

## **Commencement arrangements for the parenthood provisions in Part 2 of the Human Fertilisation and Embryology Act 2008**

1. The parenthood provisions in part 2 of the 2008 Human Fertilisation and Embryology Act (“the 2008 Act”) will come into force on 6 April 2009.
2. From 6 April 2009 partners of women to whom they are not married or with whom they are not in a civil partnership will only be recognised as the legal parent of any child born from treatment with donor sperm or embryos if written consent has been given **before gamete or embryo transfer** takes place. Centres should use the WP and PP forms to obtain these consents. The new parenthood provisions do not change the fact that the woman who gives birth to the child is the legal mother when the child is born.
3. There will be no retrospective provision to bestow parenthood on a partner where the embryo or gamete transfer took place prior to the commencement of these provisions. Any same sex couple wishing to take advantage of the provisions must be advised to ensure that embryo or gamete transfer occurs on or after the 6 April 2009.

### ***Parenthood for couples having treatment with donor sperm or embryos created with donor sperm***

#### **For embryo or gamete transfers that take place from 6 April 2009**

4. **Married couples** – the situation for married couples is unchanged from the 1990 Human Fertilisation and Embryology Act (“the 1990 Act”). Unless the husband explicitly states that he does not consent to his wife’s treatment he will be recognised as the legal father of any child born as a result of treatment.
5. **Civil partners** – the situation for civil partners has now been brought in line with that of married couples. Therefore, unless the partner explicitly states that she does not consent to the treatment of her partner, she will be recognised as the second legal parent of any child born as a result of treatment.
6. **Unmarried heterosexual couples** – the male partner must have consented (prior to embryo or gamete transfer) to being the father of any child born as a result of treatment in order to be legally recognised as such. The mother must have also consented to him being recognised as the father. This is different from the situation under the 1990 Act, which uses the concept of being ‘treated together’ (section 28(3)) to establish consent to parenthood.

This concept has been removed and replaced with the parenthood provisions in the 2008 Act.

7. It is very important that unmarried couples who will have donor embryos or sperm transferred on or after 6 April 2009, who did not complete the parenthood consent forms (PP and WP forms) when their treatment began, **complete the PP and WP consent forms before embryo or gamete transfer**. If the consents are not in place before this happens, the male partner will not be recognised as the legal father of any child born as a result of treatment. Couples may view the PP and WP consent forms before 6 April 2009, however they should only be completed and will only have legal standing on or after this date.
8. **Same-sex couples who are not in a civil partnership** – the situation for same-sex couples is in line with the situation for unmarried heterosexual couples. The female partner of the woman receiving treatment must have consented (prior to embryo or gamete transfer) to being the second parent of any child born as a result of treatment in order to be legally recognised as such. The woman receiving treatment must also have consented to her partner being recognised as the second parent. If the consents are not in place before gamete or embryo transfer, the partner of the woman receiving treatment will not be legally recognised as the second parent of any child born as a result of treatment. Couples may view the PP and WP consent forms before 6 April 2009, however they should only be completed and will only have legal standing on or after this date.

### **For embryo or gamete transfers that take place before 6 April 2009**

9. Part 2 of the 2008 Act cannot be applied retrospectively. This means that the 1990 Act will apply and that, in the case of same sex couples, the second female parent can only be recognised as a legal parent by way of adoption.
10. The relevant sections of the 1990 Act will remain in force, applying only to those who had treatment before 6 April 2009.

### **Information provision and the offer of counselling**

11. Clinics should note that from 6 April 2009 they will need to comply with licence conditions set out in 14(3) of the 2008 Act, which amends section 13(6) and adds 13(6A) – 13(6E) to the 1990 Act. Schedule 4 to the 2008 Act, which introduces a new Schedule 3ZA to the 1990 Act, will also be brought into force on 6 April 2009 to set out the additional counselling requirements and to ensure that they also apply to the female second

parent or civil partner. All of these requirements are outlined and explained in the HFEA guidance note on legal parenthood.

12. Clinics may provide information to couples and offer counselling in line with these new requirements before 6 April 2009 for couples who are due to undergo gamete or embryo transfer on or after 6 April 2009.

13. Where couples:

- began treatment before 6 April 2009; and
- are to undergo gamete or embryo transfer on or after this date; and
- were already provided with the relevant information and offered counselling before this date in line with the 1990 Act before it was amended by the 2008 Act,

centres must repeat the offer counselling and ensure they have provided information in line with these new requirements.

### ***Embryo or gamete transfers after partner has died***

14. The 2008 Act repeals the Deceased Fathers Act 2003. The provisions set out in the Deceased Fathers Act are reflected in the 2008 Act, which extends the provisions to civil partners and same sex couples.

15. These provisions will also come into force on 6 April 2009. If the required consents are not in place, embryos created using either the husband or male partner's sperm or donor sperm may not be used after their death.

16. In cases where the husband or male partner provided the sperm, he must consent in writing to the use of his sperm or use of embryos after his death. He must also consent in writing to being treated as the father of the child and for his details to be entered into the register of births as the child's father.

17. If the husband or male partner did not provide the sperm, he must consent in writing to the placing of the embryo into the woman, to being treated as the father of the child after his death and for his details to be entered into the register of births as the child's father.

18. The 2008 Act extends these provisions to civil partners and same sex couples. The second parent or civil partner must consent in writing to the placing of the embryo into the woman, to being treated as the second parent after her death and for her details to be entered into the register of births as the child's second parent.

## Frequently Asked Questions

**Is there anyway these provisions can be applied retrospectively (ie, consent to parenthood given retrospectively)?**

No, this is not possible.

**What will happen when a same sex couple registers the birth of a child?**

The General Registry Office (GRO) is the government agency responsible for the registration of births in England and Wales. The GRO have advised that the new provisions for registering the birth of a child born to female couples will mirror the existing ones for heterosexual couples.

When a couple register the birth of their child, the Registrar may ask questions to correctly establish legal parentage, but evidence will not be required routinely. However, if there is a dispute about whether either partner provided the right consent, or if one partner withdrew consent, the Registrar may ask for evidence (eg, a copy of the consent forms) to determine the correct position.

The same rules will apply in Scotland and Northern Ireland, although the design of the birth certificates will be different.

For further information about registering a child's birth, see:

England and Wales: [www.gro.gov.uk](http://www.gro.gov.uk)

Scotland: [www.gro-scotland.gov.uk](http://www.gro-scotland.gov.uk)

Northern Ireland: [www.groni.gov.uk](http://www.groni.gov.uk)

**What if the treatment with donor sperm or embryos happened outside the UK?**

If the couple is married or in a civil partnership and the gamete or embryo transfer takes place outside the UK, parenthood will automatically be conferred on the partner (unless it is shown the he or she stated lack of consent to the treatment).

However, for couples who are not married or in a civil partnership the gamete or embryo transfer would need to take place in the UK for the agreed fatherhood/parenthood conditions of the 2008 Act to apply. Therefore, if treatment takes place outside the UK, the partner would have to adopt the child in order to be the father or parent.

**What if insemination with ‘donor’ sperm does not take place at a licensed centre?**

If the couple are married or in a civil partnership and sperm insemination does not take place at a licensed centre, parenthood will automatically be conferred on the partner.

However, if couples who are not married or in a civil partnership conceive outside of a licensed centre, the agreed parenthood conditions of the 2008 Act do not apply. The ‘donor’ would be the legal father of the child, unless the intended father or second parent adopts the child.

**What if a married woman seeks treatment, using donor sperm, with someone she is not married to?**

The husband will automatically be the legal father of any child born as a result of this treatment, unless he explicitly states that he does not consent to his wife’s treatment.

In all cases when a married woman receives treatment with donor sperm (or embryos created with donor sperm) it is good practice for clinics to seek the husband’s consent to this.

If the husband states his lack of consent to his wife’s treatment then the wife’s new partner can be the father or parent of any child born as a result of this treatment, if the right consents are in place.

It is not possible for the new partner to also be the sperm donor e.g. the commissioning man in a surrogacy arrangement.

**Does the intended father or second parent need to be the partner of the woman receiving treatment?**

No, the woman receiving treatment with donor sperm (or embryos created with donor sperm) can consent to any man or woman being the father or second parent, as long they are not within “*prohibited degrees of relationship in relation to each other*” (as defined in paragraph 58(2), part 2, HFE Act 2008).

In surrogacy arrangements the commissioning man will still need to register as a donor (if providing sperm) and therefore cannot be the father upon birth of the child.

**Do the new parenthood provisions affect surrogacy arrangements?**

The new parenthood provisions do not change the fact that the woman who gives birth to the child is the legal mother when the child is born.

If the surrogate is married or in a civil partnership, her husband or civil partner will be the legal father or second legal parent of any child born – unless it is

shown that the he/she does not consent to the treatment (the WC form should be used to record this lack of consent).

If the surrogate has a partner, with whom she is not married to or in a civil partnership, the partner must have consented to being the father or second parent of any child born as a result of treatment in order to be legally recognised as such (the PP form should be used for this). The surrogate must have also consented to her partner being recognised as the father or second parent (the WP form should be used for this).

If the surrogate is single or has a partner who does not wish to be the father or second parent, the new parenthood provisions make it possible for the intended father or second parent to be the legal father or second parent upon birth of the child – but only where they have not provided sperm for the treatment. The surrogate will need to consent to this using a WP form. The intended father or second parent will need to consent to this using a PP form.

As is currently the case, if the intended father has provided sperm for the treatment of the surrogate, he will need to register as a donor and therefore cannot be the father upon birth of the child. If the intended second parent has provided eggs for the treatment of the surrogate she will need to register as a donor, .but she can also become the legal second parent if the relevant consents are in place.

As is currently the case, the Parental Orders (Human Fertilisation and Embryology) Regulations 1994 and (in Scotland) the Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 1994 provide that parental rights and obligations in respect of surrogacy arrangements may, provided certain conditions are met, be transferred from the birth parents to those who commissioned the surrogacy arrangement.

From April 2010 it will be possible for civil partners and two persons who are living as partners in an enduring family relationship (as well as married couples) to apply for a Parental Order (providing that certain conditions are met).

Patients seeking a surrogacy arrangement should be advised to seek legal advice.

**What about male same sex couples who have a surrogacy arrangement? If one partner is registered as the father, would these new provisions apply to the other partner?**

No, provisions only apply when one person is the mother. From April 2010, it will be possible for male couples to apply to the court for a Parental Order which, if granted, will allow the birth to be registered showing both men as the parents in the Parental Order Register.

