



# Human Fertilisation and Embryology Act 2008

## 2008 CHAPTER 22

### PART 2

#### PARENTHOOD IN CASES INVOLVING ASSISTED REPRODUCTION

##### *Meaning of “father”*

#### **35 Woman married [<sup>F1</sup>to [<sup>F2</sup>, or civil partner of,] a man] at time of treatment**

(1) If—

- (a) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage [<sup>F3</sup>with a man][<sup>F4</sup>or a civil partnership with a man], and
- (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage [<sup>F5</sup>or civil partnership],

then, subject to section 38(2) to (4), the other party to the marriage [<sup>F5</sup>or civil partnership] is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

- (2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1)(a).

#### **Textual Amendments**

- F1** Words in s. 35 heading inserted (E.W.) (13.3.2014) by [Marriage \(Same Sex Couples\) Act 2013 \(c. 30\), s. 21\(3\), Sch. 7 para. 38\(2\)](#); S.I. 2014/93, art. 3(k)(iv); and said words in s. 35 heading also inserted (S.) (16.12.2014) by [The Marriage and Civil Partnership \(Scotland\) Act 2014 and Civil Partnership Act 2004 \(Consequential Provisions and Modifications\) Order 2014 \(S.I. 2014/3229\), art. 1\(2\), Sch. 5 para. 18\(2\)\(a\)](#); and said words also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\)](#)

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and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 (S.I. 2019/1514), regs. 1(2), **26(2)(a)**

- F2** Words in s. 35 heading inserted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(2)(a)**; and said words in s. 35 heading also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(2)(a)**
- F3** Words in s. 35(1)(a) inserted (E.W.) (13.3.2014) by [Marriage \(Same Sex Couples\) Act 2013 \(c. 30\)](#), s. 21(3), **Sch. 7 para. 38(3)**; S.I. 2014/93, art. 3(k)(iv); and said words in s. 35(1)(a) also inserted (S.) (16.12.2014) by [The Marriage and Civil Partnership \(Scotland\) Act 2014 and Civil Partnership Act 2004 \(Consequential Provisions and Modifications\) Order 2014 \(S.I. 2014/3229\)](#), art. 1(2), **Sch. 5 para. 18(2)(b)**; and said words in s. 35(1)(a) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(2)(b)(i)** (with regs. 6-9)
- F4** Words in s. 35(1)(a) inserted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(2)(b)(i)**; and said words in s. 35(1)(a) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(2)(b)(i)** (with regs. 6-9)
- F5** Words in s. 35(1) inserted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(2)(b)(ii)**; and said words in s. 35(1) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(2)(b)(ii)** (with regs. 6-9)

### 36 Treatment provided to woman where agreed fatherhood conditions apply

If no man is treated by virtue of section 35 as the father of the child and no woman is treated by virtue of section 42 as a parent of the child but—

- (a) the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies,
- (b) at the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed fatherhood conditions (as set out in section 37) were satisfied in relation to a man, in relation to treatment provided to W under the licence,
- (c) the man remained alive at that time, and
- (d) the creation of the embryo carried by W was not brought about with the man's sperm,

then, subject to section 38(2) to (4), the man is to be treated as the father of the child.

### 37 The agreed fatherhood conditions

- (1) The agreed fatherhood conditions referred to in section 36(b) are met in relation to a man (“M”) in relation to treatment provided to W under a licence if, but only if,—
  - (a) M has given the person responsible a notice stating that he consents to being treated as the father of any child resulting from treatment provided to W under the licence,
  - (b) W has given the person responsible a notice stating that she consents to M being so treated,
  - (c) neither M nor W has, since giving notice under paragraph (a) or (b), given the person responsible notice of the withdrawal of M's or W's consent to M being so treated,

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- (d) W has not, since the giving of the notice under paragraph (b), given the person responsible—
    - (i) a further notice under that paragraph stating that she consents to another man being treated as the father of any resulting child, or
    - (ii) a notice under section 44(1)(b) stating that she consents to a woman being treated as a parent of any resulting child, and
  - (e) W and M are not within prohibited degrees of relationship in relation to each other.
- (2) A notice under subsection (1)(a), (b) or (c) must be in writing and must be signed by the person giving it.
- (3) A notice under subsection (1)(a), (b) or (c) by a person (“S”) who is unable to sign because of illness, injury or physical disability is to be taken to comply with the requirement of subsection (2) as to signature if it is signed at the direction of S, in the presence of S and in the presence of at least one witness who attests the signature.

### 38 Further provision relating to sections 35 and 36

- (1) Where a person is to be treated as the father of the child by virtue of section 35 or 36, no other person is to be treated as the father of the child.
- (2) In England and Wales and Northern Ireland, sections 35 and 36 do not affect any presumption, applying by virtue of the rules of common law [<sup>F6</sup>or section A1(2) of the Legitimacy Act 1976][<sup>F7</sup>or section 2(1)(a) of the Family Law Act (Northern Ireland) 2001], that a child is the legitimate child of the parties to a marriage [<sup>F8</sup>or civil partnership].
- (3) In Scotland, sections 35 and 36 do not apply in relation to any child who, by virtue of any enactment or other rule of law, is treated as the child of the parties to a marriage [<sup>F9</sup>or civil partnership].
- (4) Sections 35 and 36 do not apply to any child to the extent that the child is treated by virtue of adoption as not being the man's child.

#### Textual Amendments

- F6** Words in s. 38(2) inserted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(3)(a)**; and said words in s. 38(2) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(3)(a)** (with regs. 6-9)
- F7** Words in s. 38(2) inserted (E.W.N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(3)(b)** (with regs. 6-9)
- F8** Words in s. 38(2) inserted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(3)(b)**; and said word in s. 38(2) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(3)(c)** (with regs. 6-9)
- F9** Words in s. 38(3) inserted (27.1.2022) by [The Civil Partnership \(Scotland\) Act 2020 and Marriage and Civil Partnership \(Scotland\) Act 2014 \(Consequential Modifications\) Order 2022 \(S.I. 2022/74\)](#), art. 1, **Sch. 1 para. 2(2)**

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**Modifications etc. (not altering text)**

- C1** S. 38(4) modified (6.4.2010) by [The Human Fertilisation and Embryology \(Parental Orders\) Regulations 2010 \(S.I. 2010/985\)](#), reg. 5, **Sch. 4**
- C2** S. 38(4) modified (21.12.2018) by [The Human Fertilisation and Embryology \(Parental Orders\) Regulations 2018 \(S.I. 2018/1412\)](#), reg. 1(2), **Sch. 4 para. 23**

**39 Use of sperm, or transfer of embryo, after death of man providing sperm**

(1) If—

- (a) the child has been carried by W as a result of the placing in her of an embryo or of sperm and eggs or her artificial insemination,
- (b) the creation of the embryo carried by W was brought about by using the sperm of a man after his death, or the creation of the embryo was brought about using the sperm of a man before his death but the embryo was placed in W after his death,
- (c) the man consented in writing (and did not withdraw the consent)—
  - (i) to the use of his sperm after his death which brought about the creation of the embryo carried by W or (as the case may be) to the placing in W after his death of the embryo which was brought about using his sperm before his death, and
  - (ii) to being treated for the purpose mentioned in subsection (3) as the father of any resulting child,
- (d) W has elected in writing not later than the end of the period of 42 days from the day on which the child was born for the man to be treated for the purpose mentioned in subsection (3) as the father of the child, and
- (e) no-one else is to be treated—
  - (i) as the father of the child by virtue of section 35 or 36 or by virtue of section 38(2) or (3), or
  - (ii) as a parent of the child by virtue of section 42 or 43 or by virtue of adoption,

then the man is to be treated for the purpose mentioned in subsection (3) as the father of the child.

- (2) Subsection (1) applies whether W was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination.
- (3) The purpose referred to in subsection (1) is the purpose of enabling the man's particulars to be entered as the particulars of the child's father in a relevant register of births.
- (4) In the application of this section to Scotland, for any reference to a period of 42 days there is substituted a reference to a period of 21 days.

**40 Embryo transferred after death of [<sup>F10</sup>male spouse, civil partner or intended parent] who did not provide sperm**

(1) If—

- (a) the child has been carried by W as a result of the placing in her of an embryo,

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- (b) the embryo was created at a time when W was a party to a marriage [<sup>F11</sup>with a man][<sup>F12</sup>or a civil partnership with a man],
- (c) the creation of the embryo was not brought about with the sperm of the other party to the marriage [<sup>F13</sup>or civil partnership],
- (d) the other party to the marriage [<sup>F14</sup>or civil partnership] died before the placing of the embryo in W,
- (e) the other party to the marriage [<sup>F15</sup>or civil partnership] consented in writing (and did not withdraw the consent)—
  - (i) to the placing of the embryo in W after his death, and
  - (ii) to being treated for the purpose mentioned in subsection (4) as the father of any resulting child,
- (f) W has elected in writing not later than the end of the period of 42 days from the day on which the child was born for the man to be treated for the purpose mentioned in subsection (4) as the father of the child, and
- (g) no-one else is to be treated—
  - (i) as the father of the child by virtue of section 35 or 36 or by virtue of section 38(2) or (3), or
  - (ii) as a parent of the child by virtue of section 42 or 43 or by virtue of adoption,

then the man is to be treated for the purpose mentioned in subsection (4) as the father of the child.

(2) If—

- (a) the child has been carried by W as a result of the placing in her of an embryo,
- (b) the embryo was not created at a time when W was a party to a marriage or a civil partnership but was created in the course of treatment services provided to W in the United Kingdom by a person to whom a licence applies,
- (c) a man consented in writing (and did not withdraw the consent)—
  - (i) to the placing of the embryo in W after his death, and
  - (ii) to being treated for the purpose mentioned in subsection (4) as the father of any resulting child,
- (d) the creation of the embryo was not brought about with the sperm of that man,
- (e) the man died before the placing of the embryo in W,
- (f) immediately before the man's death, the agreed fatherhood conditions set out in section 37 were met in relation to the man in relation to treatment proposed to be provided to W in the United Kingdom by a person to whom a licence applies,
- (g) W has elected in writing not later than the end of the period of 42 days from the day on which the child was born for the man to be treated for the purpose mentioned in subsection (4) as the father of the child, and
- (h) no-one else is to be treated—
  - (i) as the father of the child by virtue of section 35 or 36 or by virtue of section 38(2) or (3), or
  - (ii) as a parent of the child by virtue of section 42 or 43 or by virtue of adoption,

then the man is to be treated for the purpose mentioned in subsection (4) as the father of the child.

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- (3) Subsections (1) and (2) apply whether W was in the United Kingdom or elsewhere at the time of the placing in her of the embryo.
- (4) The purpose referred to in subsections (1) and (2) is the purpose of enabling the man's particulars to be entered as the particulars of the child's father in a relevant register of births.
- (5) In the application of this section to Scotland, for any reference to a period of 42 days there is substituted a reference to a period of 21 days.

#### Textual Amendments

- F10** Words in s. 40 heading substituted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(4)(a)**; and said words in s. 40 heading also substituted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(4)(a)** (with regs. 6-9)
- F11** Words in s. 40(1)(b) inserted (E.W.) (13.3.2014) by [Marriage \(Same Sex Couples\) Act 2013 \(c. 30\)](#), s. 21(3), **Sch. 7 para. 39**; S.I. 2014/93, art. 3(k)(iv); and said words in s. 40(1)(b) also inserted (S.) (16.12.2014) by [The Marriage and Civil Partnership \(Scotland\) Act 2014](#) and [Civil Partnership Act 2004 \(Consequential Provisions and Modifications\) Order 2014 \(S.I. 2014/3229\)](#), art. 1(2), **Sch. 5 para. 18(3)**; and said words in s. 40(1)(b) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(4)(b)(i)** (with regs. 6-9)
- F12** Words in s. 40(1)(b) inserted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(4)(b)(i)**; and said words in s. 40(1)(b) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(4)(b)(i)** (with regs. 6-9)
- F13** Words in s. 40(1)(c) inserted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(4)(b)(ii)**; and said words in s. 40(1)(c) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(4)(b)(ii)** (with regs. 6-9)
- F14** Words in s. 40(1)(d) inserted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(4)(b)(ii)**; and said words in s. 40(1)(d) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(4)(b)(ii)** (with regs. 6-9)
- F15** Words in s. 40(1)(e) inserted (E.W.S.) (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), regs. 1(2), **16(4)(b)(ii)**; and said words in s. 40(1)(e) also inserted (N.I.) (13.1.2020) by [The Marriage \(Same-sex Couples\) and Civil Partnership \(Opposite-sex Couples\) \(Northern Ireland\) Regulations 2019 \(S.I. 2019/1514\)](#), regs. 1(2), **26(4)(b)(ii)** (with regs. 6-9)

#### 41 Persons not to be treated as father

- (1) Where the sperm of a man who had given such consent as is required by paragraph 5 of Schedule 3 to the 1990 Act (consent to use of gametes for purposes of treatment services or non-medical fertility services) was used for a purpose for which such consent was required, he is not to be treated as the father of the child.
- (2) Where the sperm of a man, or an embryo the creation of which was brought about with his sperm, was used after his death, he is not, subject to section 39, to be treated as the father of the child.

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- (3) Subsection (2) applies whether W was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination.

**Changes to legislation:**

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**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 55(3)(e) and word inserted by [2022 c. 18 \(N.I.\) Sch. 3 para. 75\(b\)](#)