

THE HIGH COURT

FAMILY LAW

[2011 No. 68 CAF]

IN THE MATTER OF A CHILD, AND IN THE MATTER OF THE STATUS OF CHILDREN ACT 1987, AND THE IRISH NATIONALITY AND CITIZENSHIP ACT 1956, AND IN THE MATTER OF AN APPLICATION BY E.P. (AN INFANT SUING BY HER FATHER AND NEXT FRIEND Z.P.)

BETWEEN

E.P. (AN INFANT SUING BY HER FATHER AND NEXT FRIEND Z.P.)

APPLICANTS/APELLANTS

AND BY ORDER

ATTORNEY GENERAL

FIRST NAMED THIRD PARTY

AND BY ORDER

P.Z.

SECOND NAMED NOTICE PARTY

AND;

[2011 No. 141 CAF]

BETWEEN

Z.P.

APPLICANT/APELLANT

AND

T.F. AND P.Z.

RESPONDENTS

JUDGMENT of Mr. Justice Abbott delivered on the 15th day of December, 2011

1. The above application and proceedings, commenced by separate civil bills, came before this Court by way of an appeal from an order of the Circuit Court refusing relief in both cases. The overall purpose of the Circuit Court proceedings was to have the next friend appointed guardian of the infant applicant who was born subsequent to a surrogacy arrangement in India and to obtain orders enabling a passport to be obtained for such infant applicant. The Family Law Civil Bill in the first mentioned appeal sets out in para. 4 the history of the case to date as follows:-

'4. The place of birth of the applicant not being within the State and for the purposes of O. 59, r. 2(3)(d) of the Rules of this Honourable Court the reasons for bringing this application are as follows:-

(a) The applicant was conceived and ultimately born in September, 2010, by means of an in-vitro fertilisation programme using the next friend's sperm and anonymous donor egg undertaken pursuant to a gestational surrogacy agreement in February, 2010, between P.Z. (the second named notice party in the first appeal and the second respondent in the second appeal) who is described in the said agreement as the "intended mother" and the next friend herein who is referred to as "intended father" and collectively termed the "intended parents" and T.F. of New Delhi, India and therein referred to as the "surrogate mother".

(b) The next friend and the said P.Z. are named as father and mother of the applicant on the applicant's birth certificate which issued under s. 17 of the Registration of Births and Deaths Act, 1969, from the Municipal Corporation of Delhi, Republic of India, in September, 2010.

(c) The next friend is an Irish citizen and is a holder of an Irish passport.

(d) Genetic testing was preformed on samples taken from the applicant and the next friend on or about 22nd February, 2011, and assessment of the results of the genetic testing has confirmed that the next friend is the true biological father of the applicant herein (subject to a male sibling and family member caveat).

(e) The said T.F. was married to a Mr. Q.F. on a date unknown and in October, 2007, Mr. Q.F. died. In the circumstances the said T.F. was a widow at all material times.

(f) The applicant contends that by reason of her aforementioned parentage, she is, pursuant to the Irish Nationality and Citizenship Act, 1956, an Irish citizen and entitled to a recognition of such.

(g) The applicant's next friend has been advised by way of letter dated 9th December, 2010, from the passport officer of the Department of Foreign Affairs that before a passport can issue to the applicant herein, the applicant must obtain a declaration of parentage pursuant to s. 35 of the Status of Children Act 1987, which letter was appended to the Equity Civil Bill and it is important and informative to set out the contents thereof in full as follows:-

'I refer to your recent passport application on behalf of E.P. submitted through the Passport Office in Y.

You are aware of the difficulties surrounding the issue of passports to children born through surrogacy. You have been in touch with our embassy in Delhi and were provided with the information note in this regard in 2010. This note described the additional court orders that would be required to be submitted with any passport application.

You were recently provided with an emergency travel certificate in Delhi to allow you to bring the child back to Ireland in order that the required legal process could take place. You were informed that the issue of E.T.C. was without prejudice to the citizenship or other status of the person in respect of whom it is issued.

As has been previously indicated to you, no passport can issue to the child until all of the outstanding issues in relation to citizenship and guardianship have been dealt with. You are advised therefore to apply to an Irish court for a declaration of parentage under s. 35 of the Status of Children Act, 1987, and for an order directing that a passport may be issued to the child without the consent of the surrogate parent.

Until these documents are received, the Passport Office cannot proceed with the passport application.'

2. The Attorney General was joined in the first appeal in the Circuit Court for the purpose of ensuring under the 1987 Act that any order made would be binding on all State authorities and the said P.Z. was joined as a notice party in the first appeal by this Court during the course of case management of the proceedings, not by reason of any strict legal right but by reason of the factual interest of P.Z. through her involvement in India in the surrogacy arrangements and now as a carer of the infant applicant.

The Evidence

3. All parties were represented in court except the said T.F. and the court is satisfied on the affidavits of service and the correspondence from her Indian solicitors that she has been satisfactorily notified of these proceedings and having been advised by her solicitors that she is consenting to the orders being sought and proposed to be made by this Court. In this regard, this Court took particular care to ensure that the said T.F., as gestational mother, was again served and fully brought up to date with developments during the course of case management of the appeals in this Court.

4. Having seen the results of the genetic tests and considered the evidence in the next friend's affidavit, I am satisfied that the genetic tests show that the next friend is the biological father of the infant applicant on the basis of 99.999% probability subject to the sibling caveat contained in the expert genetic testing report. The next friend has deposed to the fact that he has no brother or no other member of his family who could be father of the minor applicant. Hence, I am satisfied that the sibling caveat does not apply to this case and that the next friend is the biological father of the applicant to a very high level of proof on the balance of probabilities approaching the absolute. I am satisfied that at all material times the minor applicant had her habitual place of residence with the next friend and the said, P.Z., who is the partner of the next friend and cares for the minor applicant on a daily basis. I am satisfied that the next friend and the said P.Z. are the persons who have at all material times since the birth of the infant applicant occupied the role of holders of parental responsibility for the applicant within the meaning of the Brussels II bis Regulations. That T.F. has had no role as a parent other than that of a gestational mother under the surrogacy arrangements in India. It is extremely unlikely that the said T.F. would seek to play any role in relation to parental responsibility in the future and that the next friend, if appointed guardian, will in the course of time explain with the said P.Z. to the minor applicant the circumstances of her birth in an age appropriate way. It is a matter of considerable urgency and in the best interests of the infant applicant that the infant applicant would obtain an Irish passport. Taking the interests of the minor applicant as being of paramount importance under the Guardianship of Infants Act, 1964, as amended, the Court is satisfied that the best interests of the child in this case is to be cared for and reared as a child in the so called de facto family of the applicant and the said P.Z..

5. I am further satisfied that by reason of the tender age and lack of maturity of the minor applicant, it is inappropriate to seek to hear the voice of the child in accordance with any procedure prescribed by the Brussels II bis Regulations, the Constitution or the Guardianship of Infants Act, 1964, as amended.

Conclusions

6. Having regard to the foregoing evidence, I am satisfied that these are appropriate cases for the making of the following orders.

The First Appeal

7. A declaration pursuant to Part VI of the Status of Children Act 1987, that Z.P. of Q. is the father of E.P., the first named applicant herein and the infant in the title hereof named and the following orders:-

1. That it is appropriate that this matter be held *in camera*.
2. That the said appeal be allowed.
3. That the said order of the Circuit Court judge dated 6th day of June, 2011, be set aside but that the next friend be given the liberty to apply in the Circuit Court for a declaration in like form to that made on this appeal in view of the necessity of same from the abundance of caution and the formal statutory and regulatory provisions relating to the declaration to be issued from the Circuit Court with the seal of the County Registrar.
4. That the *in camera* rule be lifted so as to allow notification of the terms of this order to the relevant authorities as appropriate.
5. That there be no order as to costs.

6. That there be liberty to apply herein.
7. And the Court adjourn to a date to be fixed for the giving of written reasons for this decision.

Second Appeal

1. That the applicant/appellant, Z.P., be appointed as guardian of E.P. pursuant to s. 6A of the Guardianship of Infants Act, 1964, as inserted by s. 12 of the Status of Children Act, 1987, and amended.
2. That custody of the said E.P. continues in accordance with the current care arrangements in which the second named respondent cares for E.P., and that the said respondent be notified if any proposed change should arise pursuant to s. 11 of the Guardianship of Infants Act, 1964.
3. That the consent of the first named respondent be dispensed with for the issuing of a passport to E.P. whilst E.P. is a minor pursuant to s. 14(3) of the Passports Act, 2008, and s. 11 of the Guardianship of Infants Act, 1964.
4. Liberty to apply in the Circuit Court.