No. ILI3P00197

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Friday, 14th February 2014

Before:

MRS. JUSTICE THEIS

(**In Private**)

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B E T W E E N:

CC Applicants

- and -

DD Respondents

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MS. R. CABEZA (instructed by **Natalie Gamble Associates**) for the **Applicants.**

MS. M. CAREW (instructed by **CAFCASS Legal**)

THE RESPONDENT not represented and did not appear.

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J U D G M E N T

MRS. JUSTICE THEIS:

Introduction

1 This is an application made by the applicants in relation to a little boy (Q) who is now one year old. This application has resulted in the lawyers and the court having to consider the legal complexities that arise from this application. If nothing else Q will leave his mark long term in the legal textbooks that consider this area of the law.

2 The court has had the considerable benefit of written and oral submissions from advocates with expertise in this field. Ms Cabeza and her instructing solicitor Ms Gamble have been involved in a number of these cases and the written skeleton argument submitted on their behalf has been of great assistance in navigating some of the unchartered waters this case has had to consider. Their analysis of the law has been considered by the Advocate to the Court, Ms Carew. The skeleton argument submitted by her was of the highest standard and the court is extremely grateful for the role she has willingly undertaken.

3 This case highlights once more the legal complexities in this area of the law and the need for those who embark on international surrogacy arrangements to ensure they have expert advice both here and in the jurisdiction where the arrangement is taking place. This international flavour of this case is not unusual: the applicants are of British and French origin, the child was born in the US to a US surrogate mother in an arrangement that involved legal procedures between two US States, the family currently live in France and the proceedings for a parental order are here.

Relevant Background

4 The applicants, Ms C and Mr C, are a British-French married couple who are currently living in France. Ms C was born overseas to British parents who were working on a temporary posting abroad and who subsequently returned to live permanently in England, where they still reside. Ms C was raised in this jurisdiction and lived here until 2006 when she met Mr C, who lived in France.

5 Ms C moved to France to be with Mr C who is unable to leave due to the nature of his business, she has remained living there since. The applicants married in 2011. Ms C continues to return to this jurisdiction on a regular basis and maintains significant connections here, including two properties that she owns.

6 Q is the applicants' first child and was conceived through a surrogacy arrangement entered into under the law of Iowa, where the respondents Mr and Ms D live, and Minnesota, where the surrogacy agency is based and where Q resided temporarily after his birth.

7 The applicants and the respondents formed an exceptionally close bond, such that following unsuccessful initial treatment using a third party egg donor Ms D offered to donate her egg to the applicants which resulted in Q's birth.

8 All legal steps were taken in Minnesota to secure the applicants' status as Q's legal parents. Their US attorney Mr Synder has provided a detailed report setting out the relevant legal framework. This confirms that, in line with normal post-birth procedure in Minnesota, an order was made shortly after Q's birth confirming Mr C as Q's legal father and, with her consent, extinguishing Ms D's legal motherhood. Immediately

afterwards (at the same court hearing) a step parent adoption order was made under Minnesota law securing Ms C's position as Q's legal mother. This enabled the applicants to be recorded as Q's legal parents on his birth certificate which was issued in Iowa. The orders made by the Minnesota court are recognised in other US states (including Iowa) by virtue of the Full Faith and Credit Clause of the US Constitution. I shall return to this aspect of the case later.

9 In considering this application, the court has to be satisfied about two matters: firstly, whether the requirements of s 54 of the Human Fertilisation & Embryology Act 2008 (HFEA 2008) are satisfied and, secondly, whether Q's lifelong welfare needs will be secured by this court making a parental order (s 1 Adoption and Children Act 2002 (ACA 2002)).

10 It is quite clear from the detailed material that I have considered, in particular the statement filed by Ms C and Mr C, this has been a very long and difficult journey for them to fulfil their wish to be able to have a child of their own. That journey has, however, been rewarded with the arrival of Q who it is quite clear has brought them enormous fulfilment and joy.

11 One of the matters that the court will need to consider is the relevance, or not, of the adoption order that was made in Minnesota. In summary, I am quite satisfied on the evidence of this case that not only has there been no contravention of s 83 of the Adoption & Children Act 2002 as it is quite clear that neither the applicant nor the child were habitually resident in this jurisdiction at the time the order was applied for, but also that it is necessary for the court to consider a parental order application to ensure Mr C's position is clear in relation to his status regarding Q in this jurisdiction.

12 So, for those very brief reasons, whilst the adoption made in Minnesota is an important part of the background to this matter it does not, and should not, prevent this court considering the application for the parental order.

Section 54 HFEA 2008

13 Turning to consider s 54 HFEA 2008, briefly in some respects and fuller in others: firstly, the court has to be satisfied that there is a biological connection between one of the applicants and that Q was carried by a woman who was not one of the applicants. The evidence clearly establishes that there is a biological connection between Ms C and Q, and Q was carried by Ms D who carried Q pursuant to a surrogacy arrangement that was entered into in the US. (s 54(1))

14 Initially, Ms D was engaged as a gestational surrogate but when the treatment that was initially undertaken was unsuccessful, she offered to donate her eggs, thereby becoming a traditional surrogate mother. That resulted in a successful pregnancy.

15 The second matter the court has to consider is the status of the applicants' relationship. They are married and so clearly meet that requirement. (s 54 (2))

16 Thirdly, the court has to be satisfied that the application for a parental order was made within six months of Q's birth. The application was issued within the period of six months. (s 54 (3))

17 Fourthly, the court has to consider whether the Q's home was with the applicants at the time they made their application in June 2013 and when the court is considering

making an order. The evidence clearly demonstrates that Q has effectively been in the applicants' care within a matter of hours, if not minutes, after his arrival into this world. His home was clearly with the applicants at the time the application was issued, and is very clearly in their care at the time the court is considering making the order as he is not only present in court as the court is actually considering whether it should make the order but the report from the parental order reporter makes it clear his home remains with the applicants. (s 54 (4)(a))

18 The other aspect of that sub-section is the court has to be satisfied that at least one of the applicants is domiciled in this jurisdiction to enable them to make the application. This application can be determined irrespective of whether there is habitual residence or physical presence in this jurisdiction.

19 The importance of domicile has been highlighted in previous cases, in particular by what McFarlane J (as he then was) said in the case of *Re G(Surrogacy: Foreign Domicile) [2007] EWHC 2814 (Fam)* at paragraph 3 (when he considered the comparable provisions in the HFEA 1990)

> *"The terms of HFEA 1990 s30(3)(b) make it plain that one or both of the commissioning couple must be domiciled in a part of the United Kingdom or in the Channel Islands or the Isle of Man. What renders the case of young M remarkable, and justifies this detailed judgment, is that Mr and Mrs G, the commissioning parents, are Turkish nationals who are domiciled in Turkey. As a result, it is not legally possible for them to achieve the status of M's parents by means of a parental order."*

He stated further, at paragraph 6:

> *"The court has been told, and accepts, that, hitherto, from time to time couples who are domiciled abroad have participated in successful surrogacy arrangements with UK surrogate mothers and have achieved a parental order with respect to the resulting child under HFEA 1990 s30. If that is indeed the case, then such orders must have been made outside the jurisdiction of the court, which, as I have indicated, is confined to applicant parents where one or both is domiciled in the UK, Channel Islands or Isle of Man. It is to be hoped that the publication of this judgment will see an end to such unlawful parental orders being made."*

20 There is no requirement under s 54 that the applicant or that the child should be present in this jurisdiction. The court's jurisdiction to make a parental order rests solely on the requirement in s.54 (4) (b) that at least one of the Applicants has a domicile in a part of the United Kingdom, Channel Islands or the Isle of Man. As noted above, s 54(4)(a) requires the child's home to be with the applicants at the time of the application and the making of the order, but does not specify that the child's or the applicants' home must be in the UK. A parental order is not a Part 1 Order as defined in Chapter I of the Family Law Act 1986 and therefore jurisdiction to make such an order is not governed by that Act.

21 Although a parental order has the effect of conferring parental responsibility on the child's new legal parents, the primary function of the provision is to transfer legal parenthood from the surrogate and her husband to the applicants. Accordingly this provision is primarily concerned with parentage and status and not parental responsibility, consequently it is more like an adoption order than an order made

under s.8 of the Children Act 1989 or a special guardianship order. Therefore, while orders which transfer legal parentage following a surrogacy arrangement are not referred to explicitly in any part of Brussels II revised (Council Regulation (EC) No 2201/2003) such orders must fall within the Article 1(3) of Brussels II revised which explicitly excludes matters related to the establishment of parentage and adoption.

22 It is submitted the key principles relating to domicile are set out in a number of cases (in particular *Barlow Clowes International Ltd (In Liquidation) & Ors v Henwood* [2008] EWCA Civ 577 per Arden LJ at paragraph 8) and can be summarised as follows:

i. a domicile of origin adheres unless the acquisition of a domicile of choice is proved to the required standard (balance of probabilities) by the person asserting such a change;

ii. to acquire a domicile of choice there must be both 'animo et facto' i.e. a person must both reside in a new country and also form a sufficient intention to live permanently or indefinitely in that country;

iii. acquisition of a domicile of choice is not to be lightly inferred; and

iv. important factors which are relevant in considering whether a person has formed the necessary intention are whether they intend to return to live in their country of origin on the happening of a realistically foreseeable contingency, and whether they are resident in a country for a general or limited purpose.

23 I agree with this distilled analysis of the key principles. It has been made clear in a number of cases that long residence in a new country is not of itself sufficient to establish that a person has acquired a domicile of choice there, if they intend to return to their country of origin on the happening of a contingency, which is reasonably foreseeable. See for example; *IRC v Bullock [1976] 1 WLR 1178* where the contingency was the possibility of a spouse dying or eventually agreeing to move to her husband's home country. *Agulian and Anr v Cyganik [2006] EWCA Civ 129* involved a Cypriot-born man who had lived in the UK for 43 years from the age of 19 until his death age 63, but was found by the Court of Appeal to have retained his Cypriot domicile of origin.

24 It is very much a question of fact based on the circumstances of each case. The court needs to consider the broad canvas of evidence in order to establish the intention of the relevant person.

25 In this case reliance is placed on a number of features that, it is submitted, demonstrate Ms C has not given up her domicile of origin here despite her move to live in France. In particular reliance is placed on the following:

(1) Her domicile of origin is in this jurisdiction;

(2) She returned with her parents, who had only temporarily worked abroad, and remained living here for the next 42 years. Her family remain living in the same area in England.

(3) She met Mr C and went to live with him in 2006. She would have preferred to live in England but they were unable to due to Mr C's business.

(4) They plan to live in England as a family once Mr C is able to; either on retirement or having found someone else to take over the business.

(5) Ms C sets out in her statement how she has retained her British identity. It is clear, if Mr C were to die, she would return to live here where the rest of her family is based.

(6) Ms C has taken no steps to acquire French nationality and has no intention to do so.

(7) She retains two properties in this jurisdiction which provide her with a base here from which she can work and see her family.

(8) Q is being raised as a bi-cultural child and the applicants speak to their son only in English to support him being bi-lingual.

(9) The applicants' intention is to send Q to school and/or university in England and, if required, Ms C will return to live here to support this.

26 What the court needs to consider is whether Ms C has formed an intention to reside permanently and indefinitely in France.

27 In the circumstances of this case I do not consider she has. In my judgment she has retained her domicile of origin here and thereby satisfied the requirements of s 54 (4) (b). Her residence in France is for a limited purpose, related to her relationship and subsequent marriage to Mr C whose personal business circumstances tie him to France. Ms C intends to return to live in this jurisdiction on the happening of a number of realistically foreseeable contingencies: upon her husband being able to leave his business, upon his retirement, to support Q's education here or upon her husband's death. As stated in *IRC v Bullock ibid* she has not formed an intention sufficient to *'clothe [her] residence [in France]…with the necessary quality to result in his having adopted a domicile of choice'.*

28 The next requirement is relatively straightforward. I have to be satisfied that both applicants are over 18 years of age. They are respectively 54 and 55 years of age. (s 54 (5))

29 The next matter the court has to consider is whether the respondent surrogate mother and her husband have consented freely, unconditionally and with full understanding to the making of a parental order. In relation to the surrogate mother that consent must be more than six weeks after Q's birth. Within the papers are written consents from both the respondents that clearly fulfil the criteria, and are signed more than six weeks after Q's birth. They satisfy the requirements under s 54 (6) and (7). They are also supported by the wider evidence in this case which clearly establishes that the respondents support the order that is being sought. They have fully participated in the proceedings in Minnesota and have filed an acknowledgement to this application indicating their consent to the order that is being sought.

30 Finally, in relation to the s 54 criteria, there is the question of payments made to the respondents. In total there was a payment of about $35,780.00, as is set out in detail

in the documents, which is about £21,640.00. $19,200.00 relates to compensation rather than expenses, and this is the focus of the court's attention and will require authorisation by the court under s 54(8). There were also a number of payments that are itemised as having been paid to the agency and third parties, of which it is obviously clear that an element of that will include profit. They are commercial organisations that are lawfully allowed to operate in the US.

31 In considering whether to authorise these payments, the court has to consider a number of matters. Whether the sums paid are so disproportionate to reasonable expenses to either overbear the will of the surrogate mother or to exploit her. I am satisfied, bearing in mind the court's knowledge of other payments that have been made in similar cases and also the fact that they were negotiated at arms length through a third party agency, that the sum paid was not so disproportionate to expenses that were incurred. I also have to consider whether the applicants have acted in good faith and whether there has been any suggestion that they have sought to defraud the authorities. I am entirely satisfied in this case on the information that I have seen, that all the evidence points the other way. Both of these applicants have acted entirely with good faith. They have sought advice at all relevant stages and have provided full cooperation with all the relevant authorities, any directions made by the court and in any requests made by the parental order reporter. In the circumstances of this case it is appropriate for the court to exercise its discretion to authorise the payments that have been made. That is the final hurdle that the applicants have to meet in relation to s 54.

32 Before I turn to consider the issue of welfare there are two particular features of this case that should be addressed.

Adoption order made in the US

33 I have set out at paragraph 6 above the steps that were taken in Minnesota to secure the applicants' legal status in relation to Q.

34 In his document Mr Snyder explains the legal framework for commercial surrogacy in Minnesota and Iowa as follows:

> *"State law concerning surrogacy varies widely and generally falls into one of three categories... The third category includes those states that have neither statues nor case law that applies to and/or governs surrogacy. In states that fall into this last category, surrogacy rises or falls on the application of and options available under existing parentage law as it existed before surrogacy became a viable family-building option.... Minnesota and Iowa both fall into the third category mentioned above... Therefore surrogacy arrangements are fashioned under and carried out through other laws regarding parentage that were not necessarily intended to apply to surrogacy. Since the court proceedings were conducted in Minnesota once jurisdiction and venue were established there by virtue of the child's physical presence in that state shortly after the birth, only Minnesota law is relevant...*
>
> *Specifically, three separate chapters of the Minnesota statutes, Minnesota Statues Chapter 257 governing establishment of paternity/maternity, Minnesota Statues Chapter 260C governing termination of parental rights, and Minnesota Statues Chapter 259 governing step-parent adoptions, were used in this case. Given that I have personally successfully completed over two hundred surrogacy parentage proceedings in Minnesota and Iowa combined, virtually all of them compensated*

arrangements I believe it is very safe to state that compensated surrogacy is not illegal in either Minnesota or Iowa..."

He goes on to explain the context for Ms C's step parent adoption:

"Minnesota has a streamlined legal procedure for the spouse of a child's genetic/legal parent to adopt the child with no residency requirement via a step-parent adoption proceeding. It was under this provision that [Ms C] adopted Q in Minnesota once [the surrogate's] legal rights were effectively and permanently terminated...

Adoptions by the spouse of a child's legal parent (commonly referred to as 'step parent' adoptions) are permitted, and many of the requirements imposed on other types of adoptions can be waived in the court's discretion. One of the requirements a court can waive is the residency requirement for bringing such an action. According to the US Department of State, such adoptions are not considered 'international' adoptions and are not subject to any of the requirements of the Hague Convention on International Adoption."

35 In undertaking these steps the applicants were following advice given by their US attorney, which were lawful procedures. The existence of the adoption order raises what are described as two novel points:

(1) whether the Applicants have committed any breach of UK domestic adoption law pursuant to s 83 ACA 2002, even if in the US the adoption was not considered an 'international adoption' subject to the Hague Convention by the US, and

(2) whether the Applicants are already recognised as Q's legal parents under UK law by virtue of the adoption order and, if so, what impact that has on the making of a parental order.

36 In relation to the possible breach of domestic adoption law the position is clear. Section 83 ACA 2002 creates an offence for persons who are habitually resident in the British Islands to adopt a child abroad, unless they have complied with the provisions of that section and all relevant regulations made there under. On the particular facts of this case, there has been no breach of section 83 because neither of the applicants is (or was at the relevant time) habitually resident in the British Islands and therefore s.83 1(b) does not apply.

37 There may well be cases, on different facts, where such a breach does occur. In that scenario the court will need to consider, in the light of the facts of that case, whether the applicants have acted in good faith or whether it would amount to a clear abuse of public policy which may prevent the court making a parental order. In circumstances such as this case, where the applicants acted in good faith relying on reputable legal advice it may be difficult to say they were not acting in good faith. However, each case is fact sensitive and needs to be carefully considered.

38 The second point that arose is whether Ms C is already treated as Q's mother for the purposes of UK law, by virtue of the US step parent adoption order. The US is a designated country for the purpose of an overseas adoption the adoption order should be recognised here.

39 One of the curious features of this case is that as a matter of English law Ms C, due to the making of the step parent adoption, is recognised as Q's mother whereas Mr C is not treated as a parent as the surrogate mother was married, even though he has the biological connection to Q.

40 It is submitted on behalf of the applicants that a parental order meets Q's lifelong welfare needs in this case for the following reasons:

(1) Mr C's status as Q's legal father is not recognised here as he is not the subject of the adoption order and by virtue of s 35 HFEA 2008 he is not Q's father under UK law as the surrogate mother was married (s 38 HFEA 2008). A parental order will confer legal parenthood on both applicants. This will also give Q a British birth certificate confirming his parentage, which better reflects his identity as a child of reproduction rather than an adopted child.

(2) A parental order is the order most suited to surrogacy situations. It is merely a geographical accident that the applicants' legal parentage in the US was secured by way of adoption rather than a parentage order. The applicants wish for the same legal certainty as other parents through surrogacy in similar situations.

(3) Even if the court were to make a declaration that the US adoption order was recognised in UK law, this would not make Q British. The applicants would then need to make a separate application to the Home Secretary to exercise his discretion under s 3 of the British Nationality Act 1981 to give Q British citizenship. A parental order will make Q a British citizen automatically.

41 I agree that each of the matters outlined in the previous paragraph carry with them important lifelong benefits for Q that clearly support the making of a parental order as meeting his lifelong welfare needs.

Welfare

42 I now turn to consider the question of Q's welfare. The court is concerned with Q's lifelong welfare pursuant to s 1 ACA 2002, having considered the matters set out in the checklist in s 1(4). The court is greatly assisted in undertaking that task by the report from Mrs. Sivills who has met the applicants and Q on a visit whilst they were visiting family here. The report is dated 31st January 2014 and it sets out within the body of that report between para.23 and 28 an assessment of the welfare checklist, which I fully agree with. She concludes her assessment at para.29 of the report as follows:

> *"The applicants' approach to this application reflects the care and attention to detail that they have given to the whole process of attempting to have a child. Their love and pride in Q is evident, and he is now a member of a supportive extended family on both sides. The relationship of the applicants is loving, good-humoured and mutually supportive. They communicate effectively and would score highly on any parenting-capacity assessment. There is every welfare reason why Q should remain happily and grow up confidently in the care of the applicants. Their close friendship with the respondents will enrich the details to be given to him of special arrangements that were made to bring him into the world. I have no doubt that Q's understanding of his history will be a positive and open process handled sensitively by the applicants."*

43 From what I have seen and read I wholeheartedly agree with that assessment. It is quite clear that Q's lifelong welfare can only be met by securing his relationship with both of the applicants in a lifelong way that will give them equal status that will endure for the rest of their lives. The only order that is capable of doing that is a parental order.