

HUMAN FERTILISATION AND EMBRYOLOGY (DECEASED FATHERS) ACT 2003

EXPLANATORY NOTES

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

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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 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 disappling 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

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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 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

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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.
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.