Case No: ZC15P00936

Neutral Citation Number: [2016] EWHC 2643 (Fam)

IN THE FAMILY COURT
Siting at Canterbury

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2016

Before:

MRS JUSTICE THEIS DBE

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Between:

	C and D	**Applicants**
	- and -	
	E and F	**1st and 2nd Respondents**
	- and -	
	A and B (by their Guardian)	**3rd and 4th Respondents**

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Ms Barbara Connolly QC & Mr Colin Rogerson (instructed by **Dawson Cornwell**) for the **Applicants**

Mr Richard Jones (instructed by **Wedlake Bell**) for the **1st and 2nd Respondents**
(Both Counsel and Solicitor Acted Pro Bono)

Ms Deirdre Fottrell QC (instructed by **Goodman Ray**) for the **3rd and 4th Respondents**

Hearing date: 29 September 2016

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Judgment**Mrs Justice Theis DBE :**

Introduction:

1. I am giving this short judgment to explain why the applications for parental orders cannot be determined today.

2. Both the applicants, C and D, are the biological parents of twins, A and B, born in 2015. The children have been in their care since the day following their birth.

3. The respondents, E and F, are the surrogate mother and her husband.

4. The parties entered into a consensual altruistic surrogacy arrangement in this jurisdiction.

5. Embryos created using the gametes of both C and D were transferred to E, who carried A and B to birth.

6. The children have had no contact with the respondents, E and F, they have made it clear they seek to have no active involvement in the children's lives.

7. At the recent hearing there was no issue that the court should make a child arrangements order, providing for the children to live with the applicants, C and D. This gave the applicants parental responsibility and orders were made that prevented the respondents being able to exercise any parental responsibility in relation to the children.

8. Save in one respect, all the relevant criteria for the making of a parental order under section 54 Human Fertilisation and Embryology Act 2008 (HFEA) are met. The one that is not relates to the respondents consent. Section 54 (6) provides that the court must be satisfied the respondents have *'freely, and with full understanding of what is involved, agreed unconditionally to the making of the [parental] order'*. What is perhaps so unusual about this case is, as set out above, the respondents wish to take no part in the children's lives. Their rationale for refusing their consent is due to their own feelings of injustice, rather than what is in the children's best interests.

9. Without the respondent's consent the application for a parental order comes to a juddering halt, to the very great distress of the applicants. The result is that these children are left in a legal limbo, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives.

10. The consequences for the children of the parental orders not being made are as follows:

    (1) They remain living with the applicants, who are their biological and psychological parents, but not their legal parents. The child arrangements order, which gives the applicants parental responsibility, lasts until they are 18 years old.

    (2) The respondents, who wish to play no part in the children's lives, remain the children's legal parents throughout their lives by virtue of ss 33 and 35 HFEA.

11. Even though the children's lifelong welfare needs require a parental order to be made, which would secure their legal relationship with the applicants in a lifelong way and extinguish the respondents legal status with the children, under the provisions of s 54 (6) HFEA 2008 if the respondent's consent is not forthcoming the court cannot make

a parental order.

12. The Law Commission has recently announced that surrogacy may be included in their next programme of law reform and have invited responses as to whether this should be an area that is included.

13. The applicants seek to adjourn their application for a parental order in the hope that the respondents may change their mind, or that there may be some change in the current statutory regime governing parental orders.

14. None of the parties took issue with the application being adjourned. They submitted a joint document addressing this issue. Whilst they recognise that it is generally preferable to bring a resolution to proceedings, these are quite exceptional circumstances. In *Re Z (No 2) [2016] EWHC 1191* the President of the Family Division adjourned the father's application for a parental order generally with liberty to restore and directed that any future proceedings should be reserved to the President of the Family Division *(Re Z (No 2) ibid [20])*. This was in the context of proceedings for a parental order in relation to Z, who is the biological son of the applicant father, carried to birth by a surrogate mother. The President determined that section 54 provides such an order can only be made on the application of 'two people'. He subsequently declared that sections 54 (1) and (2) HFEA are incompatible with the rights of the applicant and Z under article 14 ECHR taken in conjunction with Article 8 *'insofar as they prevent the Applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple'.*

15. In the very unusual circumstances of this case, I am prepared to accede to the request for the applications for a parental order to be adjourned generally, with liberty to restore before me, if available. To do otherwise may prejudice the applicant's ability to commence a fresh application for a parental order to secure their legal status with the children in the future.

Relevant background

16. The applicants were unable to have children due to medical reasons and decided to embark on a surrogacy arrangement. They were put in touch with the respondents through a non-profit organisation in this jurisdiction that puts intended parents in touch with surrogates. The arrangement with this organisation allow only for the surrogate to select the intended parent they might be willing to act for from their profile. The applicants were contacted by E. She had been a surrogate before which had been a positive experience for her, which she hoped to replicate in an arrangement with the applicants.

17. The applicants were delighted to have been selected by E and within the recommended three month 'getting to know' period it was agreed E should have two sessions with an obstetrician who had had some previous involvement with her. C and D attended one appointment with her, and F attended the second. The parties then decided to proceed with a written surrogacy arrangement and signed their agreement 3 months after they first met.

18. E was age 51 at the time the embryo transfer took place at a fertility clinic operating in this jurisdiction. The parties had all had the mandatory 'implications' counselling provided by the clinic before the transfer took place.

19. Unfortunately the relationship between the applicants and respondents broke down.

It is not necessary for the court to investigate or determine the reasons for that change, save that the catalyst appears to have been an appointment around the 12 week scan when the consultant obstetrician expressed very real concerns about the health of E if the pregnancy continued. Further specialist advice was sought and the pregnancy did continue. E considers the applicants did not show sufficient concern for her wellbeing during this period. The applicants acknowledge in their statement the situation could have been handled better by them. Regrettably the difficulties continued, there was limited contact between them although E periodically updated C and D about the progress of the pregnancy.

20. The children were born early; the applicants were not at the hospital at the time and on arrival encountered difficulties in them gaining access to the children, who were in the neonatal intensive care unit. They were able go in the following day, but were, understandably, distressed by the circumstances.

21. Unfortunately relations between the parties did not improve, although there remained some communication between them after the birth. The applicants continued to send E photos of the children until early in 2016, when she stated she did not want to receive anything further.

22. The applications for parental orders were made in mid-2016. There is no dispute between the parties that all of the relevant criteria are met, save for the issue of the respondents consent. Mediation to help resolve the issue of consent was, sadly, not successful.

23. Both applicants are the biological parents of the children (s 54 (1) (b)); E was the gestational surrogate (s 54 (1) (a)); the applicants are married (s 54 (2)(a)); they issued their application within 6 months of the children's birth (s54 (3)); the children have had their home with the applicants effectively since birth (s 54 (4) (a)); the applicants domicile of origin is here (s 54 (4)(b)); they are both over 18 years (s 54 (5) and any payments made to the respondents were for expenses reasonably incurred so do not require the authorisation of the court (s 54 (8)).

24. Both children are thriving in the applicants care.

25. In their statement filed in support of their application for parental orders the applicants acknowledge the enormous gift E, with F's support, has given them. They express regret at the breakdown in the relationship between the parties and acknowledge their part in that situation. They describe their utter joy at having a family and hope that E and F will change their minds to enable the children to have the legal status which they say truly reflects where they come from and who they are.

26. The respondents have each filed a statement where they set out their account of the background and their reasons for not agreeing to the court making a parental order. Their reasons include highlighting how E felt so unsupported when the relationship between the parties broke down, to increase awareness and emphasise the need for intended parents and surrogates to work co-operatively and to support and show compassion to the surrogate. F feels as he agreed to support E in this arrangement, he should support her decision not to agree to the making of a parental order. He also feels by not agreeing it ensures what has happened is not forgotten. Both respondents have said in their statements they would not object to an adoption order, as F says he would not want the children's lives to be left in limbo.

27. The parental order reporter has filed an extraordinarily perceptive report. In her well

structured document she has carefully analysed the difficult issues in this case. She recognises the problems there have been in the relationship between the parties, the emotional journey the applicants have undertaken to become parents due to the cruel circumstances of the medical diagnosis which led them towards the surrogacy arrangement with the respondents. In her analysis, whilst understanding the initial mutual enthusiasm of the parties, she considered they did not really know each other before embarking on this arrangement. This, she considered, became increasingly obvious when difficulties emerged.

28. Whilst at the early stages the parental order reporter considered there was some initial hope that agreement to the applications may be reached the respondents statements were resolute in their refusal to agree to the parental order. In her view she considers E's opposition to the parental orders is to demonstrate and have recognised her sense of grievance. Whilst the parental order reporter recognises E's position she hopes E will be able to reflect on this, due to the life-long consequences for the children.

Discussion

29. A parental order was devised specifically for a surrogacy arrangement, recognising the biological connection of the applicants as intended parents of the child. Whilst the respondents have indicated they would not object to an adoption order being made that does not reflect the reality, these children are the biological children of the applicants. An adoption order treats the children as if they were the children of the applicants, which they already are.

30. This issue arose in *AB v CD* [2015] EWFC 12 where I set out the differences between the two orders as follows at [70]:

> *'(3) ...section 67 (1) ACA 2002 which provides 'An adopted person is to be treated in law as if born as the child of the adopters or adopter.' This is what demarks the difference between the two orders. Adoption orders create a presumption in law that the child is treated as if the biological child of the adopters. A parental order does not require that presumption to be made. Both orders are transformative, but a parental order proceeds on the assumption one of the applicants is the biological parent. That is one of the key criteria in s 54 HFEA. It doesn't change the child's lineage as an adoption order does; a parental order creates a legal parentage and removes the legal parentage of the birth family under the provisions of the HFEA 2008. Unlike adoption there is already a biological link with the applicants before the parental order application is made. Its purpose is to create legal parentage around an already concluded lineage connection.*
>
> *(4) From the point of view of the child the orders are different. An adopted child is seen to have had a family created for it, whereas in a surrogacy arrangement the child's conception and birth has been commissioned by the parents, the child has a biological connection and the same identity as one of the parents. The latter arrangement is more congruent with a parental order than an adoption order.*
>
> *(5) These differences are important welfare considerations from the child's perspective. These are the reality of the identity issues children will need to resolve. In surrogacy situations the court by making a parental order settles the identity*

issue and does not leave other fictions to be resolved, which could be the case if an adoption order was made in these situations.

31. As has been referred to in a number of cases adoption orders in these circumstances is inappropriate as, like the applicants in this case, they would be seeking to adopt their own children (see *In Re A* [2015] EWHC 2602 (Fam) [71]).

Conclusion

32. E powerfully describes in her statement what drew her to becoming a surrogate mother. The court can only express the hope that she will be able to rediscover what led her to undertake such a selfless role and see the situation from the view point of these young children. From the perspective of these children's lifelong emotional and psychological welfare parental orders are the only orders that accurately and properly reflect the children's identity as surrogate born children.