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A & B v SA

Case No: IL12P00150

High Court of Justice Family Division

14 February 2013

[2013] EWHC 426 (Fam)

2013 WL 617673

Before: Mrs Justice Theis DBE

Date: 14/02/2013

Hearing date: 14 February 2013

Representation

A & B in Person.

Ms Penny Logan (Cafcass Legal) as Advocate to the Court.

Judgment

Mrs Justice Theis DBE:

1 This case concerns an application by A and B for a parental order concerning a young boy C born in March 2012.

2 A and B entered into a surrogacy agreement with a surrogate mother based in India. The agreement was arranged through a surrogacy clinic based in India. The surrogate mother is Indian, one of the applicants is the biological father and the egg donor originated from India.

3 The applicants applied for a parental order pursuant to section 54 Human Fertilisation and Embryology Act 2008 ('HFEA 2008').

4 The surrogate mother is the Respondent. She has taken no active part in these proceedings.

5 Due to the issues raised on the papers regarding the applicants' domicile, which is one of the mandatory gateway requirements that gives the court jurisdiction (see s 54 (4) (b) HFEA 2008 which provides *"At the time of the application and the making of the order either or both of the applicants must be domiciled in the United Kingdom or in the Channel islands or the Isle of Man"*), I directed Cafcass Legal was appointed as Advocate to the Court. This was for the sole purpose of addressing the court on whether the applicants had acquired domicile of choice in England and Wales at the date of the parental order application. I am very grateful to Ms Logan for the helpful skeleton argument submitted by her outlining the legal framework and analysis of the written evidence.

6 The Applicants submitted an excellent court bundle that contained all the relevant material. The court appointed a parental order reporter who has provided a detailed report, which considered not only the relevant criteria in s 54 HFEA 2008 , but also the welfare considerations if the criteria are satisfied. At the hearing on 14 February 2013, as well as considering the court bundle, both applicants gave oral evidence and I heard submissions from the applicants, Ms Logan and the parental order reporter. I made the parental order and gave brief reasons but indicated that full reasons would follow in this judgment.

Background

7 The applicants are a same sex couple. A was born in Poland in 1982. At the age of 17 years he moved with his family to America. It was intended to be a permanent move. His family have not returned to Poland and neither has he. His father has died and his mother continues living in America. B was born in Memphis, Tennessee in 1973. His mother, brother and two sisters remain living there.

8 A and B met in 2004. They subsequently moved to Memphis, Tennessee and lived together as a couple. They purchased their own property. Same sex unions are not recognised in the State of Tennessee. In January 2008 the applicants entered into a domestic partnership in the State of California.

9 In July 2008 the applicants moved to England. They set out in their written and oral evidence that this move was intended by them both to be a permanent move. They sold their home in America and severed all financial ties with America. A had an automatic right of entry as an EU citizen and B entered as a family member. The domestic partnership is recognised in this jurisdiction as a civil partnership pursuant to the provisions in ss 215 (1), 212 (1) and Schedule 20 Civil Partnership Act 2004 . Both the applicants are entitled to remain in this jurisdiction permanently. They run a graphic design business together and pay tax and national insurance contributions here. They live in rented accommodation and their intention is to buy a property.

10 The primary reason given by both applicants for making their permanent home here is founded on the legal recognition and protection of same sex partnerships. They wanted to start a family and wanted to ensure they raised their child in a jurisdiction that was tolerant and protective for such families. They considered a number of options. A said same sex partnerships are not recognised in Poland and same sex couples are not allowed to adopt. He has not lived or visited there for over 13 years and has no family or other connections there. He was very concerned about the attitudes to same sex couples there and B does not speak Polish. They considered moving to other States in America, but as a civil partner of a US Citizen A is unable to become a permanent resident or citizen as the U.S. Government prohibits same sex couples from federal benefits such as immigration, tax equality and health care. In oral evidence A said they considered Canada as well but there were restrictions on the entry requirements. It was in this context they decided in 2008 to move to England and cut all ties with America, save for visiting their family.

11 Following their arrival here they have rented accommodation and A has completed a degree course here.

12 Having based themselves here they decided to further their plans to start a family. They decided to go through the surrogacy process in India as they considered their legal position is protected by law there from the outset. They chose the D clinic as the lead doctor had trained and practised in the United Kingdom before moving to India to set up the clinic.

13 The surrogate mother was selected through the clinic and the applicants were sent her profile. Following the preliminary enquiries the surrogacy agreement was entered into through the clinic and signed copies are in the court bundle. The Gestational Surrogacy Agreement was signed by the applicants and the respondent in July 2011. Following the applicants' selection of the egg donor the necessary procedures were carried out and the embryo transferred to the surrogate mother. The applicants received regular updates and arrived in India a few days before C was born.

14 Following his birth C was placed in the care of the applicants, where he has remained since.

15 The applicants had researched the immigration process to return with C to this jurisdiction. Following DNA testing to establish C's biological connection with B, C was issued with a U.S. Passport. It was not necessary for entry clearance to be obtained to return to this jurisdiction as both the applicants had residency status here and C was treated as a family member of an EEA citizen exercising freedom of movement in the EU. The applicants returned to this jurisdiction in April with C and applied to the UKBA for confirmation of C's residency status. This was granted on 23 January 2013.

16 The applicants had not sought legal advice about C's position here. A applied for a parental

responsibility order as they thought this would be the best way for him to be able to make decisions on C's behalf. They did not consider it was necessary to apply for any orders for B as they considered having his name on the Indian birth certificate was sufficient. Their application for a parental responsibility order for A was made on 25 May 2012. It is now accepted that this order was incorrectly granted as the court only has power under the Children Act 1989 (CA 1989) to make such orders in favour of a spouse/civil partner of a *'parent who has parental responsibility'* section 4A CA 1989 . Although B has a biological connection to C and is treated as a matter of English law as C's legal father (as the surrogate mother is not married) that does not give B parental responsibility.

17 The applicants wanted to secure their legal position regarding C and took legal advice in August 2012. They thought they could perhaps apply to adopt. It was only then they discovered their legal status regarding C. The detailed letter of advice sent by their solicitors on 10 August 2012 is in the court bundle.

18 Following that advice the applicants lodged an application for a parental order. The matter came before me for directions in November and December and I listed the matter for final hearing on 14 February 2013.

Section 54 HFEA 2008 criteria

19 Dealing with each of the criteria listed in section 54 in turn.

> (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.

20 The evidence establishes that C was carried by the Respondent, a gestational surrogate mother, following IVF treatment at a fertility clinic in India. The treatment involved the creation of embryos with eggs from an unknown third party egg donor and sperm from B. The DNA analysis confirms B's biological connection with C.

> (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.

21 The applicants entered into a formally registered domestic partnership in California in 2008, a copy of which is in the papers. This automatically equates to a civil partnership under English law (Schedule 20 CPA 2004).

(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.

22 The application was received by the court on 6 August 2012 and issued on 14 September 2012. It is within 6 months of C's birth on 30 March 2012.

(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.

23 C's home has been with the applicants at the time the application was made and at the time the order was made. He has been in the applicants full time care since birth.

24 Turning to domicile I set out the relevant legal principles in Z v C [2011] EWHC 3181 (Fam) paras 13 – 17. Those principles remain the same, I do not propose to repeat them. The burden of proof is on the applicants. In reaching my decision I have taken into account the emphasis in the cases of the tenacity of the domicile of origin, and that the applicants must satisfy the court not only that they reside here as their permanent home, but also they have a fixed intention to remain here indefinitely.

25 A's domicile of origin is Poland. It is uncertain whether he gave up his domicile of origin when he moved to America. He was under 18 years and the precise details of the move are not entirely clear. The circumstances surrounding the move from America to this jurisdiction are much clearer. There was a strong motivation to move here permanently, connected to the legal framework that exists in this jurisdiction in relation to same sex couples and his wish to ensure their child was brought up in an environment that did not discriminate or was intolerant to such family arrangements. The decision he reached to move here was carefully thought out and planned. His statement and oral evidence makes clear he retains no ties with Poland, either through family, friends or property. He has not lived, or visited, for a number of years and has no intention of ever returning to live there, he wants to remain living here permanently. He has made his life here and intends to apply for British citizenship as soon as he is eligible to. In oral evidence he gave more details about his integration here, which I accept. They run their business from home, see A's cousin and her son regularly and have a circle of friends who live in the area.

26 B was born in America, that is his domicile of origin. His mother and siblings remain living there in the area where he grew up. His written evidence sets out what he considered to be the intolerance to same sex relationships in the State of Tennessee, including proposed legislation that would make it unlawful to provide any instruction or material in schools that discusses sexual orientation other than heterosexuality. Following the registration of their domestic partnership in California they found, when they returned to live in Memphis, they could not live openly as a couple as it would have put B's job at risk. In addition, A was ineligible for any benefits through B's job or to be included in A's healthcare. A considered, with B, moving to other more tolerant States but B was still denied a range of federal benefits. Together with A the decision to move

permanently to the United Kingdom was a planned thought out decision. He sets out in his statement the considerations that provided the powerful motivation for this decision, in particular the legal recognition of their domestic partnership and the legal protection to prevent discrimination if they had a family. In his oral evidence, which I accept, he confirmed that this move was permanent, lifelong and he had no intention of returning to live in America. He expresses this in his statement *"We will never return to the US and raise our son in a society in which public schools may censor him from talking about his family"* .

27 Having considered the written and oral evidence of the applicants, together with the detailed skeleton argument submitted by Ms Logan as Advocate to the Court I am satisfied, on the balance of probabilities, that both applicants have discharged the burden on them of proving the abandonment of their domicile of origin and the acquisition of a domicile of choice. They have both demonstrated by their actions, together with the motivation and rationale behind their respective decisions, that neither of them has any intention of ever returning to live in their country of birth. They have made their home and their lives here, both intend to remain here indefinitely.

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

28 A is 31 and B 40.

(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.

(7) Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

29 The respondent carried C. She was unmarried at the time of C's conception and birth. She had been married, the evidence establishes that she divorced in 2009. I am satisfied that she has freely, with full understanding, agreed unconditionally to the making of the order and that consent has been given more than six weeks after C's birth. There is a notarised statement of consent signed by the respondent over 24 weeks after C's birth. This statement of consent is in the form similar to Form 101A, as required by PD5A Family Proceedings Rules 2010 (FPR 2010), and witnessed in accordance with the provisions in r 13.11 (4) FPR 2010 . The evidence establishes that these documents have been translated and read out to the respondent in her first language. In addition, there is a signed acknowledgement of service to the parental order application confirming the respondent has given her consent to the application.

(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—

(a) the making of the order,

(b) any agreement required by subsection (6),

(c) the handing over of the child to the applicants, or

(d) the making of arrangements with a view to the making of the order, unless authorised by the court.

30 Under the terms of the gestational Surrogacy Agreement the applicants made payments, via the clinic, to the respondent totaling 260,000 Indian Rupees (approximately £2,958). It is conceded that this payment is for more than expenses reasonably incurred. Therefore, consideration needs to be given as to whether the court should exercise its discretion to authorise that payment pursuant to section 54 (8) HFEA 2008 . In exercising that discretion the court needs to take into account a number of matters, including whether the applicants have acted in good faith and without moral taint in their dealings with the surrogate mother; whether the applicants were party to any attempts to defraud the authorities (per *Hedley J Re X and Y [2009] 1 FLR 733* at *paragraph 21*). The court also needs to be alert to public policy considerations to ensure that commercial surrogacy arrangements were not used to (a) circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country; (b) not to be involved in anything that looked like the simple payment for effectively buying children overseas; (c) to ensure that sums of money that might look modest in themselves were not in fact of such substance that they overbore the will of a surrogate. Although as Hedley J noted in Re L (Commercial Surrogacy) [2010] EWHC 3146 (Fam) the court's paramount consideration is the welfare of the child (pursuant to section 1 Adoption and Children Act 2002), therefore it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order, if otherwise welfare considerations support the order being made. Each case needs to be carefully considered on its own facts and circumstances.

31 In this case the evidence from the applicants, together with the detailed enquiries undertaken independently by the parental order reporter, establishes the applicants have acted throughout in good faith. The agreement with the respondent and payments to her were through a third party and the agreement is legal in India. The parental order reporter details in her report her enquiries made with the clinic in India, which enables her to conclude that she is satisfied with the propriety and legality of the arrangements that were entered into. Whilst the level of payment is worth considerably more in India than elsewhere there is no evidence to suggest that it overbore the will of the respondent, or in any other way put undue pressure on her. Therefore, in the circumstances of this case, I am satisfied that the court should exercise its discretion and authorise the payment to the respondent.

Welfare

32 I am satisfied that each of the relevant criteria in s 54 HFEA 2008 is satisfied. It is then necessary to consider the welfare of C, which is the court's paramount consideration taking into account the matters set out in section 1 (4) ACA 2002 .

33 A and B have set out their circumstances and plans for C's care in their statements. The parental order reporter has visited their home on three occasions. She describes the applicants as being *'utterly committed to meeting his [C's] needs and providing him with the best opportunities throughout his life…..They are extremely child focussed and interact with C constantly. He experiences much emotional warmth and positive reinforcement'.* This assessment was wholeheartedly supported by enquires she made with the health visitor who

said she had *'absolutely no concerns'* about C. The parental order reporter has discussed with the applicants how they will share C's birth history and origins, she describes their approach and attitude to this, and the issues that may lay ahead, as being *'open, positive, educated and child-focussed'* . Her report recommends a parental order should be made. I agree with her detailed analysis of the issues. C's welfare demands that he has life long security and stability. That welfare need requires an order that will secure his legal relationship with the applicants. This can only be achieved by a parental order, which is the order I shall make in favour of the applicants.