

# Streamlining declarations of parentage



*Bethan Cleal and  
Natalie Gamble* NGA Law



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*The President of the Family Division has published new guidance and precedents on sperm donation parentage cases*

Unmarried couples conceiving with donor sperm in the UK rely on their fertility clinics, not only to provide good medical care, but to ensure they will be recognised as the legal parents of their children. The Human Fertilisation and Embryology Act 2008 contains clear legal rules designed to confer parentage on unmarried parents through sperm donation, and they are put into practice by UK fertility clinics.

A specific process must be followed at the fertility clinic, which involves the clinic providing counselling and ensuring the couple completes a set of formal written signed notices by which both partners agree to legal parenthood. If the process is followed correctly, a non-biological father will be the legal father of his child (where the couple are in a different-sex relationship), or a non-birth mother will be the second legal parent (where the couple are in a same-sex relationship). This has lifelong significance in terms of parental status, the child's birth certificate, financial and parental responsibility, inheritance rights, nationality, pensions and, most importantly, the child's identity.

The front-line nursing staff/clinicians who work within fertility clinics are in practice responsible for ensuring this process is followed correctly. However, they have rarely had any legal training, and the forms (which confer legal parenthood) are just one part of an enormous volume of paperwork which they must ask patients to sign as part of the fertility treatment process. Perhaps unsurprisingly, the system does not always work flawlessly in practice.

Following a specific case in 2013 in which the Family Court ruled that a non-birth mother was not the legal parent of her child, the Human Fertilisation and Embryology Authority instructed all UK fertility clinics to carry out an audit of their historic cases involving sperm donation with unmarried patients to check that legal parenthood had been correctly dealt with. Shockingly, 42% of the UK's fertility clinics identified cases where there were procedural and paperwork errors, meaning that the father or second legal parent's status was potentially questionable. In some

cases the legal parenthood forms were missing altogether, in others the wrong forms had been completed or there were mistakes with the completion of the forms (missing signatures, boxes which hadn't been ticked or missing/incorrect dates). For the families affected, who had already conceived or given birth, it was too late to remedy the paperwork retrospectively, since legal parenthood is set at conception (the Act only confers legal parenthood if the forms are executed correctly before embryo transfer or artificial insemination).

## The "Alphabet" cases

Clinics were required to notify their patients that there was an issue, and some of the affected parents made applications to the Family Court seeking help. The first case (*Re A, B, C, D, E, F, G and H* [2015] EWHC 2602 (Fam) – now known as the "Alphabet" case) was heard by the President of the Family Division in September 2015. Using a certain amount of creative legal gymnastics, he was able to find a way to remedy the mistakes and make findings of fact that missing forms had been correctly completed and only subsequently lost. Declarations of parentage were made confirming legal parenthood and removing any potential uncertainty for those families in the future.

This was not, however, the end of the story. Over the past two years, the High Court has heard 35 further cases in which declarations of parentage have been made (with a further two currently pending). The applications, although dealt with sensitively by the court, are often hugely emotional for parents who placed their trust in regulated fertility clinics and found to their distress that their legal parenthood had not been properly dealt with. However sensitively handled, a High Court process is an intimidating prospect for many families.

There is therefore ongoing concern about affected parents who have been notified their legal parenthood ➤

was in jeopardy but not applied to court. Might they be storing up problems for the future for them and their children? In particular, what might happen if they separate or die? And how will it affect their child if they discover these issues in later life?

### A new regime: *Re AD-AH*

Cases *AD*, *AE*, *AF*, *AG* and *AH* were cases 25-29 to come before the High Court. The issues in each were relatively straightforward (involving mistakes and issues which replicated those seen in earlier cases), so there were no new legal principles being explored and the President was able to make a declaration of parentage in each case on the facts. However, he went further. On application from our team and counsel Elizabeth Isaacs QC (representing the parents), he also considered how the process might be made easier and more streamlined in the future for other similarly straightforward cases.

He confirmed that, while a declaration of parentage cannot be granted simply by consent or concession and needs proper judicial scrutiny, there may be a way of limiting the impact on families by not requiring oral evidence to be given or even resolving applications on the papers without a hearing at all in straightforward cases. That might apply where:

- a) the application turns entirely on written documents from the clinic's file;
- b) the factual circumstances are the subject of a previous judgment which is precisely in point;
- c) there is no dispute between the parties;

*"In Re AD-AH Munby J published four draft orders as precedents for those managing declaration of parentage cases. The aim is to enable such cases to be dealt with in a more streamlined way."*

- d) there has been no intervention by the Human Fertilisation and Embryology Authority, the Attorney General or the Secretary of State for Health; and
- e) the applicant and respondent both wish to proceed without an oral hearing.

Munby J went on to publish four draft orders as precedents for those managing these cases. The aim is to enable these cases to be dealt with in a more streamlined way, where possible, and therefore to minimise the impact on the families affected.

Ultimately, declarations of parentage affirm the status parents should have always had, and are incredibly important to ensure that the family unit is and feels legally secure. Being a legal parent means that a parent has a lifelong connection with their child, which will continue long beyond the day they turn 18 and become an adult, and it is important that this is not lost by simply missing a mark in a tick box.

Bethan@ngalaw.co.uk  
Natalie@ngalaw.co.uk

