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In the Matter of C (A Child)

Case No: BRO1POO819

High Court of Justice Family Division

22 February 2002

[2002] EWHC 157 (FAM)

2002 WL 1039708

Before: The Honourable Mr Justice Wall

Friday 22nd February, 2002, Hearing date: 28 January 2002

And In the Matter of an Application by Mr and Mrs X Under Section 30 of the Human Fertilisation and Embryology Act 1990

Representation

Pat Monro of Darlington & Parkinson for the applicants.

JUDGMENT

Mr Justice Wall

1 On 28 January 2002, I made a parental order under section 30 of the Human Fertilisation and Embryology Act 1990 (the Act) in favour of the applicants, whom for the purposes of this judgment I will call Mr and Mrs X. The child concerned was C, who was born on 23 June 2000, and was therefore nearly 19 months old at the date of the hearing. I reserved the reasons for my decision, which I now give.

The facts

2. Mr and Mrs X were married in 1979. It was a first marriage for both of them. Both wanted children, but their attempts were unsuccessful. Eventually, after much medical investigation and intervention, including IVF, they were advised to discontinue treatment, and were put in touch with an organisation called COTS (Childlessness Overcome Through Surrogacy).

3. Through COTS they were introduced to a surrogate mother, whom I will identify only by the initials SM. Mr and Mrs X and SM then entered into what is described as a ***Surrogate and Couple Memorandum for Host Surrogacy/Straight Surrogacy*** (the Memorandum) under which conception by SM was to take place by artificial insemination using Mr X's semen. The Memorandum, which is detailed, recorded that whilst SM was the birth mother of any child conceived by this process, she had stated that she would not consider any child born as a result of the agreement as her own, and any such child would reside with and be raised as the child of Mr and Mrs X.

4. SM agreed in the Memorandum to part with the child at birth, and Mr and Mrs X agreed after the birth to apply for a Parental Order under section 30 of the Act. SM agreed not to oppose the making of any such order.

5. All went according to plan. SM conceived at the first attempt, and C was duly born. Mr and Mrs X collected her from SM, and she has lived with them effectively from birth. She is clearly a contented and much cherished child.

6. What brings the application to this court is clause 10 of the Memorandum, under which Mr and Mrs

X agreed to pay SM:

> … for the various expenses, including: loss of actual earnings, potential loss of earnings, maternity clothes, food craving, housework / home help, telephone calls, life insurance, wills (for travelling and child minding see below) etc: — The total expenses are £12,000 ….

There then follows a detailed list of additional items for which Mr and Mrs X agreed to pay.

The application to the justices

7. Mr and Mrs X duly made their application to the justices for a Parental Order . The justices, with some regret, felt unable to grant it. In their reasons, they said:

> We have given much thought to this case. We are unfortunately not satisfied that SM did incur £12,000 in expenses and loss of earnings. We are frustrated by lack of information, despite the Children's Guardian and the parents' best endeavours to obtain more details! The parents have been commendably open about the sum paid. As the law stands, we must be sure there has been no payment to SM other than reasonable expenses. In the circumstances we cannot make a parenting order. This is no reflection on the parties present and having seen C ourselves we would agree with the Guardian's conclusions that Mr and Mrs X "care for her lovingly and completely meet her physical and emotional needs". We have taken the child's welfare into account; however, the legal requirements regarding surrogacy have not been sufficiently met. There are hopefully other avenues open to Mr and Mrs X which will lead to a satisfactory conclusion and we are transferring this case to the county court on the grounds of complexity and public interest …

Section 30 of the Act

8. Section 30 of the Act reads, where material, as follows:

> ### Parental orders in favour of gamete donors
>
> (1) The court may make an order providing for a child to be treated in law as the child of the parties to a marriage (referred to in this section as "the husband" and "the wife") if—
>
> (a) the child has been carried by a woman other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination;
>
> (b) the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo; and
>
> (c) the conditions in subsections (2) to (7) below are satisfied.

9. The conditions laid down in section 30(1) of the Act are clearly met. Mr and Mrs X also meet the conditions laid down in section 30(2) to (5) . (Section 30(6) does not apply on the facts of this case.) These conditions are, in summary, that the order must be applied for within six months of C's birth (sub-section (2)); that at the time of the application and of the making of the order C's home must be with the applicants (sub-section 3(a)); that one or both of them must be domiciled in the United Kingdom (sub-section 3(b)); that both of them have attained the age of 18 (sub-section (4)); and that both Mr X and SM freely, and with full understanding of what is involved, agree unconditionally to the making of the order (sub-section (5)).

10. The problem lies in section 30(2)(7) which reads:

> The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife for or in consideration of—
>
> (a) the making of the order,
>
> (b) any agreement required by subsection (5) above,
>
> (c) the handing over of the child to the husband and the wife, or
>
> (d) the making of any arrangements with a view to the making of the order, unless authorised by the court.

11. The questions which arise, accordingly, are: (1) can the court be satisfied that the sum of £12,000 paid by Mr and Mrs X to SM was for "expenses reasonably incurred" and (2) if the answer to that question is "no", does the court have the power retrospectively to authorise the payment?

12. The first question is a pure issue of fact, and it is reasonably clear that the answer to it is "no". In this respect, therefore, it seems to me that the justices were right not to be satisfied that SM had incurred £12,000 in expenses and loss of earnings. However, as the fact of the payment, and the circumstances in which it came to be made are relevant to the exercise of the discretion retrospectively to authorise it (assuming that discretion to exist) I need to examine the issue in a little more detail.

13. Mr and Mrs X's evidence is that when they approached COTS, they were advised that the usual amount of expenses paid for a surrogacy agreement was £10,000, but that SM wanted £12,000. When Mr and Mrs X met SM, the latter made it clear that she would not accept a lower figure.

14. The agreement between SM and Mr and Mrs X was that, once she was pregnant, they would pay her £200 each month and the balance of £10,200 on a successful birth. SM asked for the money in cash to be received by her by the 19th of each month. She also asked to receive the balance of £10,200 in cash.

15. During the course of the pregnancy, SM admitted that she was on income support. Mr and Mrs X both say they did not appreciate the significance of this, or the difference between fees and reasonable expenses, or the problems which, arose when they applied for a parenting order. The say they received no advice from COTS on these matters, and were totally focused on having their first baby after 20 years of marriage.

16. During the course of the proceedings, C's guardian asked Mr and Mrs X to obtain a breakdown of the expenses paid. Mr X wrote to SM asking her to provide particulars. SM refused to do so. The material part of her letter reads:

> I would very much prefer it if expenses was not mentioned. It has never been mentioned before with my previous couples and I was even told not to say anything as it would come across as if the baby was bought (by a previous couple). No-one knows whether it would stay confidential either and saying it was for loss of income, life insurance etc would be easily checked out to be not true, so it is best not to say anything as I will not give an exact figure it is not really there (sic) business whether it was 1000 of 12000. I will just say a small amount, which is true.

17. C's Guardian fared no better. At initial interview SM refused to discuss the matter in detail. She said that she had been in financial difficulty and that she would have had to work very long hours to support her family and meet her debts. She added that no payment or reward was received and that the money (the amount of which she would not disclose) was used to cover her reasonable expenses relating to conception, pregnancy and the birth of C. The only letter the Guardian received said:

> I would just like to say that I received expenses like every other surrogate mother from the COTS agency, which is all legal and above board. So I don't understand why the courts have a problem with this, if they care to make some enquiries they would see this for themselves. I have had 3 other surrogate pregnancies and I am not the first person

to do this. (All these adoptions went through straight away)

18. Mr and Mrs X told the guardian that they wanted to ensure that SM did not work during the pregnancy as they saw her as medically vulnerable in view of her large number of previous pregnancies. They had therefore assumed, initially at least, that the sum of £12,000 related to loss of earnings.

19. Like the justices, and the Guardian, I accept that Mr and Mrs X have acted honestly and in good faith throughout. They would, I think, agree that, with the wisdom of hindsight, they have been naïve. But like the justices, I acquit them of any corrupt motivation in making the payment of £12,000 to SM. It is true that this was in excess of the figure they were advised by COTS was usual, but it is not so disproportionately greater as to render it patently inapt as a sum representing expenses reasonably incurred, particularly as Mr and Mrs X were anxious to ensure that SM did not work during the pregnancy.

20. Furthermore, by the time Mr and Mrs X learned that SM was on income support, she was pregnant. It is difficult to see what they could then have done. They had signed the agreement and were committed to the payment. If SM was claiming benefit and not disclosing to the Department of Social Security the payments Mr and Mrs X were making to her, that had to be her responsibility. What is important, I think, is that on all the evidence it is clear that the Memorandum was entered into by Mr and Mrs X in good faith, and without any corrupt intent. They were not paying £12,000 to buy a baby. They were paying a figure for expenses which they had been advised was on the high side, but which was not disproportionate.

21. Nonetheless, it must follow that money other than for “expenses reasonably incurred” has been given by Mr and Mrs X to SM as a consequence of the Memorandum, and that the court cannot make a parental order unless the payments are ‘authorised’ by the court.

The approach to authorisation under section 30 of the Act

22. For Mr and Mrs X, Ms Monro points out that the Parental Orders (Human Fertilisation and Embryology) Regulations 1994 (the Regulations) incorporate a number of the provisions of the Adoption Act 1976 in relation to applications for parenting orders under section 30 of the Act. These include section 6 (the duty to safeguard and promote the welfare of the child throughout childhood); section 12 (adoption orders); section 24(1) and section 27(1)(b) (restrictions on making adoption orders and removal whilst the application is pending); section 29(c) (return of child taken away in breach of section 27 or 28); section 39(1)(a), (2), (4) and (6) (status conferred by adoption).

23. The provision relating to unlawful payments (section 57) is not incorporated. It was not necessary to do so, since section 30 , as we have seen, contains its own prohibitions in relation to payment. Section 57(1) of the Adoption Act provides that:

> (1) Subject to the provisions of this section, it shall not be lawful to make or give to any person any payment or reward for or in consideration of—
>
> (a) the adoption by that person of a child;
>
> (b) the grant by that person of any agreement or consent required in connection with the adoption of a child;
>
> (c) the handing over a child by that person with a view to the adoption of the child; or
>
> (d) the making by that person of any arrangements for the adoption of a child.

24. Section 57(2) of the Adoption Act 1976 makes any payment prohibited by sub-section (1) a criminal offence. However, sub-section (3) disapplies the section in relation to any payment made to an adoption agency by a parent or guardian of a child or by a person who adopts or proposes to adopt a child, being a payment in respect of expenses reasonably incurred by the agency in connection with the adoption of the child, ***or to any payment or reward authorised by the court to which an application for an adoption order in respect of a child is made*** . (my emphasis)

25. In my judgment, Ms Monro is plainly correct to argue that there is a clear analogy between section 30(7) of the Act and section 57(3) of the Adoption Act 1976 in both their language and purpose.

26. Ms Monro referred me to a number of the cases on surrogacy. The first in time, although not strictly relevant to the question of authorising payments, is the decision of Latey J in Re C (A minor) (Wardship: Surrogacy) [1985] FLR 846 . A childless married couple made the child in question a ward of court. The child had been conceived consequent upon a surrogacy agreement made with an American agency by means of the artificial insemination of the surrogate mother using the husband's semen. Latey J applied the welfare best interests test, and made ‘an order for care and control in favour of the married couple. He referred to the “commercial aspects” of the methods used to produce the child as raising “difficult and delicate problems of ethics, morality and social desirability” which were then being considered in Parliament, but did not think them relevant to the practical issue before him, which was the placement of the child.

27. In 1985, Parliament passed the Surrogacy Arrangements Act 1985 , which outlawed surrogacy on a commercial basis and made any surrogacy arrangement legally unenforceable

28. The most relevant case for present purposes is *In re Adoption Application (Payment for Adoption) [1987] Fam 81* , another decision of Latey J. In this case, the childless couple agreed to pay the surrogate mother £10,000, although in the event she accepted only £5,000. The original sum was agreed on the basis that she would have to give up her job in order to have the child. The £5,000 paid did not cover her loss or earnings and expenses. The childless couple in due course applied to adopt the child, and the questions which arose were (1) whether the payment fell foul of what was then section 50(1) of the Adoption Act 1958 , and if so (2) whether the court could make a retrospective authorisation of the payment.

29. Latey J held that a surrogacy arrangement for the conception of a child did not contravene the Surrogacy Arrangements Act 1985 if the payments made to the surrogate mother did not include an element of profit or financial reward. However, even if the payments were made for reward, the court had a discretion under the Act retrospectively to authorise the payments, which, on the facts of the case, the judge exercised. Latey J dealt with the point at [1987] Fam 81 at 87 after setting out the statutory provisions. The passage merits quoting in full.

> Can such authorisation be given only in advance of the making of a proposed payment or giving of a reward? Or can it be given for a payment or reward already made or given?
>
> In his role as amicus curiae, Mr Holman advanced the arguments in favour of the former interpretation. If that is the correct view the result, as he acknowledges, would be draconian indeed. It would mean, for example, that any payment, however modest and however innocently made, would bar an adoption and do so however much the welfare of the child cried aloud for adoption with all the security and legal rights and status it carried with it; and that, be it said, within the framework of legislation whose first concern is promoting the welfare of the children concerned.
>
> I do not believe that Parliament ever intended to produce such a result nor, anticipating, has it done so in my judgment. The result it intended to produce is wise and humane. It produced a balance by setting its face against trafficking in children, on the one hand, but recognising that there may be transactions which are venial and should not prohibit adoption, on the other hand.
>
> Nor in my judgment does the language of the section compel the draconian interpretation. What does ‘authorise’ mean in this context? Counsel have been unable to find any reported cases on the point, perhaps because none is necessary. In the *Shorter Oxford English Dictionary* ‘authorise’ is described variously as:
>
> ‘To set up or acknowledge as authoritative … To give legal force to … To give formal approval to; to sanction, countenance … to justify.’
>
> To my mind, in plain language, there is nothing in ‘authorises’ or its synonyms to suggest that authorisation can only be given prospectively. On the contrary, it can equally well be given retroactively. The deputy Official Solicitor has been in court during

> the argument and with his wide experience he informed me through counsel that authorisation is much more likely to be called for something which has happened than for something which is in future contemplation.
>
> For these reasons the correct interpretation is the second one, with the result that Parliament has produced the result it intended to.
>
> It follows that in each case the court has a discretion whether or not to authorise any pay, merit or reward which has already been made or may be contemplated in the future.
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> In exercising that discretion the court would no doubt balance all the circumstances of the case with welfare of the child as first consideration against what counsel for the guardian ad litem well described as the degree of taint of the transaction for which authorisation is asked.

30. In my judgment, the test posed by Latey J in the final paragraph of the extract from In re an Adoption Application is the correct one. Section 6 of the Adoption Act 1976 (the need to safeguard and promote the welfare of the child throughout childhood) is expressly applied to applications under section 30 of the Act by the Regulations. C's welfare therefore is not paramount, although it is my first consideration.

31. In re Adoption Application (Payment for Adoption) was followed by Johnson J in *Re Q (A Minor) (Parental Order) [1996] 1 FLR 369* . Although the case primarily concerned the meaning of the word "father" within section 28 of the Act, the judge had to consider whether he should authorise payments totalling £8,280 made by the applicants to the surrogate mother. At [1996] 1 FLR 373H, the judge said:

> I hold that such authorisation can be given retrospectively. In so doing I follow the decision of Latey J in *In re Adoption Application (Payment for Adoption) [1987] Fam 81* , which was concerned with a similar provision in the Adoption Act 1976 .
>
> The guardian ad litem told me that she had at first thought that this amount seemed rather high but on further inquiry she concluded that the payments were understandable. £3,280 made up of payments to cover clothes, daily trips to the doctor for injections, child care provision for her own children during some of those visits and similar related expenses. A further £5,000 was payment to compensate Miss A for loss of earnings. Given the circumstances of the pregnancy and her potential earnings of £15,000 per annum, I joined with the guardian ad litem in concluding that the payment was reasonable and, retrospectively, I gave authority for it.

32. In re Adoption Application (Payment for Adoption) was also followed in Re MW (Adoption: Surrogacy) [1995] 2 FLR 759 , a decision of His Honour Judge Callman. Thus both the power to authorise payments retrospectively, and the test to be applied in doing so, seem to me well established.

33. In this case, Mr and Mrs X accept that they should have insisted on a breakdown of SM's expenses, and asked for receipts. They also accept, given that SM appears to have been in receipt of income support, that the money paid to her is unlikely to have been only recompense for monies laid out by her. Ms Monro on their behalf, however, submits that it would be plainly contrary to the interests of C if the court were not now to secure her future by the making of a parental order.

34. Applying the test formulated by Latey J in In re an Adoption Application the factors which seem to me to weigh in the scales when considering the degree to which Mr and Mrs X are tainted by the transaction are the following:

> (1) the sum of £12,000 required of them was not disproportionate, given the usual figure quoted by COTS and Mr and Mrs X's wish to ensure that SM did not take employment during the pregnancy. It is worth noting that £10,000 was not thought an inappropriate sum in not dissimilar circumstances in 1984/85 when the parties in In re an Adoption Application negotiated it as representing (inter alia) loss of earnings. Had SM been gainfully employed,

£12,000 would by no means have been an unreasonable sum for expenses reasonably incurred if it included compensation for loss of earnings;

(2) Mr and Mrs X did not know that SM was claiming income support until after it was confirmed that SM was pregnant. At that point it was plainly too late for them to withdraw;

(3) Mr and Mrs X .are plainly a genuine couple who have spent many years attempting to conceive a child; The entered into the Memorandum in good faith and without any corrupt intent;

(4) If SM was defrauding the Department of Social Security by not disclosing the sums Mr and Mrs X were paying her, the responsibility for that behaviour is hers alone. There is no suggestion that Mr and Mrs X encouraged or aided and abetted her to do so in any way.

(5) It is very clear that C is a much loved and cherished child. It is manifestly in her interests that she should be treated in law as the child of Mr and Mrs X, and that both should have parental responsibility for her.

35. For all these reasons, I authorised the payment of £l2,000 by Mr and Mrs X to SM and made a parental order under section 30 of the Act. Whilst preserving the anonymity of Mr and Mrs X, and C, however, I propose to make this judgment public, and to send a copy to COTS, so that both couples and surrogate mothers who are introduced to each other through COTS can be made aware of the need for transparency in the definition and true extent of expenses reasonably incurred under section 30(2)(7) of the Act.

36. Finally, applications for parental orders under section 30 of the Act are family proceedings (see section 30(8)(a) of the Act) and have to be commenced in the Family Proceedings Court (see Children (Allocation of Proceedings) Order 1991 as amended). It follows that, as with care proceedings, the justices had a discretion whether or not to decide the matter themselves or transfer it upwards. In my judgment, although they had jurisdiction, the justices took the right course in transferring the case to the county court on the grounds of complexity and public interest.