

Westlaw UK Delivery Summary

Request made by :	IPUSERCP3396247981 IPUSERCP3396247981
Request made on:	Saturday, 05 July, 2014 at 14:23 BST
Client ID:	ukadvlegal-245
Content Type	Cases
Title :	JP v LP (Surrogacy Arrangement: Wardship)
Delivery selection:	Current Document
Number of documents delivered:	1

Sweet & Maxwell is part of Thomson Reuters. © 2014 Thomson Reuters
(Professional) UK Limited

JP v LP, SP, CP by the child's Guardian

Cases No: LE12P00429

BM12P09386

High Court of Justice Family Division

5 March 2014

[2014] EWHC 595 (Fam)

2014 WL 795219

Before: Mrs. Justice Eleanor King DBE

Date: 05/03/2014

Hearing dates: 2nd July 2013

Representation

Martin Kingerley (instructed by R.P. Robinson Sols) for the Applicant.

Frances Judd QC (instructed by Porter Dodson Sols) for the 1st Respondent.

Nassera Butt (instructed by Scutt Beaumont Sols) for the 2nd Respondent.

Jacqueline Matthews-Stroud (instructed by Wilson Browne Sols) for the 3rd Respondent.

Approved Judgment

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 children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs. Justice Eleanor King DBE:

1 These are proceedings arising out of applications made under to [s8 Children Act 1989](#) and under the inherent jurisdiction of the High Court in relation to a little boy, CP, who was born as the result of a surrogacy arrangement on 1 March 2010 (3years 8mths).

2 Whilst ultimately the parties have been able to agree a way forward in the interests of CP, the facts of this case stand as a valuable cautionary tale of the serious legal and practical difficulties which can arise where men or women, desperate for a child of their own, enter into informal surrogacy arrangements, often in the absence of any counselling or any specialist legal advice.

Background

3 The Applicant, JP, (who I shall refer to as the mother although she is neither the birth nor

genetic mother) and the Respondent father, LP married on 24 May 2008. The mother had had a child by an earlier relationship but had undergone an hysterectomy and was therefore unable to conceive a child with the father. The couple decided that they would attempt to conceive through 'partial' surrogacy, that is to say a form of conception where the surrogate mother's egg is inseminated using the commissioning male, (here the father's), sperm.

4 To this end the mother and father sought the help of a friend of the mother, SP (the surrogate mother). The surrogate mother agreed to help, was artificially inseminated at home with the father's sperm and became pregnant.

5 Under [s1\(A\) Surrogacy Arrangements Act 1985](#) surrogacy arrangements are not enforceable by law. This can cause serious difficulties to hospital where babies are born as a result of surrogacy agreements. Some health areas have multi agency surrogacy protocols in place to provide for all aspects of a surrogate birth taking place in their hospital; this includes the 'hand over' of the baby and any welfare issues which may arise. Such protocols unfortunately are by no means universal.

6 The mother, father and, surrogate mother planned that the birth would take place at the Leicester Royal Infirmary. I have not been told whether Leicester Royal Infirmary have a surrogacy protocol although they do have an Assisted Conception unit. In whatever guise, when the hospital became aware that the surrogate mother was giving birth as a result of a surrogacy arrangement, the hospital asked the parties to enter into and provide the hospital with a copy of a surrogacy agreement.

7 The parties agreed and an agreement was prepared by a firm of Birmingham solicitors. The solicitors were in fact committing a criminal offence as, whilst such agreements can lawfully be drawn up free of charge, the solicitors in preparing and charging for the preparation of the agreement were *negotiating surrogacy arrangements on a commercial basis* in contravention of [section 2 of the Surrogacy Arrangements Act 1985](#) which says:

2 Negotiating surrogacy arrangements on a commercial basis, etc.

(1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—

(a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement,

(b) offer or agree to negotiate the making of a surrogacy arrangement, or

(c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;

and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.

(2) A person who contravenes subsection (1) above is guilty of an offence;

8 CP was born safe and well on 1 March 2010 and the hospital, having seen and been reassured by the illegal Surrogacy Agreement, agreed to CP being handed over to the care of the mother and father. The surrogate mother registered CP's birth on 24 March 2010. The birth certificate shows the "*father*" as the father and the surrogate mother as the "*mother*" of CP.

9 The relationship between the mother and father broke down in June 2010 within months of CP's birth. The Mother left the matrimonial home with CP and, on 6 July 2010, made an application in the Leicester County Court for a residence order in her favour.

10 On 15 July 2010 a shared residence order was made in the Leicester County Court in favour of the Mother and Father. At that hearing the Mother and Father also undertook to regularise CP's legal status as between the surrogate mother, the mother and the father by issuing an application for a parental order pursuant to [s54 Human Fertilisation and Embryology Act 2008](#) ([HFEA 2008](#)). CP was a little over 19 weeks old.

11 The father signed the application for a parental order on 16 July 2010 and passed it on to the Mother to sign and lodge with the Leicester County Court. The Mother signed the application form on 28 July 2010 but did not lodge it with the court as agreed. The application was finally issued on 19 October 2010 by which time CP was 33 weeks or 7 ½ months old. The application was out of time, the statutory time limit for such an application being 6 months from the date of birth.

12 The application was listed for directions on 3 November 2010 and again on 1 December 2010. Neither party attended. HHJ Lea therefore ordered that the application for a parental order should stand dismissed unless, by 4pm on 30 December 2010, the mother applied for the application to be listed. No such application was made and accordingly the application was dismissed on 30 December 2010 pursuant to HHJ Lea's order.

13 During the early part of 2011 the relationship between the mother and father reached low ebb; on 7 March 2011 the mother issued an application for a specific issue order seeking the return of CP after contact, which order was made by a District Judge on 21 March 2011. The matter came in front of HHJ Lea on 24 March 2011 for further directions. The shared residence order was confirmed and the mother and father undertook to reissue their application for a parental order in respect of CP; no one involved appreciated that the statutory time limit for such an application had now expired. In the event no attempt was made to make a fresh application.

14 Decree Absolute was pronounced on 4 November 2011.

15 Relationships as between the mother and father continued to be fraught and on 12 September 2012 the mother made an application for sole residence of CP. The matter was transferred to the High Court and both CP and the surrogate mother were joined as parties.

16 The court was asked to address the issues which arose in circumstances where there was no parental order regularising the legal status of each of the three adults involved and also to consider how this impacted on the exercise of parental responsibility by each of them.

The Legal Backdrop

17 The [Human Fertilisation and Embryology Act 1990](#) was the result of the recommendations which had been made in the *Report of the Committee of Inquiry into Fertilisation and Embryology*, (Cmnd 9314) . The "Warnock Committee". The Act set out the boundaries of what was to be determined to be the appropriate level and type of assisted reproductive technology and embryo research to be permitted in the UK. The [HFEA 1990](#) also created the *Human Fertilisation and Embryology Authority* to regulate and license activities dealing with human embryos and gametes. [HFEA 1990](#) not only addressed issues such as consent and legal status, but also the welfare of the resulting child and the necessity of potential parents having a proper understanding of the course upon which they were embarking.

18 By way of example; the [HFEA 1990](#) introduced a statutory requirement that the welfare of a child born as a result of fertility treatment was to be taken into account, the relevant section said as follows:

[s13\(5\)](#) : " a woman shall not be provided with treatment services, other than basic partner treatment services, unless account has been taken of the welfare of any child who may be born as a result of the treatment (**including the need of that child for a father**) , and of any other child who may be affected by the birth. "

19 The [HFEA 1990](#) was substantially amended by the [HFEA 2008](#) in line not only with the scientific developments, but also the significant evolution in public perception and attitudes; for example, the change in the intervening years in society's attitude as to whether it was right for

treatment to be offered to same sex female couples or to single individuals led to an amendment whereby the words '*need for a father*' were removed from [s13\(5\)](#) in the new [HFEA 2008](#) and the words '*supportive parenting*' were substituted. Critically the requirement for a consideration of the resulting child's welfare remained in place. Guidance on the proper approach to the welfare requirement is found in Part 8 HFEA Code of Practice 8th Edition.

20 Under both the [HFEA 1990](#) and the [HFEA 2008](#) , not only must a resulting child's welfare be considered, but it is a condition of the granting of a treatment license to a fertility clinic that a woman shall not be treated unless she, and any partner who are being treated together, have *been given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and have been provided with such relevant information as is proper* ([s13\(6\)](#) .) The accompanying 8th Code of Practice, Part 3, specifically refers to counselling being provided at every stage of the treatment process by a qualified counsellor.

Surrogacy

21 So called 'full' surrogacy involves *in vitro* fertilisation as the commissioning couple's sperm and egg are fertilised *in vitro* and implanted into the surrogate mother. Given that 'full' surrogacy as of necessity involves *in vitro* fertilisation, it has to place in a licensed fertility clinic and therefore it comes within the remit of the [HFEA](#) 's regulation. (The court is not aware that there are believed to be any unregulated fertility clinics offering *in vitro* fertilisation in England and Wales although there are many abroad.)

22 In contrast 'partial' surrogacy is where the surrogate mother's egg is inseminated using the commissioning male's sperm. Partial surrogacy can, as was the case with CP, be carried out informally by the parties themselves at home without involving treatment in fertility clinics. In these circumstances such 'partial' surrogacy cases are neither controlled nor regulated; there is no third party consideration of the welfare of the resulting child and none of the three people involved receive information about critical issues such as who will be the legal parents of the resulting child, or information or counselling to ensure they understand the challenges presented to parents about such issues as "identity" consequent upon a surrogate birth.

23 Notwithstanding that a surrogacy arrangement may have taken place outside the structure of the [HFEA 2008](#) , The act itself nevertheless spells out the legal effect of such an informal arrangement:

(i) The **surrogate mother** having carried a child following assisted reproduction '*and no other woman*', is the child's legal mother [s33\(1\) HFEA 2008](#) . This remains the case unless the child is subsequently adopted or parenthood transferred through a parental order. Absent adoption or a parental order she has and retains parental responsibility.

(ii) The **father** is the genetic and social father of CP The surrogate mother was not married ([section 35 HFEA 2008](#)) and was neither treated in a UK Licensed clinic, she was not in the category of relationship which would satisfy the so called '*Fathership*' conditions' ([s 37 HFEA 2008](#)) which relationships could otherwise have the effect of making the husband/partner of the surrogate mother the legal father in place of the genetic father.

(iii) The **mother** , absent legal intervention, has no status other than the emotional and social status of being CP's psychological mother. Crucially she does not have parental responsibility, she cannot therefore give consent to medical treatment, register CP for a school or take a myriad of decisions in relation to CP which parents routinely do without a thought as to whether or not they have the authority so to do.

Conferring parental status/parental responsibility upon the mother

(i) Parental Orders

24 Prior to November 1994 the only means by which the commissioning couple of a child who was born to a surrogate mother could obtain parental status was by embarking on a full adoption procedure.

25 The [Parental Orders \(Human Fertilisation and Embryology\) Regulations 1994](#) (brought into effect by [s30 HFEA 1990](#)), created *parental orders* , which provided for a consensual “fast-track” means for the transfer of legal parenthood to a couple where the child in question was conceived using the gametes of at least one of the couple. [S30](#) , [HFEA 1990](#) was subsequently repealed and replaced with new provisions for parental orders found in [s54](#) , 2008 Act which expanded the categories of individuals in respect of whom parental orders could be made so as to include married couples, civil partners, unmarried opposite- sex couples and same sex couples not in a civil partnership.

26 [s54](#) Provides

(1) On an application made by two people (“the applicants”), the court may make an order providing for a child to be treated in law as the child of the applicants if—

(a) 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 or sperm and eggs or her **artificial insemination**,

(b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and

(c) the conditions in subsections (2) to (8) are satisfied.

(2) The applicants must be—

(a) husband and wife,

(b) civil partners of each other, or

(c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

(3) Except in a case falling within subsection (11), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born.

(4) At the time of the application and the making of the order—

(a) the child's home must be with the applicants, and

(b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.

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

(6) The court must be satisfied that both—

(a) the woman who carried the child, and

(b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of [section 35 or 36](#) or any woman who is a parent by virtue of [section 42 or 43](#)),

have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

27 At the time of the making of the application for a parental order on 16 July 2010 the mother and father satisfied the requirements of [s 54, HFEA 2008](#) to this extent:

i) CP had been carried by a woman who was not one of the applicants as a result of the placing in her of the sperm of the father ([s 54\(1\)\(a\)](#))

ii) The applicants were husband and wife ([s 54\(2\)\(a\)](#)) and were over 18 ([s54\(5\)](#))

iii) The surrogate mother agreed unconditionally to the making of the order ([s54\(6\)](#)), and no money

or benefit had been given or received ([s 54\(8\)](#))

28 Two statutory requirements were not, or may not, have been satisfied:

i) The application was not made within 6 months of CP's birth ([s54\(3\)](#)).

ii) Had the mother and father lodged the application in late July 2010, before the six month statutory time limit had elapsed, the issue of statutory interpretation which would still have faced the court would have been whether the existence of the shared residence order made on 15 July 2010 would have served to satisfy the requirement found at [s54\(4\)\(a\)](#) , that

“(4) At the time of the application and the making of the order—”

a) The child's home must be with the applicants,

That issue was not argued before the court and it would not be right therefore to speculate as to

the likely outcome of such a debate.

29 When the matter came before the High Court it was agreed by all parties that the undertakings given by the parents to the county court in March 2011 *to promptly reinstate/re-issue their application for a parental order in respect of CP*, were misconceived. By that stage CP was a year old, all agreed that [s54\(3\)](#) says that the parties **must** apply for the order during the period of 6 months beginning with the day on which the child is born. There is no provision within the Act to provide for a discretionary extension to the statutory time limit and no one sought to argue that the court could, or should, whether by means of the use of its inherent jurisdiction or otherwise, seek to circumnavigate the mandatory provisions of the statute.

30 It was recognised by the parties that the policy and purpose of parental orders is to provide for the speedy consensual regularisation of the legal parental status of a child's carers following a birth resulting from a surrogacy arrangement. Such a policy does not fit comfortably with extensions of time which inevitably result in the continued involvement over a protracted period of the surrogate mother in the lives of the commissioning couple and their child.

31 A parental order is not therefore an option for this family.

(ii) Adoption

32 An adoption order does not provide a solution to the problem of the mother's status of irrevocable parental responsibility:

i) If the mother were to adopt CP alone, the father's parental responsibility would be extinguished pursuant to [ss46 & 67 Adoption and Children Act 2002](#)

ii) The mother and father cannot adopt together because they are no longer married and they are not *living as partners in an enduring family relationship* [[s 50\(1\), 67 Adoption and Children Act 2002](#)]

Special Guardianship Order

33 A Special Guardianship Order is equally not an option in CP's case; if a Special Guardian Order was made in the mother's favour she could exercise her newly granted parental responsibility, not only to the exclusion of the surrogate mother, (probably appropriately), but also, (potentially inappropriately) to the exclusion of the father

(iii) Residence Order

34 The mother can and has been granted a shared residence order under [s 8 Children Act 1989](#) . The effect of the order is to confer parental responsibility upon her. It remains, on any view, an unsatisfactory solution and understandably leaves the mother feeling vulnerable; a residence order does not confer legal motherhood upon her and, in the unlikely event that she ceased to have a residence order, she would lose her parental responsibility. Whilst a residence order regulates where CP lives and gives the mother parental responsibility, the surrogate mother retains legal motherhood and parental responsibility pursuant to [s33, HFEA 2008](#) .

35 The parties, their legal teams and the Guardian worked hard to find some sort of solution to the problem faced by the parents. This was greatly assisted by the fact that, after several years of bitter recriminations and a complete inability to pull together for the sake of this much wanted child, the parents have to their credit, and with the assistance of the Guardian, managed to put aside their grievances and reach a sensible and practical shared care arrangement. This left the legal structure to be put in place in order to:

i) provide the mother with security and recognition of her status,

ii) to regulate the use the surrogate mother may choose to put of her parental responsibility in circumstances where, whilst there is no immediate reason to believe she would act inappropriately, she is a close personal friend of the mother and continues to see CP

iii) to achieve (i) and (ii) without jeopardising the father's role as legal father with parental responsibility.

Outcome

36 The parties put before the court the following structure which, given the exceptional circumstances the court has endorsed;

i) CP shall be made and remain a ward of court until further order

ii) A shared residence order as between the mother and father

iii) All issues of parental responsibility are delegated to the mother and father jointly

iv) The surrogate mother is prohibited from exercising any parental responsibility for CP without the leave of the court

37 The court bore in mind before approving the proposed consent order that the very purpose of the introduction into the [Children Act 1989](#) of Prohibited Steps Orders and Specific Issue Orders was to incorporate into the 'new' Act valuable features of wardship which had prevented the taking of important steps in a child's life without the leave of the court. I bear in mind that prohibited steps orders can be made against third parties and therefore, in theory, could be made to regulate the use made by the surrogate mother of her parental responsibility. I concluded however that given the wholly exceptional circumstances of this case, wardship is the most appropriate way in which to manage the overall use of parental responsibility as between the father, the legal mother and the psychological mother of this child.

Cautionary Tale

38 Happily, the mother and father having had the benefit of expert legal advice and, with assistance from a first class Guardian, CP can now look forward to a secure and happy future with her care being shared between the two people she does and will continue to regard as her parents.

39 This case however highlights the real dangers which can arise as a consequence of private 'partial' surrogacy arrangements where assistance is not sought at a regulated fertility clinic (or indeed full surrogacy arrangements where the child is born abroad.) At a licensed clinic consideration will be given to the welfare of a child born as a result of the surrogacy arrangement and counselling services will be provided to the parties which will include the provision of information about the likely repercussions of a surrogacy arrangement and the importance of obtaining a parental order.

40 It is to be hoped that a multi agency surrogacy protocol will soon be in place in every Health

Authority in England and Wales, drafted in conjunction with their local fertility units and local authorities. Such protocols would go some way to ensuring that in informal surrogacy arrangements the welfare condition is met and the adults will be given important information and advice.

41 Outside the regulated clinics advice is hard to find; there are few firms of solicitors specialising, or even passingly knowledgeable, in the field, perhaps in part because the prohibition contained in [s2. Surrogacy Arrangements Act 1985](#) prohibiting the negotiating of surrogacy agreements on a commercial basis means that firms are not providing a 'surrogacy service'. Surrogacy is however becoming increasingly common and the number of applications for parental orders around the country is increasing rapidly, particularly since the amendments to the [HFEA 2008](#) now allow same sex and co-habiting opposite-sex couples (but not single people), to apply for parental orders. ([s54\(2\)](#)).

42 In CP's case, not only did the first firm of solicitors draft an illegal surrogacy agreement, but once [Children Act](#) proceedings commenced no one knew, (or checked), the time limits relating to parental orders.

43 The application for and granting of parental orders whilst not "routine" is no longer the exclusive province of lawyers specialising in reproduction and human embryology law. An understanding of, and ability to make a proper application complying with the provisions of the [HFEA 2008](#) , should be as much a part of the skills set of a competent general family practitioner as is a step parent adoption.

Crown copyright

© 2014 Sweet & Maxwell

