology Act 2008.

The President found as fact in each case (1) that the treatment leading to C's birth was undertaken with full knowledge by both X and Y; (2) it was the intention of both X and Y that X would be C's legal parent; (3) from the moment the pregnancy was confirmed and following birth, both X and Y believed X was the other parent of C; (4) X and Y registered C's birth in good faith that they were both C's parents; (5) the first they knew that anything was 'wrong' was when they were contacted by the clinic.

The case of AJ related to treatment provided by Royal Devon and Exeter NHS Foundation Trust. In this case, Y had not ticked the consent box at section 3.1 of the WP form. The facts of the case were identical to *Re the Human Fertilisation and Embryology Act 2008 (Case J)* [2016] EWHC 1330 (Fam), and the President quoted paragraph 15 of his judgment confirming that the identified defect in the completion of Form WP which had led to the litigation was “a simple undetected clerical error” and “can be ‘corrected’ as a matter of construction”. The declaration was made in the terms sought. The clinic agreed to pay X's reasonable costs.

In the case of AI, the treatment was provided by Central Manchester University Hospitals NHS Foundation

Trust. In this case the Form WP was correctly completed in all respects and signed by Y, save that in section 4, Y's date of birth was inserted rather than the date the Form WP was signed by her. This case was on all fours with Case D, *In re A and others (Legal Parenthood: Written Consents)* [2015] EWHC 2602 (Fam) and the President concluded in Case D "that this was a mistake is obvious, as is the 'correction' required to remedy the mistake" (para 78).

An additional issue arose in AI, that Y was at all material times married to a man referred to as S. Section 35(1) of the 2008 Act provides that where a woman undergoing treatment was party to a marriage then the husband "is to be treated as the father unless it is shown that he did not consent to the placing...of the embryo". This issue arose in Case G (*Re the Human Fertilisation and Embryology Act 2008 (Case G)* [2016] EWHC 729 (Fam) in respect of a civil partnership.

In Case G, it was clear the only parties involved in the treatment were X and Y, and there was no evidence S had knowledge of or consented to the treatment. There was no basis on which the court could conclude S consented, and it had been shown he did not consent (see para 26(ii) in Case G). The declaration as sought was made, and the clinic agreed to pay X's reasonable costs.

## Permission

 Family Law Week