

HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Parenthood in Cases Involving Assisted Reproduction

Sections 36 and 37: Fatherhood conditions

172. The existing provisions of the 1990 Act which enable an unmarried man to be the father of a donor-conceived child if he is “treated together” with the mother in a licensed clinic are replaced by sections 36 and 37. The new provisions require the couple to be treated in a UK licensed clinic, as before, to ensure there is clear evidence of the parents’ intentions about fatherhood. However, for the man to be the father at the time the embryo or gametes have been placed in the woman or at the time she is artificially inseminated, the couple must each have given notice of consent to him being treated as the father. Neither of them must have given notice withdrawing that consent and the woman to be treated must not have given notice of consent to another man or woman being treated as the child’s parent. The notices of consent do not necessarily have to be drawn up in the clinic, but they must be provided to the “person responsible” at the clinic. This is the person under whose supervision licensed activities are carried out. If, for example, a woman were to give notice of consent to several people being the father of a child, and corresponding notices were given by the other persons, the latest set provided to the clinic would apply. A notice under section 37 must be in writing and signed by the person giving their consent. The requirement for written notice is waived, however, if any of the parties involved is unable to sign because of illness, injury or physical disability.
173. After the transfer of the gametes or embryo, neither the man nor the woman can withdraw their consent to the man being treated as the child’s father unless the woman does not conceive and a new cycle of treatment has to begin. Changes to the conditions which must be included in all treatment licences, which are made by section 14(3), will require that, if the man withdraws his consent at an earlier stage, the woman must be told before the treatment proceeds. She will therefore have the opportunity to decide whether she wishes to go ahead in these circumstances. If the woman withdraws her agreement to the man being the father, he must be told as soon as possible but he would not, through these provisions, be able to stop her going ahead if she wished to do so. Notices may not validly be given by two people who are within the prohibited degrees of relationship. This is defined in section 58(2) to include parents and children, siblings and uncles or aunts and their nephew or nieces. Close relatives of this kind may not jointly be treated as a child’s parents.
174. The Act will maintain the situation that if an unmarried couple carry out self-insemination with donor sperm at home or elsewhere, not as part of licensed treatment, the male partner would not be the legal parent. He would have to take steps to acquire formal parental responsibility, for example by adopting the child. An unmarried man cannot become a parent where donor sperm is provided under a licence under paragraph

*These notes refer to the Human Fertilisation and Embryology Act
2008 (c.22) which received Royal Assent on 13 November 2008*

1A of Schedule 2 to the 1990 Act (non-medical fertility services) unless also used in treatment services.