

F v M & Others [2015]

[2015] EWHC 3601 (Fam)

10/12/2015

Barristers

Andrew Powell

Court

Family Division

Practice Areas

Private Children Law

High Court judgment in proceedings under s55A Family Law 1986 for a declaration of parentage in respect of a child, C.

The mother had applied for a declaration that F is not C's father and F had applied for a declaration that he is. The mother later conceded that there could be a declaration that F is C's father, but as the President said in *Re HFEA 2008* [2015] EWHC 2602 '...a declaration cannot be granted by consent or default. There must be a proper examination of the facts, assessed in the light of the applicable law, before a judge can be satisfied, as he must be if the relief sought is to be granted, that the claim for the declaration is indeed made out'.

Pauffley J had already given a judgment in respect of her decision to make a declaration of parentage that F is C's father. This judgment expanded on that decision and also commented on the acts and omissions of the Herts and Essex Fertility Centre (HEFC) in the same way that the President dealt with the 'ineptitude' of such an organisation in *Re HFEA 2008*.

In respect of parentage under the HFEA 2008 sections 36 and 37 in order for a man to be treated as the father of a child he and the woman must, among other things, both give signed, written consent prior to the commencement of treatment. Guidance provided by the President in *Re HFEA 2008* is that where the forms cannot be found the court can act on parol evidence to establish that the forms had been properly completed. The court can also 'correct' mistakes on the form. In this case the mother asserted that she and F had not signed the forms. The forms could not be found but the court found that on the evidence M and F had both signed the forms prior to the commencement of treatment.

In respect of the failings of the HEFC the court identified two specific matters which required comment.

The first was in respect of the HEFC's response to the Legal Parenthood Audit, initiated at the request of the HFEA in February 2014 following the decision of Cobb J in *AB v CD* and the *Z Fertility Clinic* [2013] EWHC 1418. The outcome of the audit was that "nearly half of all clinics that have responded reported anomalies with their legal parenthood consent." Clinics were advised to seek advice if they had any

doubt about the validity of parenthood. The underlying message that there was an obligation to be open and transparent was clear and the parents should be treated with respect and proper concern.

The medical files for these parents had not been included in the audit, although they should have been, and it was not clear why the parents' files had been missed. An investigation is about to begin and the medical director of HEFC assured the court that he is committed to getting to the bottom of what happened and to take action to ensure the circumstances that gave rise to this case never happens again. The HEFC had also since taken other steps, including the installation of Meditex, a fertility database used across Europe, which required consent forms to be scanned and retained.

The second matter was in respect of the 'wholly extraordinary' litigation conduct of HEFC. The disclosure of medical records had been 'fraught' and 'piecemeal' despite M and F having given written authorisation for the release of documents.

In May 2015 only around 20 pages of medical records had been provided. Numerous letters from M and F's solicitors produced no results and in late May 2015 HEFC was strongly recommended to attend the first court hearing. HEFC declined to attend and did not accept that it had failed to comply with necessary procedures. On 29 May HEFC was joined as a party to the proceedings. Nothing was heard until 10 August when HEFC responded that it would not intervene and would not attend the hearing. On 14 August the court directed statements from the Person Responsible and the Medical Director. Statements were duly provided but the clinic wrote to say it would not be in attendance at the hearing as 'this is a Family Law matter'. Again the clinic was reminded to attend the next hearing and again it indicated there would be no attendance. Eventually in October an order was made with a penal notice. The clinic finally took legal advice and accepted that it had not appreciated the gravity of the situation.

Pauffley J said the clinic's "bewildering behaviour" had "undoubtedly added to a situation of enormous tension in circumstances which were already intensely fraught." She noted that the clinic had not attempted to engage with M or F; there had been no correspondence, no apology and no offer of help, support or explanation. This, she said, was "quite obviously a profoundly shocking state of affairs."

The Medical Director accepted that the clinic's litigation conduct was wholly unsatisfactory. He intended to write to M and F to apologise and would meet them in person to apologise and answer their questions. HEFC also undertook to pay the costs of M and F in respect of the declaration of parentage proceedings.

Permission

 **Family Law Week**