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NEUTRAL CITATION NUMBER: 2014 EWHC 2121(Fam)
Case No. SE11P00839

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
LEEDS DISTRICT REGISTRY

Leeds Civil Hearing Centre
Coverdale House
13-15 East Parade
Leeds
LS1 2BH

Date: Wednesday, 19th March 2014

Before:

THE HONOURABLE MR JUSTICE MOYLAN

In the matter of:

Re: D (A Child)

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Counsel for the Applicant: MISS HEATON QC
The First Respondent appeared In Person
Counsel for the Local Authority: MR JACKSON
Counsel for the Guardian: MR SHELTON

JUDGMENT

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child and members of his family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is complied with strictly. Failure to do so will be a contempt of court.

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1.

This case provides a clear example of the difficulties created as a result of surrogacy arrangements being subject to varying degrees of domestic regulation, from significant regulation to none at all, and also because of the existence of significant differences in the effect of such domestic regulation. There is, in my view, a compelling need for a uniform system of regulation to be created by an international instrument in order to make available an appropriate structure in respect of what can only be described as the surrogacy market.

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2.

These proceedings concern a young boy called D who was born in 2010. He was born in the Republic of Georgia as a result of a commercial surrogacy arrangement, using eggs from a donor and the First Respondent’s sperm, which took place at and through a clinic in Georgia.

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The parties to the proceedings are: the Applicant, represented at this hearing by Miss Heaton QC; the First Respondent, who has previously been represented but who has appeared in person at this hearing; a local authority, represented by Mr Jackson and; the child, through his guardian, represented by Mr Shelton.

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4.

The proceedings have been continuing for a very substantial period of time. This has been caused in part by the need for enquiries to be made in Georgia. It is, therefore, very much to the parties’ credit that they have agreed the orders which should be made concerning the child. It is considerably to the benefit of a child if their parents can work together in a reasonably harmonious and constructive manner. This may well require parents to put their own differences or disputes to one side but it is never in a child’s interest to become involved in such differences or disputes. I am entirely satisfied that the provisions agreed by the parties in this case are consistent with and will promote D’s welfare. Indeed, those provisions are in accordance with the preliminary view I had formed on reading the papers as to what orders would fulfil the obligation imposed on the court by section 1 of the Children Act 1989, namely that the child’s welfare should be the court’s paramount consideration.

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Issue and Legal Framework

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5.

The issue I have to decide in this judgment is whether the surrogate mother was married at the relevant time. This is necessary for the purposes of deciding whether, as a matter of English law, the father is the child’s legal father. As Baroness Hale said in *Re G (Children)* [2006] 2 FLR 629, parenthood can be defined in a number of different ways: genetic parenthood, gestational parenthood and social and psychological parenthood. There is, of course, in addition, legal parenthood.

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There can be no doubt that both the Applicant and the First Respondent are the social and psychological parents of the child, which is why in the rest of this judgment I will

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refer to them as the mother and the father. However, this does not make them at law the parents of the child. The father is also a genetic parent but that too, in the circumstances of this case, does not necessarily make him at law a parent or the father of the child. The mother is not the legal parent of the child.

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7. The legal parental status of the mother and the father is not affected by the fact that both of them are registered as the child's parents on the birth certificate provided by the State of Georgia.

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8. The relevant statutory provisions are contained in Part 2 of the Human Fertilisation and Embryology Act 2008 ("the HFEA 2008"). Pursuant to section 33, D's legal mother is the surrogate mother. This section provides that the woman who is carrying or has carried a child through surrogacy is to be treated as the mother of the child. This applies whether the woman was in the United Kingdom or elsewhere at the time the surrogacy was effected.

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9. By virtue of section 35 of the HFEA 2008 the answer to the question, "Who is the legal father?", depends on whether the surrogate mother was married at the relevant time. Section 35(1) provides:

"If – (a) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage, and;

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,

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then, subject to section 38(2) to (4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)."

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Section 35(2) provides:

"This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1)(a)."

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10. Section 48 of the HFEA 2008 provides that where, by virtue of the provisions of the Act, a person is to be treated as the mother, father or parent of a child,

"that person is to be treated in law as the mother, father or parent (as the case may be) of the child for all purposes".

Section 48(2) provides the converse, namely that where, by virtue of the HFEA 2008, a person is not to be treated as a parent of the child,

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"that person is to be treated in law as not being a parent of the child for any purpose".

Proceedings

A 11. At an early stage in the proceedings Hedley J. made an order requiring service of certain documents on the surrogate mother in Georgia. Further orders have been made for the purposes of seeking to locate the surrogate mother, including by the instruction of an international detective agency. None of these endeavours have proved successful. Accordingly, the whereabouts of the surrogate mother are unknown.

B 12. There is, at least, a question as to whether the details provided by the clinic, which provided the surrogacy arrangements, as to the surrogate mother's identity are correct. A letter sent by the guardian addressed to the surrogate mother, in accordance with the details provided by the clinic, was returned endorsed, "Could not find. There are three (women with the same name as the surrogate mother) in the relevant location and all three claim the letter is not for her".

C 13. Orders have been made that the mother should file a statement from the director of the clinic. Despite saying on occasion that she would co-operate, it is plain that, in fact, the director has refused to do so.

14. The evidence, therefore, which is available to me to determine whether the surrogate mother was married at the relevant time is incomplete. Further, the evidence is not consistent.

D Evidence

E 15. As referred to above, D was born as a result of a commercial surrogacy arrangement in the Republic of Georgia. The surrogacy was effected through a clinic, the director of which is called MK. There was no written contract between the mother and/or the father and the clinic until after D's birth. The mother then entered into a contract with the clinic. This contract does not refer to the surrogate mother's marital status. She is, however, called Mrs. In her written evidence the mother states that she had no significant direct contact with the surrogate mother. She also cannot recall if she was told that the surrogate mother was single or whether she assumed that she was but, "Certainly that was what I understood at the time to be the case".

F 16. When the mother and MK went to the British Embassy in Georgia on 5th January 2011 MK informed the consular official that:

"The surrogate mother is divorced and was divorced before she entered into the surrogacy arrangement. There are a further five surrogate mothers waiting to deliver their babies in February/March all destined for the UK."

G On 30th December 2011 MK sent an e-mail to the mother's solicitors in which she said:

H "As for surrogate mother, yes, she is and was legally married. She is married also now. We have holidays here until January 3rd and then I will send official letter to public registry and obtain the proof that the surrogate mother is and was legally married, also request copy of her marriage certificate."

In an e-mail dated 5th January 2012 MK said:

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“Also one more important issue. Surrogate signed a contract with us claiming she was single. This was declared to the UK Embassy but very recently we became aware that the surrogate was married. I went to the UK Embassy with the mother to declare the surrogacy but I do not think this is problematic because some of our UK citizen surrogate mothers were married but UK law regulates this and none of our former potential parents has any problem because of this. You can check same in UK Embassy.”

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On 20th February 2012 MK said that they had been unable to find the surrogate mother.

17. On 15th October 2012 MK said that the surrogate mother:

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“Was either divorced or single. We do not match married surrogates to UK couple but we cannot provide any proof as we do not have any further link with her and only she can obtain proof of her marital status from public registry.”

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The fact that only the surrogate mother could obtain proof of her marital status from the public registry was subsequently confirmed by the detective agency. In another e-mail of the same date, 15th October 2012, MK said:

“Paperwork was completed and D was granted papers to go to UK. At the time the surrogate mother has declared that she was single. We were later to be informed she had, indeed, been married.”

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And then a bit later:

“I had a declaration (just my team member reminder) that surrogate mother was single when she signed and was given to the Embassy.”

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In answer to the question as to whether she had any more information, MK said nothing more.

18. The mother’s solicitors have made very considerable efforts to obtain clear and further evidence from MK or from elsewhere. They have been unsuccessful. MK has not provided a statement, as requested, clarifying in particular the marital status of the surrogate mother. In addition, although MK refers to there being a contract between the clinic and the surrogate mother and that she would send it, she has never in fact done so. In her written statement addressing this issue the mother says:

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“After the contract had been signed, it was at this point that MK told me that the surrogate mother was, in fact, married. She did not, however, want this known and explained that the Embassy did not want married women to act as surrogates as it caused complications. She suggested that potential surrogates were aware of this and implied that some would lie as to their marital status so as not to be turned down. She did not elaborate on how or when she had discovered that the surrogate mother was, in fact, married and I did not ask.”

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A The mother then recounts how MK informed the Embassy that the surrogate was divorced.

19. In his written evidence, the father says that, when the mother first told him that she was not D's biological mother, she told him that the surrogate mother had been married.

B Submissions

20. Turning to the parties' submissions, the mother submits that the preponderance of the evidence points in favour of the surrogate mother being married at the relevant time. Particular reliance is placed on the e-mail of 30th December 2011, as it was sent to the mother's solicitors.

C 21. The case on behalf of the father is set out in written submissions prepared for an earlier hearing by his then counsel, Mr Bellamy. He submits that MK must be considered an unreliable witness given the differing accounts she has provided and given her unwillingness to co-operate with this court. Having regard to the fragmented and tenuous nature of the evidence, it is submitted on behalf of the father that I cannot, on the balance of probabilities, conclude that the surrogate mother was married.

D 22. The guardian, through Mr Shelton, submits that the evidence is too contradictory and incomplete to enable me to determine that the surrogate mother was married at the relevant time.

Determination

E 23. Turning now to my determination, the evidence in this case, on the issue of whether the surrogate mother was married at the relevant time, is clearly not satisfactory. The only person able to give direct evidence is MK and she has refused to provide a statement. She has said, at different times, that the surrogate mother was single, married and divorced. I do not consider that any greater weight can be given to MK's e-mail of 30th December 2011 than her other statements, which were either also provided to the mother's solicitors or to the consular official at the British Embassy. These were, as I would describe them, equally official statements.

F 24. The mother's evidence is inevitably unclear, based, as it is, on what she was told by MK or the impression she gained from MK.

G 25. In my view, the evidence does not establish that the surrogate mother was married at the relevant time. The evidence is not sufficient to enable me to come to that conclusion on the balance of probabilities. Indeed, in my view there is considerable doubt as to whether the clinic provided accurate details as to the identity of the surrogate mother. It is notable that the clinic has failed to provide its contract with the surrogate mother, although this may be explained by being unwilling to reveal the terms of that contract.

H 26. I propose, very briefly, to outline the orders agreed by the parties. In their position statements the parties were seeking different solutions. Those being addressed were adoption, special guardianship and shared residence. The mother sought either an adoption order or a special guardianship order. The father, in an extremely balanced

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statement, sought a shared residence order. The Local Authority supported the making of a special guardianship order. The guardian did not support the making of either an adoption order or a special guardianship order, having regard in particular to the effect those orders would have on the parties' respective positions as parents. The guardian's recommendation was that both parties should have parental responsibility and that there should be a shared residence order.

27. The parties, through sensible discussions, have agreed on a structure which follows that made by King J in the case of *JP v LP & Ors [2014] EWHC 595 (Fam)*, including that D should remain a ward of court and that there should be a shared residence order. As I said at the beginning of this judgment, I am entirely satisfied that the proposed orders are in D's best interests and, accordingly, at the request of the parties, I make such orders.

[Discussions re order follow]