

# X (Applicant) v Y (Respondent) & St Bartholomew's Hospital Centre & for reproductive medicine (CRM) (Intervener) & CAFCASS Legal (Advocate to the court) (2015)

**[2015] EWFC 13**

13/02/2015

## **Barristers**

Dorothea Gartland KC

## **Court**

Family Court

## **Practice Areas**

Private Children Law

## **Summary**

A man was declared to be the father of the child his partner had conceived following sperm donor treatment at a fertility clinic, where it was more likely than not that he had signed the consent form required by the Human Fertilisation and Embryology Act 2008 s.37(1)(a) but the clinic had mislaid it. The clinic's breach of record-keeping requirements had not invalidated its licence to treat the man's partner. It would be wholly inconsistent with the underlying intention of s.36 if agreed fatherhood status could be removed by such a breach.

## **Facts**

The applicant sought a declaration that he was the father of the child his partner had conceived following treatment at a fertility clinic.

The applicant and his partner had started attending the clinic in 2012. On discovering the applicant was infertile, they opted for a sperm donor. They received counselling for the proposed treatment on October 16, 2012 and completed various documents on October 26, including some consent forms as to the parentage of any child that resulted from the treatment. The treatment was successful and the applicant's partner gave birth in August 2013. Later that year, the Human Fertilisation and Embryology Authority (HFEA) directed the clinic to carry out an audit of its files. The clinic could not find the notice of consent that the applicant had been required to sign under the Human Fertilisation and Embryology Act 2008 s.37(1)(a) in order to be treated as the child's father. The issues were whether (i) the applicant had signed the notice of consent and it had been mislaid by the clinic; (ii) if the consent was mislaid, it amounted to a breach of record keeping that invalidated the clinic's licence to treat his partner, required by s.37(1).

## Held

It was more likely than not that the applicant had signed the notice of consent required by s.37(1)(a) and it had subsequently been mislaid by the clinic. First, the clinic had complied with other requirements, such as offering counselling to the couple. Second, the documents signed on October 26, including the partner's s.37(1)(b) notice of consent and the clinic's internal form confirming that the applicant understood he would become the legal parent on the completion and signature of the two s.37(1) forms, were more consistent with his s.37(1)(a) notice being signed at the same time. Further, the nurse who had dealt with their case had signed a declaration that the couple had completed the s.37(1) forms. Third, the nurse acknowledged the importance of the s.37(1) forms being completed prior to treatment. Fourth, she accepted that the consent forms were not secured in the file and could have slipped out. Finally, the couple's wider concern over documents that had been lost earlier in the course of their referral to the clinic raised general concern about the robustness of the clinic's record keeping (see para.49 of judgment). (2) The mislaying of the applicant's consent form was a breach of the HFEA's Direction 0012, issue pursuant to s.23. However, that breach of record-keeping did not invalidate the clinic's licence in such a way that offended against s.37. In accordance with s.36, if a s.37(1)(a) notice was completed and other requirements complied with prior to the treatment of his partner, the applicant would be treated as the legal father when the child was born. 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 child if the clinic mislaid the notice, possibly many years later. Any non-compliance with Direction 0012 was dealt with through the regulatory powers given to the HFEA, which had not imposed sanctions against the clinic and had allowed its licence to remain in force. There was no evidence in the enacting history of s.37 to suggest any intention to create an additional test of compliance by the clinic with directions given pursuant to s.23 and the acquisition of paternity. Accordingly, the treatment provided to the applicant's partner had been under licence as required. The applicant was the child's father (paras 52, 61). (3) (Per curiam) The applicant's case highlighted the important responsibility on licensed fertility clinics to ensure they complied with all aspects of the relevant statutory provisions and guidance, particularly as they were providing a service to people whose focus was on treatment rather than the precise legal formalities of what they were embarking on. However, any person considering fertility treatment should ensure that they were, at the very least, familiar with what legal steps had to be taken prior to treatment, particularly regarding consent. Any failings by the clinic to follow the requisite procedures might have long-term consequences for them and any child born as a result of the treatment (paras 2, 4).

## Permission

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