Neutral Citation Number: [2011] EWHC 1738 (Fam)

Case No: FD10P02154

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2011

Before:

MRS JUSTICE THEIS DBE

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Between:

A	**1st Applicant**
- and -	
A	**2nd Applicant**
-and-	
P	**1st Respondent**
-and-	
P	**2nd Respondent**
-and-	
B	**3rd Respondent**

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Ms Laura Moys (instructed by **Young and Lee Solicitors**) for the **1st and 2nd Applicant**
Ms Deirdre Fottrell (instructed by **Mullinger Banks Solicitors**) for the **3rd Respondent**

Hearing dates: 7th June 2011

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Judgment

This judgment is being handed down in private on Friday 8th July 2011. It consists of 10 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Theis DBE:

1. Although the circumstances that have arisen in this case are extremely rare, they bring into sharp focus again, the difficulties that can arise in international surrogacy arrangements. I have therefore given permission for this anonymised judgment to be reported.

2. The application before me was made by a married couple, Mr and Mrs A, for a parental order relating to a little boy B who was born on 12th April 2010. The application was made pursuant to section 54 of the Human Fertilisation and Embryology Act 2008 ("HFEA 2008").

3. B was born in India. There was in place a surrogacy agreement between Mr and Mrs A and a clinic in India which included provision for the payments being made to the surrogate mother. The agreement was lawful in the jurisdiction where it was made. It involved payments to the surrogate mother which are, more likely than not, to be more than expenses reasonably incurred and, consequently, invalid in this jurisdiction unless authorised by the court.

4. B is the biological child of Mr A, there is uncertainty as to whether or not Mrs A is biologically related to him. The evidence from the consultant gynaecologist at the clinic confirmed that 5 embryos were transferred the surrogate mother, 2 were formed from Mrs A's oocytes and 3 from donor oocytes. All oocytes were fertilised with Mr A's semen.

5. B was placed with Mr and Mrs A after his birth, initially in India and then in this jurisdiction having obtained a British passport.

6. Mr and Mrs A issued their application for a parental order on 8th July 2010.

7. Tragically, Mr A was diagnosed with liver cancer and died on 19th December 2010.

8. Following directions having been made the matter was listed before me on 12th May 2011. I had the benefit of a full report from the Parental Order Reporter appointed by the court. I adjourned that hearing until 7th June to enable (i) further evidence to be obtained regarding the payments made and the surrogacy agreement and (ii) for B to be joined as a party to assist the court on the legal issues raised following the death of Mr A.

9. The matter came back before me on 7th June 2011 when I heard detailed submissions on the law from both Ms Moys, on behalf of Mrs A and Mr A's estate (the latter instruction is via Mrs A as the sole executrix of Mr A's estate) and Ms Fottrell on behalf of B. They both submit the court should make a parental order. I directed counsel to file and serve a written document setting out the other forms of order that would be available to secure B's position. That document was filed on the 10th June.

10. Does the cause of action survive the death of one of the joint applicants after the making of the application but prior to the making of the order? There is no definition of "applicant" in either the HFEA 2008 or the relevant rules. The Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) provides

    'Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, is estate. Provided that this subsection shall not apply to causes of action for defamation…'

11. In *D (J) v D(S) [1973] 1 All ER 349* the court was concerned with a summons under s 17 of the Matrimonial Causes Act 1965 for a variation of the post nuptial settlement in respect of property. The court determined the husband's death prior to the hearing

extinguished his claim. This was mainly due to the fact that one of the relevant factors the court had to take into account in reaching its decision involved an examination of the relative needs of the parties at the time of the hearing. That was clearly not possible where one of the parties had died.

12. The application I am concerned with can be distinguished. An application for a parental order is essentially declaratory in nature and confers a fundamental status on an applicant and on the child, who is the subject matter of the application. The relevant welfare considerations all relate to the child. Therefore, I consider the court does, as a matter of law, have jurisdiction to consider the application following the death of Mr A.

13. On the evidence I have before me I am satisfied that the following requirements under section 54 HFEA 2008 are met:

    (1) The application was made by two people "the applicants" (s 54 (1))
    (2) The child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo (s 54(1)(a))
    (3) The gametes of at least one of the applicants were used to bring about the creation of the embryo (s 54(1)(b))
    (4) The applicants were married (s 54(2)(a)
    (5) The application was made within 6 months of B's birth (s 54 (3))
    (6) The mother is domiciled in the United Kingdom (s 54 (4) (b))
    (7) The surrogate mother and her husband have unconditionally agreed to the making of the parental order (s54 (6))

14. There are three further matters that the court must be satisfied about. They are:

    (1) s 54 (4) (a) that at the time of the application and the making of the order the child's home is with the applicants.
    (2) s 54 (5) that at the time of the making of the order both the applicants have attained the age of 18 years.
    (3) Whether the court should exercise its discretion and give retrospective approval to the sums paid which would otherwise have contravened s 54(8)

15. I shall deal with (1) and (2) together. The relevant parts of s 54 (4) and (5) provide

    S 54 (4) At the time of the application and the making of the order
    (a)The child's home must be with the applicants....

    S 54 (5) At the time of the making of the order both the applicants must have obtained the age of 18.

16. Ms Moys submits that the court must consider whether it is possible to purposively construct the relevant provisions to allow for the common intention of the applicants to be met and for an order to be made which is clearly in the best interests of the child. Pursuant to *Human Fertilisation and Embryology Act 2008 (Parental Orders) (Consequential, Transitional and Saving Provision) Order 2010* s1 Adoption and Children Act 2002 ("ACA 2002") is imported into s 54 HFEA. In *Re L (Commercial Surrogacy) [2011] 1 FLR 1423* Hedley J emphasised that the consequence of that development is that *'welfare is no longer merely the Court's first consideration but becomes its paramount consideration'* (para 9).

17. The key question is whether the word 'applicants' in s 54 can be construed in this case so as to require two people to make the application but not require that there be two living applicants at the time of the making of the order.

18. Under s 54(1) the discretionary nature of the Court's task is set out, it states that the court *'may make an order'* but that is linked to the mandatory conditions set out in the remainder of s54.

19. In considering whether to construct the statute in the way suggested Ms Moys submits the court must have regard to the purpose of the relevant provisions. The clear intention behind s 54 is to avoid circumstances where a single person could apply for a parental order or enter into a surrogacy agreement as the commissioning parent or for orders to be made in favour of applicants who had not attained the age of 18 years. Counsel have been unable to find anything in the legislation, or during the consideration of the Bill by Parliament, where Parliament contemplated a situation where one or other of the commissioning parents died between the making of the application and the making of the order.

20. It is submitted some guidance can be obtained from analogous cases under other legislation. Where it remains in a child's interests to do so an adoption order may be made in favour of both applicants, even where the applicants have separated. In *Re WM (Adoption; Non-Patrial) [1997] 1 FLR 132* Johnson J in considering whether such an order could be made the court took into account the following: (a) the advantage to the child of becoming a child of the family from an emotional and social perspective, (b) the financial advantage to the child under the Matrimonial Causes Act 1973 (c) the protection of the child's inheritance rights under the Inheritance (Provision for Family and Dependants) Act 1975.

21. In applying the analysis that has been used in analogous cases to this case it is submitted by Ms Fottrell, on behalf of B, the following factors can be taken into account:

    (i) That it was the common intention of the applicants as the commissioning parents and the surrogate parents that the child should be the child of both applicants.
    (ii) That the child is the biological child of the deceased applicant.
    (iii) That considerable emotional and social advantages will follow for the child if a parental order is made which reflects the factual circumstances in which he will grow up; that he was the child of his parents as a matter fact and as a matter of law.

22. Both Ms Moys and Ms Fottrell submit the provisions of the Human Rights Act 1998 ("HRA 1998") are relevant. Ms Fottrell puts it in her skeleton argument in the following way:

    (i) The court must read all primary and secondary legislation so as to give effect to the provisions of the Human Rights Act 1998.
    (ii) The effect of s 3 HRA is that when considering the interpretation of legislation the court must have regard to not just the intention of Parliament but it should seek to adopt any possible construction which is compatible with and upholds

convention rights. (*R v A [2001] UKHL 25 para 44; Ghaidan v Godin-Mendoza [2004] UKHL 30 para 41)*
(iii) Article 8 includes a positive obligation which requires the State to ensure that de facto relationships are recognised and protected by law (*Marckx v Belgium 2 EHRR 330 para 31*)
(iv) Article 8 requires the court to provide protection of the rights of children which are real and effective and not theoretical and illusory.

23. In this case, it is submitted, the Court may read into s 54(4) and (5) an interpretation which would allow a parental order to be made in favour of both applicants. In making such an order the court should have regard to the public policy constraints which may be summarised as follows:

(i) That Parliament intended that surrogacy arrangements can only be made by persons in 'an enduring relationship'.
(ii) That it did not intend that persons who were single could be commissioning parents.
(iii) It cannot be said to be the intention of Parliament that where a commissioning parent dies at such a late stage of the process of a parental order application that the child should be denied the legal and social benefits which flow from having his relationship with both parents recognised by law.
(iv) Each case must be decided on its facts. In this case (as in the case of *WM ibid*) the court could not be said to be going behind the purpose of the legislation or create a precedent whereby single applicants could defeat the intention behind the legislation or that applicants under 18 years of age could seek parental orders.

24. The primary aim of s 54 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants. The effect of the order is that the child is treated as though born to the applicants. It has clear implications as regard the right to respect for family life under Article 8. Family life exists in this case as the child has lived with both Mr and Mrs A. The child is biologically related to Mr A and perhaps Mrs A. The effect of not making an order will be an interference with that family life in that the factual relationship will not be recognised by law. The court's responsibility to *'guarantee not rights that are theoretical and illusory but rights that are practical and effective' Marckx v Belgium (ibid) para 31*

25. A further relevant consideration is that family life is not only a matter of fact and degree but also the significance of legal relationships. In this case if an order is not made there is no legal connection between the child and his deceased biological father. Protection of the right to family life pre-supposes the factual existence of family life (*Pini v Romania [2005] 2 FLR 596 at para 143)*. Once that is established (and it is in this case) the State must facilitate and protect that right.

26. The consequences of not making an order in this case are as follows:

(i) There is no legal relationship between the child and his biological father who is also the commissioning father
(ii) The child is denied the social and emotional benefits of recognition of that relationship

(iii) The child may be financially disadvantaged if he is not recognised legally as the child of his father (in terms of inheritance)
(iv) The child does not have a legal reality which matches the day to day reality
(v) The child is further disadvantaged by the death of his biological father

27. Article 8 of the United Nations Convention of the Rights of the Child ('UNCRC') requires the State to protect the child's right to identity, it provides as follows

> *'1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without lawful interference.*
> *2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protections, with a view to re-establishing speedily his or her identity.'*

28. The concept of identity includes the legal recognition of relationships between children and parents. In *ZH (Tanzania) v Secretary of State for the Home Department UKSC 2011 4* Baroness Hale considered that the courts in this jurisdiction and decision makers had to have regard to the key principles of the UNCRC, both in respect of Article 8 of the ECHR and in its application to decisions by authorities in this jurisdiction (paras 22 – 25). If the consequences of a purposive construction of s 54(4) is that the child's identity with his biological father is preserved and the child's identity is linked to both Mr and Mrs A the court may consider itself bound to arrive at such a conclusion on the combined reading of Article 8 ECHR and Article 8 of the UNCRC.

29. In their joint written submissions Ms Moys and Ms Fotrell addressed what alternative orders would be available instead of a parental order. Their conclusion was that no other order, or combination of orders, would have the same transformative legal effect as a parental order.

30. Their joint submissions can be summarised as follows:

(1) By operation of s 33, 25, 38 and 48 HFEA 2008 if no further order was made by the court concerning this child his mother and father, as a matter of English law, would be the surrogate mother and her husband 'for all purposes' (s 48(1)).

(2) The consequences of a parental order in favour of both Mr and Mrs A on the status of the child is as follows

(i) The child becomes the legal child of both applicants;
(ii) The parental responsibility of the surrogate mother and her husband is extinguished;
(iii) The child is registered on the parental order register and the child is issued with a birth certificate;
(iv) It has a transformative effect on the child's legal status in that he becomes the legal child of both applicants;
(v) Each of the applicants has the same legal status is respect of the child.

(3) A declaration of parentage under s 55A Family Law Act 1986 ('FLA 1986') would be available. The courts have made declarations of parentage in a case in which the legal parentage differs from the biological parentage of a child e.g. where the child was subsequently adopted but wished to have acknowledgement of their 'natural' or biological parentage *M v W (declaration of parentage) [2007] 2 FLR 270.* They submit there is a fundamental difference between a declaration as to legal status and a declaration that a person is the 'natural parent' of a child. In this case a declaration of parentage would not assist in establishing that Mr A was the child's legal parent. By its nature a declaration can only declare or state the current legal position, it can't transform the legal position. Therefore a declaration as to the legal position would only serve to confirm that the surrogate father remains the legal father of the child. In *M v W* at paragraph 18 Hogg J stated *"…The declaration [of natural parentage] sought would not alter or affect the validity of the adoption order made in May 1965. That is a forever order by which the petitioner became a legal member of the adoptive family and the adopters his legal parents."*

(4) A declaration of parentage in this case would be insufficient in this case for the following reasons:

(i) If no further orders were made the surrogate's husband would continue to be recognised in law as the child's father, notwithstanding the fact that the surrogate has positively relinquished those rights and the child's legal status would therefore bear no relation to the everyday reality of the situation;
(ii) If Mrs A sought to adopt the child then, whilst the surrogates' legal status would be extinguished by virtue of the adoption order, neither the adoption nor declaratory relief would enable B to become the legal child of Mr A.

(5) The key issue is the legal status of the child vis a vis Mr and Mrs A and whether that can and should be recognised by law. Following the positive obligation identified by *Marck v Belgium* the court should seek to ensure that the child is in an equivalent relationship with each parent. The court is therefore seeking to protect the rights to respect to family life of the unit as well as each of the individual members. The rights of the child and his interests have

> '…primacy of importance…This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. Where the best interest of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.' (*ZH (Tanzania) v Secretary of State for the Home Department (ibid) per Lord Kerr SCJ para 46).*

Only a parental order would have the effect of *transforming* the legal status of the child such that both commissioning parents are recognised as being the legal parents of the child. The effect of a parental order is the same as an adoption order.

(6) Does an adoption order to Mrs A provide a remedy to the alleged breach of the Article 8 rights of the child which would arise is a parental order is not made? The combined effect of s 46 and 67 of the Adoption and Children Act 2002 is that an adoption order, like a parental order, has a transformative effect. They are the only orders that have that effect in respect of both parents, but both orders are not available as owing to Mr A's death a joint adoption application is now not possible.

(7) The practical impediments to the making of an adoption order in favour of Mrs A are as follows:

(i) Further consents from the surrogate parents would be necessary (s19 ACA 2002) or their consent would need to be dispensed with (s 20 ACA 2002).
(ii) An order from the High Court would be required to authorise the placement as the child has not been placed for adoption by an adoption agency.
(iii) If consents were obtained the mother would have to apply to adopt the child as a step-parent pursuant to s 51(2) ACA 2002 (*'An adoption order may be made on the application of one person who has attained the age of 21 years if the court is satisfied that the person is the partner of a parent of the person to be adopted')*
(iv) If the mother was to be make that application, the court would first need to make a declaration of parentage under s 55A FLA 1986 and the Registrar permit the birth certificate to be changed in order to facilitate a step-parent adoption.
(vi) This has a distorting effect because the Mr A may be recognised on the birth certificate but the Mrs A (who may also be the child's genetic parent) is an adoptive parent.
(vii) Where one of the adopters is the step parent the register is still marked 'adopted' and the tracing of the child's natural parents is still done in the same manner as for any other adopted child.
(viii) It is not clear that the adoption register certificate can include the father if the s 55A FLA 1986 declaration is made and the birth certificate is altered, as he cannot participate in the adoption process.

(8) This case is fundamentally about identity rights and recognition of a relationship which is central to the child, but cannot be developed by any other route.

(9) In the absence of a parental order a legal relationship between Mrs A and B could be created by way of a residence order or a special guardianship order. However these orders would not negate the legal relationship between the child and the surrogate mother and father under English law and only last during the child's minority.

31. Having considered the detailed written and oral submissions I have reached the conclusion I am able to interpret s54(4) (a) and 54(5) in such a way that allows the court to be satisfied that the relevant requirements are met in this case for the following reasons:

(1) For the reasons outlined above no other order or combination of orders will recognise B's status with both Mr and Mrs A equally.
(2) Article 8 is engaged and any interference with those rights must be proportionate and justified.
(3) In the particular circumstances of this case the interference cannot be justified as no other order can give recognition to B's status with both Mr and Mrs A in the same transformative way as a parental order can.
(4) To interpret s 54(4) (a) and 54(5) in the way submitted will not offend against the clear purpose or policy behind the requirements listed in s 54. It will not pave the way for single commissioning parents to apply for a parental order or orders being made in favour of those under the age of 18 years.
(5) Mr and Mrs A were lawfully entitled to apply for a parental order when they made their application.
(6) Such an interpretation will protect the identity of B and the family unit in accordance with Article 8 UNCRC.
(7) It is clearly in B's interests that a parental order is made to secure his legal status with both Mr and Mrs A.
(8) B's home was with Mr and Mrs A from the time of his birth up until the time of Mr A's death, thereafter he has remained in the care of Mrs A. But for Mr A's death B would have remained in the care of them both.
(9) Mrs A is now 36 years and Mr A would have been 34 years.

32. I now turn to the question of payments. The total payments made directly to the surrogate mother were about £4,500. This sum is made up of a combination of payments for loss of earnings, an after delivery charge and other relatively modest payments. In addition, various payments were made to the clinic in accordance with the agreement which included the cost of accommodation, food and care at the clinic for the surrogate mother who stayed at the clinic during her pregnancy.

33. On the information I have it is likely that the payments were more than expenses reasonably incurred. For example, I was told that it was understood the loss of earnings figure was based on two years loss of earnings. There is no evidence in this case of Mr and Mrs A acting in anything other than the utmost good faith, or that the level of payments or the circumstances of the case could be said to have overborne the will of the surrogate mother. In those circumstances I authorise (pursuant to s 54(8)) the payments that were made to the surrogate mother in accordance with the agreement.

Welfare

34. Having been satisfied that the requirements of s 54 are met the court then turns to the welfare considerations. As was set out in *Re L* B's welfare is the courts paramount consideration in accordance with s 1 ACA 2002.
35. The Parental Order Reporter visited B in his home. She observed the child as happy and contented and that he has developed a secure relationship with Mrs A. B is a much loved child who has bonded well with both his maternal and paternal extended family. Her written report recommends a parental order being made.

36. The evidence clearly demonstrates that B's welfare needs are met by the making of a parental order, which is the order I shall make.

37. Although the circumstances that arose is this case are rare I take this opportunity, as Hedley J has done before in *Re X & Y (Foreign Surrogacy)* [2009] 1 FLR 733 and *Re IJ (A Child) [2011] EWHC 921*, to emphasise the legal difficulties that overseas surrogacy agreements can create, the need to take advice from those skilled in this area as to the problems that may arise, how they can be addressed and the need to consider applying for a parental order to secure the legal status of the child.