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In the matter of: Re: B-G (A Child)

Case No. DI13P00247

High Court of Justice Family Division Lancaster District Registry

5 February 2014

[2014] EWHC 444 (Fam)

2014 WL 795136

Before: The Honourable Mr Justice Peter Jackson

Wednesday, 5th February 2014

Representation

Solicitor for the Local Authority: Mr Gilmore .

The Applicant Fathers appeared in Person.

The Respondent Mother appeared in Person.

Judgment

The Judge:

1 This is an application made on 4th September 2013 for a parental order under [section 54 of the Human Fertilisation and Embryology Act 2008](#) . It concerns a little girl, by name A J B-G, who was born five days earlier on 31st August 2013 in [a town in England]. A's point of view in these proceedings is represented by Miss Kane, the parental reporter.

2 The applicants for this order are Mr W G and Mr J B-G. The first is a South African national aged 29 and the second a British national aged 41. For convenience in the course of what I say I will refer to them as the English and South African fathers.

3 The short history is that the English father, who had lived in this country up to that point, went to South Africa in about 2007 to pursue his career. While there he met and fell into a relationship with the South African father which led to their full marriage in South Africa in 2008. They have lived there ever since. The South African father has many family members living in South Africa and the English father many family members living in England. With them he has a considerable amount of contact, both on visits and also by telephone, Skype and the like.

4 By deliberate plan this married couple wished to have a child, or children, and the arrangement that they came to was that there should be a process of **artificial insemination** assisted by clinic in South Africa. To allow this to happen the English father's younger sister, Miss M B, aged 31, offered her assistance as a carrying mother, carrying a donor egg which was inseminated by the South African father. That pregnancy continued successfully to full term in England, and so it was that A was born in [town] last August.

5 The proceedings then very promptly began and with the blessing of the court A was taken back to South Africa, where the fathers had of course been living, on 28th October. They have returned for this hearing and it is a pleasure to see them both and A and the mother in court today.

6 In order for a parental order to be made the court must be satisfied that it is in the interests of the child concerned and also that a number of procedural matters of greater or lesser importance have been properly complied with. These orders are as important and serious as those who are involved in this case would expect them to be and there is no room for either short cuts or for overlooking matters that require proper consideration.

7 Starting with the most important question of A's welfare, I am in no doubt at all based upon the information that has been provided by the applicants, by the carrying mother, who is, of course, also in the role of an aunt, her other children being in the role of A's cousins, by the evidence of Miss Sandon, the local authority social worker who carried out a detailed assessment, and by the report of the parental reporter that this order is thoroughly in A's interests. There is nothing possible that can be said in the other direction. It is apparent that she is not only fully a part of her fathers' family but also that the excellent relationship between the English father and his sister continues so that they come to court today having been staying at her home over the course of the last week. When, as she will, A returns to South Africa at the end of this week, everybody who has had dealings with the family, including the court, has every confidence that the excellent progress that she is making will continue and is likely to continue throughout her childhood and into her future adult life.

8 So in those circumstances, it would take some serious failing in the procedural arrangements in this case for the court to be persuaded that anything short of a parental order was going to be appropriate. It offers the fullest form of family membership that can be achieved and A and her fathers are, in my view, entitled to it.

9 I have, however, to engage with the matters set out in [section 54](#) of the Act, which are unproblematic in every respect save for one which requires slightly more detailed consideration. I have reviewed all the eleven sub-sections to [section 54](#) and in each case declare myself satisfied that they represent no obstacle to the making of this order, or indeed that they are not applicable.

10 The only matter which properly requires a little more detailed consideration is the question of domicile. Under [section 54\(4\)\(a\)](#) the child's home must be with the applicants. That is, of course, the case, but in circumstances where that home is presently in Gauteng, formerly Johannesburg, it is plainly not a home that happens at the present time to be in the United Kingdom. That brings us to sub-section 4(b), which requires that either or both of the applicants must be domiciled in the United Kingdom. There is no doubt that the South African father is domiciled in South Africa and always has been. There is no doubt at all that until travelling to South Africa in 2007 the English father had always been domiciled in England, his domicile of origin, but he contends, and it is for him to establish, that he has not lost or changed that domicile of origin by reason of having moved to live and to marry in South Africa. I have helpfully had my attention drawn to decisions in this area by Mr Gilmore on behalf of the local authority. In particular there is the decision of Mrs Justice Theis in the case of *Z & Anor v C & Anor* [2011] EWHC 3181 (Fam).

11 In this case the English father argues, and in my view with success, that he has never lost his domicile of origin in the United Kingdom. There is no doubt that at the moment his life is being lived in the fullest sense in South Africa in that he is present there in normal circumstances and indeed that he is resident there. He might even, if it was of any relevance, be said to be habitually resident in South Africa at the present time. However, domicile is another matter and the law in this country is that if one leaves to reside in another country with the intention of living there for some indefinite time one will not necessarily lose one's domicile of origin in circumstances where one has a genuine intention of returning to reside permanently in the country that one has left. In this case there is, I find, a clear and agreed common intention on the part of both fathers that the time will come within the foreseeable future, and in particular by the time A gets to school age, of returning to the United Kingdom and in the case as it is most particularly relevant, of the English father of coming back to live and to pursue his life in this country. So in the overall circumstances my finding is that the provisions of 54(4)(b) are satisfied in that one of these applicants is at this point domiciled in the United Kingdom.

12 I do not, during the course of this hearing, require any further evidence about that because the matter has been dealt with in a sworn statement. It has been investigated by the social workers who do not cast any doubt on the account that is given by the fathers in this respect. That means that there is a proper connection between the child and the court that allows the court to approach this application as it would wish, namely, that it is an application in relation to a child who was carried here, who was born here, and who has and will have a British parent on one

side. So that, for me, disposes of that particular issue.

13 The last thing that I wanted to say on matters of procedure is that CAFCASS, through Miss Kane, have quite rightly wanted to receive the normal safeguarding checks that one would receive in a domestic case from the South African authorities. For reasons that can be easily imagined those have not proved forthcoming and the question therefore is whether it would have been appropriate to adjourn these proceedings for further enquiries to be made. Had this been a case in which there was reason to believe that there were going to be concerns arising from checks of this kind then, whatever the inconvenience and difficulty, I would have waited for that to be brought to a conclusion. But there is, in my view, nothing that suggests that any checks that would come back would be likely to lead to a different conclusion in this case and therefore, having noted the fact that the evidence is not 100 percent complete in that regard, it is not a gap that causes me any concern about proceeding.

14 All that said, I will, with the greatest pleasure, make the parental order that has been sought in this case so that A leaves her legal relationship with the lady who will now become her aunty and becomes a full member of the family of her fathers and I wish her and you all the very best for the future.

15 The only other order that I make is that a transcript of this judgment is to be obtained at the expense of the applicants and copies are to be sent, once it has been approved, to CAFCASS and to the local authority as well as to the applicants themselves.

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