

HUMAN FERTILISATION AND EMBRYOLOGY (DECEASED FATHERS) ACT 2003

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Human Fertilisation and Embryology (Deceased Fathers) Act 2003, which received Royal Assent on 18 September 2003. They have been prepared by the Department of Health in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. These notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act, so where a section or part of a section does not seem to require any explanation or comment, none is given.

BACKGROUND

3. This Act addresses the situation of mothers who have conceived children, after the death of their husbands or partners, using assisted conception techniques (commonly called fertility treatment). These women have been unable to register their deceased husband or partner as the father on the child's birth certificate as a result of the provisions of section 28(6) of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"). In proceedings brought by children conceived in these circumstances, the High Court declared in March 2003 that this restriction was incompatible with the claimants' right under Article 8 of the European Convention of Human Rights and/or Article 8 read in conjunction with Article 14. The Act also implements the recommendation of Professor Sheila McLean, Professor of Law and Ethics in Medicine at the University of Glasgow, made in her report "Review of the Common Law Provisions relating to the Removal of Gametes and of the Consent Provisions of the Human Fertilisation and Embryology Act 1990" (July 1998) that children born in these circumstances should have a symbolic acknowledgement of their father on their birth certificates.

THE ACT

4. The Act allows a man to be registered as the father of a child conceived after his death using his sperm or using an embryo created with his sperm before his death. This registration will not confer upon the child any legal status or rights as a consequence of that registration. This Act also enables a man to be registered as the father of a child conceived after his death using an embryo created using donor sperm before his death, again, without conferring upon the child any legal status or rights as a consequence of that registration.
5. The position under section 28(6) of the 1990 Act was that where the sperm of a man who had given consent in accordance with Schedule 3 to the Act for his gametes to be used for a particular purpose was used for that purpose, or the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he was not to be treated in law as the father of any resulting child for any purpose. The position was adopted in the legislation to ensure that a child born in these

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circumstances did not have any legal status or rights, the effect of which would be to prevent the winding-up of a man's estate.

COMMENTARY ON SECTIONS

Section 1: Certain deceased men to be registered as fathers

6. This section consists of two subsections which contain the main provisions of the Act.
7. *Subsection (1)* inserts nine new subsections (5A) to (5I) after section 28(5) of the 1990 Act. These subsections set out the circumstances in which certain deceased men may be registered as the father on a child's birth certificate.
8. *New subsection (5A)* provides that in the case of a married couple, where a child is conceived after the husband's death using his sperm or using an embryo created with his sperm before his death, the woman may elect in writing, not later than the end of the period of 42 days from the day on which the child was born, that her late husband is to be treated as the father for the purpose mentioned in new subsection (5I).
9. This purpose is that of enabling his particulars to be entered as the particulars of the child's father in a register of live-births or still-births kept under the Births and Deaths Registration Act 1953 or the Births and Deaths Registration (Northern Ireland) Order 1976 or a register of births or still-births kept under the Registration of Births, Deaths and Marriages (Scotland) Act 1965. An election by the woman will be effective provided the man gave consent in writing (and did not withdraw that consent) except where someone else is to be treated as the father of the child by virtue of section 28(2) or (3) of the 1990 Act or by virtue of adoption or the child being treated as mentioned in section 28(5)(a) or (b) of the 1990 Act. The consent given by the man must have been to the use of his sperm after his death which brought about the creation of the embryo carried by the woman or (as the case may be) to the placing in the woman after his death of an embryo which was brought about using his sperm before his death, and to being treated for the purpose mentioned in subsection (5I) as the father of any resulting child.
10. *New subsection (5B)* provides that in the case of an unmarried couple, where a child is conceived after the partner's death using his sperm or using an embryo created with his sperm before his death, the woman may elect in writing, not later than the end of the period of 42 days from the day on which the child was born, that her late partner is to be treated as the father for the purpose mentioned in new subsection (5I). Subsection (5B) applies where treatment services were being provided for the woman and the man together before his death either by a person to whom a licence under paragraph 1 of Schedule 2 to the 1990 Act applies or outside the UK. The circumstances in which an election by the woman will be effective are the same as those set out in paragraph 9 above in relation to the new subsection (5A) (although the reference to the husband should be read as a reference to the partner).
11. *New subsection (5C)* provides that in the case of a married couple, where a child is conceived after the husband's death using an embryo created with donor sperm before his death, the woman may elect in writing, not later than the end of the period of 42 days from the day on which the child was born, that her late husband is to be treated as the father for the purpose mentioned in new subsection (5I). An election by the woman will be effective provided the man gave consent in writing (and did not withdraw that consent) except where someone else is to be treated as the father of the child by virtue of section 28(2) or (3) of the 1990 Act or by virtue of adoption or the child being treated as mentioned in section 28(5)(a) or (b) of the 1990 Act. The consent given by the man must have been to the placing in the woman after his death of the embryo which was brought about using donor sperm before his death, and to being treated for the purpose mentioned in subsection (5I) as the father of any resulting child.
12. *New subsection (5D)* provides that in the case of an unmarried couple, where a child is conceived after the partner's death using an embryo created with donor sperm in the

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course of treatment services provided for the woman and the man together by a person to whom a licence under paragraph 1 of Schedule 2 to the 1990 Act applies or outside the UK, the woman may elect in writing, not later than the end of the period of 42 days from the day on which the child was born, that her late partner is to be treated as the father for the purpose mentioned in new subsection (5I). The circumstances in which an election by the woman will be effective are the same as those set out in paragraph 11 above in relation to the new subsection (5C) (although the reference to the husband should be read as a reference to the partner).

13. *New subsections (5E) to (5I)* supplement new subsections (5A) to (5D). In particular, subsection (5E) provides that in each of subsections (5A) to (5D) the period of 42 days, by the end of which the woman's election must have been made, is to be read as a period of 21 days in relation to Scotland. In addition, subsection (5F) not only makes clear that a woman's election can be made before the child's birth, but also allows the 42 or 21-day periods to be extended by the Registrar General.
14. Further requirements for registration, set out in the Schedule to the Act, are the production by the mother of a certificate from a registered medical practitioner as to the medical facts concerned and such other documentary evidence (if any) that the registrar considers appropriate. Where the mother is dead or otherwise unable to produce the documents required, they may be produced by certain qualified persons.
15. *Subsection (2)* of section 1 inserts new subsections (3A) to (3D) after section 29(3) of the 1990 Act. These limit the purpose for which the deceased husband (or as the case may be, deceased partner) may be treated as the father to that mentioned in new subsection (5I).

Section 2: Consequential and supplementary provision

16. *Subsection (1)* of section 2 of the Act provides that the Schedule (which contains consequential amendments) has effect.
17. *Subsection (2)* disapplies the two-year rule contained in section 1(4) of the Regulatory Reform Act 2001 (which prohibits a Regulatory Reform Order being made in respect of legislation amended by or under an Act of Parliament in the previous 2 years) to the amendments made by this Act to the Births and Deaths Registration Act 1953.
18. *Subsection (3)* defines the term "relevant calculation" for the purpose of disapplying section 1(4) of the Regulatory Reform Act 2001.

Section 3: Retrospective, transitional and transitory provision

19. *Subsection (1)* ensures that the Act will apply to existing, as well as future, cases. The result is that the conditions mentioned in the new section 28(5A), (5B), (5C) or (5D) can be satisfied in any case where the sperm or embryo in question was used on or after 1 August 1991.
20. *Subsection (2) to (5)* provide that, where a child was born before the coming into force of the relevant provision in the Act, the mother may elect in writing not later than the end of the period of six months beginning with the coming force of that provision for her deceased husband or partner to be treated as the father of the child for the purpose mentioned in the new section 28(5I). This will give women who wish to take advantage of the provisions of the Act time to gather evidence in support of their election in circumstances where their treatment may have taken place many years ago.
21. *Subsection (6)* applies to cases where the man who the woman elects in writing to be treated as the father of the child died before the Act received Royal Assent. In respect of new subsections 28(5A) and (5B) it removes the requirement that the man consented in writing (and did not withdraw his consent) to the use of his sperm after his death or (as the case may be) to the placing in the woman of an embryo created using his sperm before his death, and to being treated for the purpose mentioned in subsection (5I) as the

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father of any resulting child. In respect of new subsections 28(5C) and (5D) it removes the requirement that the man consented in writing (and did not withdraw his consent) to the placing in the woman of the embryo after his death, and to being treated for the purpose mentioned in subsection (5I) as the father of any resulting child.

Section 4: Short Title, Commencement and Extent

22. *Subsection (1)* of this section gives the short title of the Act.
23. *Subsection (2)* provides that the Act will come into force on such day as the Secretary of State for Health may be order appoint. Under *subsection (3)* such an order will be made by statutory instrument and may make such transitory, transitional or saving provision as the Secretary of State considers appropriate.
24. *Subsection (4)* provides that any amendments made by the Schedule to an enactment have the same extent as the enactment amended. Subject to this, by *subsection (5)*, the Act extends to England and Wales, Scotland and Northern Ireland.

Schedule

25. Paragraph 1 of the Schedule to the Act inserts a new subsection (4A) after section 9(4) of the Births and Deaths Registration Act 1953 (“the 1953 Act”). This new section enables a person who makes a request under new section 10ZA of that Act to include that request in a declaration under section 10(1) of that Act. Where this happens, the documents required by section 10ZA to be produced are to be produced to the officer in whose presence the declaration is made and will be sent by him with the declaration to the registrar.
26. **Paragraph 2** of the Schedule makes a consequential amendment to section 10(1) of the 1953 Act.
27. **Paragraph 3** inserts a new section 10ZA after section 10 of the 1953 Act to allow the registrar to enter in the register as the father of a child the name of a man who is to be treated for that purpose as the father of the child by virtue of the new section 28(5A), (5B), (5C) or (5D) of the 1990 Act. Before the entry can be made the mother must produce to the registrar the relevant documents set out in new section 10ZA(3). In the case of the death or inability of the mother, the relevant documents may be produced by another person who is a qualified informant, for example, a person who was present at the birth. The relevant documents include the written election and the written consent mentioned in the new section 28(5A), (5B), (5C) or (5D) and a certificate of a registered medical practitioner as to the medical facts concerned.
28. **Paragraph 4** of the Schedule inserts a new section 10A(1)(ff) into the 1953 Act. This provides for re-registration where no person has been registered as the father of the child. The effect of this is that the registrar shall re-register the birth so as to show a person as the father in the case of a man who is to be treated as the father of the child by virtue of the new section 28(5A), (5B), (5C) or (5D) of the 1990 Act, at the request of the mother, or a qualified informant in the case of her death or inability, and on production of the relevant documents (see paragraph 27 above).
29. **Paragraph 5** of the Schedule makes a consequential amendment to section 10A(2) of the 1953 Act.
30. **Paragraphs 6 and 7** insert equivalent provisions to those mentioned in paragraphs 26 and 27 above into Scottish legislation.
31. **Paragraphs 8, 9 and 10** insert equivalent provisions to those mentioned in paragraphs 26 and 27 above in Northern Ireland legislation.

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32. Paragraphs 11 and 12 insert a minor consequential amendment in section 15(3)(a) of the Adoption (Scotland) Act 1978 and the Adoption (Northern Ireland) Order 1987 respectively.
33. Paragraphs 13, 14, 15, 16 and 17 make necessary minor consequential amendments to the 1990 Act.
34. Paragraph 18 makes a necessary minor amendment to the Adoption and Children Act 2002.

HANSARD REFERENCES

Stage	Date	Hansard Reference
House of Commons		
Introduction	11 December 2002	Vol. 396, Col 286W
Second Reading	28 March 2003	Vol. 402, Col 602-12
Committee	7 May 2003	Hansard Standing Committee E
Report & Third Reading	13 June 2003	Vol. 406, Col 990-97
House of Lords		
First Reading	16 June 2003	Vol. 649, Col 527
Second Reading	4 July 2003	Vol. 650, Col 1148-63
Committee	10 September 2003	Vol. 651, Col 300
Third Reading	18 September 2003	Vol 652, Col 1139

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