



Neutral Citation Number: [2020] EWFC 67 (Fam)

Case No: DE18P00437

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 August 2020

Before:

MRS JUSTICE THEIS

Between:

Z	<u>Applicant</u>
- and -	
X	<u>1st Respondent</u>
- and -	
A, B and C (By their Children's Guardian) Jane Powell	<u>2nd, 3rd & 4th Respondents</u>

Z Appeared in Person

X Did not attend

Mr Tom Wilson (instructed by Goodman Ray) for the 2nd - 4th Respondents

Hearing date: 28th April 2020;

Judgment date 14 August 2020 (hand down 19 October 2020 no attendance required)

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MRS JUSTICE THEIS

This judgment was delivered in private. 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, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. This matter concerns the parentage of three children, A and B age 5 and C age 2. All three children were conceived via IVF treatment and carried by X using embryos created from Z's sperm and donor eggs. The children live with X and spend some time with Z, although the precise details remain unclear.
2. Z issued applications in July and October 2018 seeking declarations of parentage, pursuant to s 55A of the Family Law Act 1986, in relation to all three children. The applications are not objected to by X, who has not taken an active part in these proceedings and has conveyed her views through the children's solicitor.
3. Following directions made by this court the children were joined as parties to the application and have been represented via their Children's Guardian, Jane Powell, who supports the declarations being made.
4. This court made a declaration of parentage in relation to the children on 28 April 2020. The reasons for that decision are set out below.

Relevant background

5. This court has limited information as to the circumstances of the parties relationship, although the information the court does have indicates they have not always been able to agree regarding matters relating to the children, with each having made allegations about the way the other has behaved towards the children which has involved referrals to the local authority.
6. Despite these differences it is not in issue that X and Z were in a relationship and sought to conceive by way of IVF treatment at the CARE clinic in Nottingham. Neither party was married at the time of the treatment and the children were conceived using Z's sperm and donor eggs.
7. Z signed his Form MT, consent to the use and storage of his sperm and subsequently created embryos. Both X and Z signed the relevant internal consent to treatment forms and the clinic provided treatment with Z's sperm, two embryos were transferred to X. The pregnancy was confirmed, and A and B were born.
8. Three years later X and Z signed the relevant internal consent contract for an extension of embryo storage and the second treatment took place later that year. Both X and Z signed the relevant internal consent to treatment forms and on the same day Z signed Form MT, consent to the use and storage of his gametes and subsequently created embryos. Two embryos were transferred to Z, the pregnancy was confirmed, and C born the following year.
9. The relationship between X and Z broke down prior to C's birth.
10. Z applied for a declaration of parentage in relation to A and B prior to C's birth. Following C's birth, he issued a similar application in relation to C. These applications have had an unfortunate procedural history.

11. The first hearing of the applications of the application in relation to A and B took place on 5 September 2018, X did not attend. The District Judge directed DNA testing. The application relating to C was made on 5 October 2018 and it was directed the two applications would be heard together.
12. Both X and Z attended the hearing on 28 November 2018 when the District Judge made a declaration of parentage in favour of Z in relation to all three children. He directed a copy of the order should be sent to the General Register Office ('GRO') for the purpose of amending the children's birth certificates.
13. On 7 March 2019 the GRO emailed the court stating '*The Registrar General has been advised the child was conceived by artificial insemination*' and raising the issue that '*it is not clear from the paperwork received whether the parenthood provision in the Human Fertilisation and Embryology Act 2008 were taken into consideration when determining who the parent of the child was*'. The GRO sought further information from the court.
14. The response to the GRO from the District Judge, sent by the court, noted that the court was told he was the father and there was no dispute about that between the parties.
15. On 2 April 2019 the GRO responded setting out its understanding of the legal position as follows:

'We understand that the child was conceived artificially.

In such cases, if the mother was not married or in a civil partnership, for the applicant to be treated as the father the following must apply:

- a) *Irrespective of whether the child was conceived using the applicant's sperm or not, the mother and the applicant must have entered a fatherhood/parenthood agreement which must have been in place at the time of treatment and the treatment must have taken place at a licensed UK clinic, or*
- b) *The child was conceived using the applicant's sperm, no parenthood agreement was in place and the treatment did NOT take place at a licensed UK clinic.*

We are advised by the applicant that the treatment took place at CARE Nottingham which is licensed by the Human Fertilisation and Embryology Authority. Therefore (b) could not possibly apply. For this reason, the applicant could only be considered the legal father if the mother and the applicant had entered into a fatherhood/parenthood agreement which was in place at time of treatment'.

16. As a result of receiving this response by the GRO on 16 April 2019 the District Judge made directions requiring the parties to file evidence setting out how they say the agreed fatherhood condition is satisfied or how otherwise they are entitled to the declaration sought, with a further hearing listed after the filing of such evidence.
17. On 12 June 2019 Z had not filed any evidence as directed, the District Judge made further directions for it to be filed.

18. On 12 June 2019 the District Judge noted that X disputed Z was entitled to the declaration and made an order that set aside the declaration of parentage.
19. The application was referred to this court and following hearings in December 2019 and April 2020 the order for declarations of parentage in relation to each child was made on 28 April 2020.

Relevant Legal Framework

20. Mr Wilson, on behalf of the Children's Guardian, has provided a comprehensive analysis of the relevant legal framework, which no other party takes issue with. Much of what is set out below is derived from his excellent document.
21. As he sets out the relevant principles governing the acquisition of legal parenthood are founded in both the common law and statute, namely the Human Fertilisation and Embryology Act 1990 (HFEA 1990) and subsequently the Human Fertilisation and Embryology Act 1990 (HFEA 2008).
22. Section 35 HFEA 2008 gives a statutory footing to the long-standing principle at common law that the woman who carries and gives birth to the child is the legal mother of the child in all circumstances, irrespective of whether she has any genetic connection to that child.
23. The position in relation to acquisition of legal fatherhood is more complex. At common law, subject to the presumption of legitimacy, the genetic father of the child is the legal father. This is so irrespective of the manner of conception; sexual intercourse, assisted conception or otherwise (*Re B (Parentage)* [1996] 2 FLR 15 per Bracewell J at [21]).
24. The provisions in HFEA 1990 and HFEA 2008 provide what Mr Wilson describes as 'defined modifications' to the pre-existing common law position in particular circumstances, with the result that if the circumstances do not fall within the provisions of either Act, the common law rules apply. In relation to HFEA 1990 Bracewell J in *Re B (ibid)* stated at paragraph 21

'I find that if Parliament had intended to alter or amend general principles as to parenthood, specific enactment would have been made in the 1990 Act, particularly as certain gamete donors are specifically excluded from being fathers under s28(6). I find fatherhood concerns genetics and the provision of sperm which results in the birth of a child, unless either there is a presumption of legitimacy which affects the situation or there is statutory intervention.'

25. This position was echoed by Peter Jackson J (as he then was) in relation to HFEA 2008. In *M v F and H (Legal Paternity)* [2014] 1 FLR 352 at paragraph 27 when he stated as follows

'Nor do I accept the argument on behalf of Mr F that the HFEA 2008 is an exclusive code governing parentage in all cases, so that if Mr H is ruled out as a parent as he did not consent to AI, the child will have no father. The statute only governs the situation that falls within its footprint: the situation described would fall outwith the footprint, and the common law would continue to apply.'

26. As Mr Wilson helpfully sets out the situations that fall within the statutory '*footprint*' and displace the common law principle that the genetic father is the legal father which he summaries as follows:
- (1) Sections 35 or 42 provide another legal parent is established by virtue of marriage or civil partnership;
 - (2) Sections 36 and 37 or sections 43 and 44 provide another legal parent is established by virtue of the agreed 'fatherhood' or 'female parenthood conditions';
 - (3) Section 41 (1) HFEA 2008 and paragraph 5 Schedule 3 HFEA 2008 provide that the genetic father is not a legal parent where he is a sperm donor who has given the relevant consents;
 - (4) Section 41 (2) HFEA provide that the genetic father who dies prior to treatment is not the legal parent, subject to any consents given pursuant to section 39 HFEA 2008.
27. The common law principles apply in circumstances that fall outside the statutory footprint outlined above.

Submissions

28. As Mr Wilson observed an unfortunate combination of circumstances has resulted in the current situation. There is no judgment setting out the reasons why the declaration of parentage was made on 28 November 2018. Equally it is unfortunate that the communication from the GRO contained an incorrect analysis of the legal position, which had the effect of introducing doubt into the decision regarding the children's parentage.
29. He submits that on analysis of the legal position, as outlined above, Z is the legal father of the children and the declaration of parentage should be made.
30. Z has attended all hearings and agrees with the analysis on behalf of the Children's Guardian. At one stage he indicated he wished to withdraw his application seeking declarations when he discovered he would not acquire parental responsibility for the children upon such declarations being made. Upon further consideration, and with the assistance of seeing the helpful written submissions by Mr Wilson, he agreed with the analysis of the legal difference between declaration of parentage and parental responsibility. He understood for the court to make a parental responsibility order, which is a welfare based decision, he needed to make a separate application, which he did.

Discussion and Decision

31. There is no issue in this case all three children were conceived by way of embryos created using Z's sperm and donor eggs and X carried the children and gave birth to them.
32. Therefore, the starting point at common law is that X is their mother and Z their father.

33. Even though the children's conception occurred as a consequence of IVF treatment in the UK at an HFEA-licensed clinic the common law position remains, unless it is displaced by the statutory framework set out in HFEA 2008.
34. Sections 36 and 37 HFEA 2008 provide a mechanism for the acquisition of parenthood by an unmarried father whose partner undergoes fertility treatment, but they are not the only mechanism for doing so. The 'agreed fatherhood conditions' provide a statutory modification to the common law principles, not a replacement for it. As a result, where they do not apply, the common law principle remains. On this analysis Z by virtue of his genetic paternity is the legal parent of the children.
35. The importance of recognising the status of a child's legal parentage reaches far beyond the strict application of the law. As has been made clear it has emotional, psychological and social significance, as well as being at the core of the child's identity. As Munby P set out in *Re P, Q, R S, T and U [2017] EWHC 2532* at paragraph [14]

'The question of who, in law, is or are the parent(s) of a child born as a result of treatment carried out under this legislation...is, as a moment's reflection will make obvious, a question of the most fundamental gravity and importance. What, after all, to any child, to any parent, never mind to future generations and indeed to society at large, can be more important, emotionally, psychologically, socially and legally, than the answer to the question: Who is my parent? Is this my child?'

At paragraph [16] he continues

'...a declaration puts matters on a secure legal footing. It affords both child and parent lifelong security. It puts beyond future dispute, whether by public bodies or private individuals, the child's legal relationship with the parents as being, indeed, his legal parent.'

36. The right to know and have recognised one's parentage is recognised as a fundamental right to 'private life' pursuant to Article 8 ECHR, in particular as it is such a key part of any individual's identity.
37. For the reasons set out above the court made declarations of parentage in relation to each of these children.
38. On the making of a declaration of parentage s 55A (7) FLA 1986 requires that a 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. Rule 8.22 (2) Family Procedure Rules 2010 provides that the court office shall notify the Registrar General within 21 days of the declaration being made.
39. The role of the Registrar General in such circumstances is set out in section 14A of the Births and Deaths Registration Act 1953 (BDRA 1953) which provides in receiving such a declaration under s 55A FLA 1986 and it appears to the Registrar General that the birth of that person should be re-registered he shall *'authorise the re-registration of that person's birth, and the re-registration shall be effected in such manner and at such place as may be prescribed'*.
40. It is a matter of concern the difficulties in this case arose from the communication from the GRO which has resulted in uncertainty for each of these children regarding Z's

status in relation to them. I direct that the solicitor for the children should send a copy of this judgment to the GRO, to ensure this situation does not arise again in the future.

41. The order made at the conclusion of these proceedings included directions relating to an application by Z for parental responsibility, which was remitted to be dealt with at the Family Court convenient to where the children live. What order, if any, the court may make in relation to that application will be governed by what order is in the best interests of the children, in accordance with section 1 Children Act 1989 ('CA 1989').
42. The status of an individual as a child's legal parent is distinct from them holding parental responsibility. It is possible for a legal parent not to have parental responsibility, in the same way that it is possible for a person who is not a legal parent to have parental responsibility, for example if they have a child arrangements order (section 12 CA 1989)
43. The re-registration of the birth pursuant to the declaration does not have the effect of conferring parental responsibility on Z. An unmarried father can only acquire parental responsibility in accordance with the provisions of section 4 (1) CA 1989, which includes that '*he became registered as the child's father under any of the enactments specified in subsection (1A)*'. Section 14A BDRA 1953 is not one of the provisions listed in section 4 (1) CA 1989. As a consequence any re-registration of the birth certificate to include Z as the father does not confer parental responsibility on him (see *M v F and H* [2014] 1 FLR 352 [31] and *JB v KS and E (Contact: Parental Responsibility)* [2015] 2 FLR 1180 [29]).