Neutral Citation Number: [2024] EWFC 341

Case No: BS24P70964/BS24P00200

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2024

Before :

THE HONOURABLE MRS JUSTICE JUDD

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Between :

(1) Mr. R **(2) Mrs. R**	**Applicants**
- and -	
(1) Ms. A (by her litigation friend, The Official Solicitor) **(2) O (by his children's guardian, Emma Huntington)**	**Respondents**

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Colin Rogerson (instructed by **Mills & Reeve LLP**) for the **Applicants**
Andrew Powell and **Olivia Gaunt** (instructed by **Bindmans LLP**) for the **1st Respondent**
Jamie Niven-Phillips of **Cafcass Legal** for the **2nd Respondent**

Hearing dates: 19th November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE JUDD

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 Judd :

1. This is an application for a parental order by Mr. and Mrs. R, with respect to a little boy, O, who is just over six months old. The application is made in sad circumstances, because the respondent surrogate mother, Ms. A, suffered from respiratory arrest during the course of a caesarean section when giving birth. This has left her with a hypoxic brain injury and cognitive impairment.

2. Mr. and Mrs. R have an older child, L. Although he is absolutely fine now, there were some complications during his birth which meant that Mrs. R were advised that a subsequent birth could be risky. For that reason they turned to surrogacy. In May 2023 they met Ms. A online. Ms. A has children of her own, and has also acted as a surrogate for other couples on three previous occasions. She agreed to act as a surrogate for Mr. and Mrs. R. The medical arrangements were made in a clinic abroad, and a memorandum containing the surrogacy agreement was drawn up in September although it was not signed (Mrs. R states that this was because all the parties knew that this was not an enforceable agreement but one that had to be done by consent). Mr. and Mrs. R agreed to pay Ms. A the sum of £15,000 in expenses, plus any expenses relating to the birth. The embryo transfer took place in October using Mr. R's sperm and Mrs. R's eggs. Mr. and Mrs. R are therefore the genetic parents of O.

3. During the course of the pregnancy Mrs. R attended all the scans and consultant appointments with Ms. A, and they kept in close contact. The pregnancy was not an easy one, with Ms. A experiencing a number of bleeds due to a low lying placenta. When she was 30 weeks pregnant, Ms. A suffered another bleed. She informed Mrs. R of this by text saying 'On way to hospital…bleeding! I don't know if you want to make your way or I can let you know what they say'. In the event Mr. and Mrs. R travelled to the hospital, and were informed that Ms. A had been taken to the operating theatre. They were then told by Ms. A's adult daughter that O had been born, but that Ms. A had suffered from a cardiac arrest and the doctors were trying to stabilise her. O had been taken to the neonatal intensive care unit because he had not been breathing when he was born.

4. This was all very shocking and distressing for everyone. Luckily O's condition stabilised quickly. Mr. and Mrs. R were allowed into the NICU. Ms. A remained in a critical condition for several days. In the meantime O was made a ward of court by Moor J on 24th May 2024, on the basis that he would be placed in the care of Mr. and Mrs. R. On 25th June I discharged the wardship and made an interim child arrangements order in their favour.

5. O was discharged from hospital when he was just under two weeks old. Since then he has thrived and put on weight.

<u>Ms. A's condition</u>

6. Ms. A remained in a coma for a fortnight after the birth. She suffered from a hypoxic brain injury as a result of an anaphylactic reaction to the anaesthetic. The injury caused seizures and behavioural changes. At first she needed assistance with feeding and all personal tasks. At the end of July she was able to name 3 out of 5 objects accurately with some cues, could count from 1 to 10, and could say the days of the week, albeit

with some errors. She could answer simple questions, for example what she would like to eat for lunch, but could not consider multiple choices or the implications of this.

7. She was discharged to a rehabilitation hospital on 30th July, presenting with severe impairment in all cognitive domains and was disorientated in time and place. Although there was improvement by mid September she was still suffering cognitive impairment and lacked insight into this. She required assistance to complete tasks and struggled to maintain her attention on topics of discussion. She still required 24 hour care and monitoring for safety and struggled to understand complex discussion.

8. On 5th November Ms. A's treating consultant stated that she was medically stable, but that she was not able to comprehend complex discussions as her information processing was impaired. She has physically improved in that she is independent with activities of daily living, but she is cognitively impaired in multiple domains.

9. Ms. A was certified as lacking litigation capacity on 22 July 2024 and is represented by the Official Solicitor.

Parental Order report

10. At the hearing on 25th June I joined O as a party and appointed a Guardian to act for him, Ms. Huntington. She has prepared a detailed report, supporting the application for a parental order. She has visited O and seen him with Mr. and Mrs. R. This is a loving home and he is thriving in their care. He is doted on by his older brother and surrounded by a supportive extended family who live in close proximity. O is meeting his developmental milestones adjusted for his prematurity and sleeps and eats well.

11. Whilst Mr. and Mrs. R paid just under £19,000 to Ms. A, the Guardian considers this to be a sum which very much aligns with other domestic surrogacy arrangements, including expenses for loss of earnings and undergoing an operation. They did not ask for receipts on the basis that this was a matter of trust. The Guardian states that she does not believe Mr. and Mrs. R attempted to undermine Ms. A's free will or exploit her in any way and invites the court to authorise the payment as compliant with s54 HFEA 2008.

12. The Guardian also spoke to Ms. A's partner (they are not married). He told her that Ms. A had acted as a surrogate for around 20 years and that she did this altruistically because she derived great satisfaction in helping others with the gift of a baby. She was involved in many surrogacy groups. He expressed the certainty that, if she was able, Ms. A would agree to the making of a parental order.

13. The Guardian considers that O was a much wanted and planned for child and that the shared intention throughout the arrangement was for O to be cared for by Mr. and Mrs. R. She recommends that a parental order is made.

The Official Solicitor

14. Ms. A was visited by her solicitor, Ms. Leivesley, a partner at Bindmans LLP, who was appointed by the Official Solicitor. In an attendance note she has set out a number of things that Ms. A said. At first she asked if the visit was about O's passport. When asked about the surrogacy agreement, she could not remember the document, but said 'He

was going to be their baby straight away'. She also said 'I am worried about whether they are going to say take the baby back'. She was able to repeat back that Mr. and Mrs. R were going to court for a parental order and repeated her worry that they were going to ask her to take the baby back.

Statutory framework

15. The making of parental orders is governed by s54 HFEA 2008. S54 provides as follows:-

    i) On an application by two people ("the applicants") the court may make an order providing for a child to be treated as a 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 or 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 (8A) are satisfied.

16. The conditions are that the applicants must be husband and wife, civil partners or two persons in an enduring family relationship, that the order must be applied for within six months of birth, that the child's home must be with the applicants (who must also be domiciled in the UK) at the time of the making of the application and the order, and that the applicants must be over the age of 18. The court must also 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 the making of the order, any agreement by subsection (6), the handing over of the child to the applicants, or the making of arrangements with a view to the making of the order unless authorised by the court. An order relating to the child must not have previously been made unless the order has been quashed or an appeal against an order been allowed.

17. S54(6) provides that:

> "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".

18. S54(7) provides:

> "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 if given less than six weeks after the child's birth."

19. Section 1 of the Adoption and Children Act 2002 applies to the making of parental orders, so that the child's welfare throughout his life is the court's paramount consideration. The welfare checklist in s1(4) of the Act also applies.

The position of the parties

20. On behalf of the applicants, Mr. and Mrs. R, Mr. Rogerson asks me to make a parental order now on the basis that all the criteria in s54 are made out. He invites me to find that Ms. A's agreement is not required as she is not capable of giving it (ss(6) and (7)). Although there is no expert evidence dealing with the precise point as to her capacity to agree, he invites me to find on the basis of the evidence before me that, as a matter of fact, she is not capable of agreeing.

21. On behalf of Ms. A, Mr. Powell and Ms. Gaunt invite the court to make the parental order. The Official Solicitor wishes to adopt a proportionate and pragmatic approach to the need for further capacity evidence given the wider contemporaneous evidence that is available and the impact of the ongoing proceedings on Ms. A and her wider family.

22. The application is also supported by Mr. Niven-Phillips on behalf of the Guardian.

Decision

23. In coming to my decision, I have been greatly assisted by the detailed submissions made by all of the parties. I will not set them out individually here as they are incorporated into the decision I have made, as set out below. I am particularly grateful to the legal teams for Mr. and Mrs. R and Ms. A for acting pro bono.

24. There is no doubt that the provisions of s54 (1), (2), (3), (4) and (5) of the HFEA are met. Mr. and Mrs. R are married, over 18, and domiciled here. O has been living with them since he was about three weeks old. The application for a parental order was deemed to have been made by me within two months of O's birth. The gametes of both Mr. and Mrs. R were used to bring about the creation of the embryo.

25. The issue which requires particular focus is that of Ms. A's agreement, pursuant to ss(6) and (7). Counsel have not been able to find any reported decisions in which it has been decided that the woman who carried the child (or any other person whose agreement is required pursuant to the subsection) is incapable of agreement. There are reported cases where the court has concluded that the agreement of the surrogate is not required because she cannot be found, for example *Re D and L (Surrogacy)* [2012] EWHC 2631 (Fam) (Baker J). In that case he observed:

> "*It is a very important element of the surrogacy law in this country that a parental order should normally only be made with the consent of the woman who carried and gave birth to the child. The reasons for this provision are obvious. A surrogate mother is not merely a cipher.*"

He went on to identify three steps the court should undertake when invited to dispense with consent. First, the court must carefully scrutinise the evidence as to the efforts which have been made to find her. It is only when all reasonable steps have been taken

to locate her without consent that the court is likely to dispense with the need for valid consent. Secondly the court is entitled to take into account any evidence that it has that the woman did actually consent, even if that was before the period of six weeks after the birth, albeit the weight to be attached to that would be limited, and thirdly that the child's welfare throughout his life is the court's paramount consideration. It would be wrong, however, to use this provision to avoid the need to take all reasonable steps to locate the woman concerned.

26. In *Re QR (Parental Order: Dispensing with Consent: Proportionality)* [2023] EWHC 3196 (Fam) Gwynneth Knowles J, applying *Re D and L* above, stated that the court should also consider the proportionality of taking any further steps to find the surrogate mother in the light of the circumstances of the case.

27. S52(1) of the ACA 2002 provides that:

> "The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that –
>
> (a) the parent or guardian cannot be found or **lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent**, or
>
> (b) the welfare of the child requires the consent to be dispensed with."

28. It can therefore be seen that the provisions of the HFEA and the ACA are different with respect to consent/agreement. Mr. Powell points out that the Mental Capacity Act was brought into force after the ACA, and that s52(1)(a) was amended to include reference to it. The HFEA came into force afterwards but no reference was included.

29. Although the two Acts clearly have similarities (and s1 of one is imported into the other), there is a clear difference when it comes to the issue of consent. There is no provision by which consent can be overridden under the HFEA on the basis of the child's welfare. I am satisfied that the question as to whether the relevant person is incapable of giving agreement pursuant to s54(7) is a question of fact to be determined by the court, giving the words their ordinary meaning, and that the capacity concerned is wider than that defined in the Mental Capacity Act 2005. The court is likely to wish to consider the person's ability to understand the information relevant to the decision, to retain it, to use and weigh it, and to communicate it, but may take into account other issues too.

30. I have set out in some detail above the medical evidence with respect to Ms. A's current cognitive abilities. The most recent report states that she is currently not able to comprehend complex discussions as her information processing remains impaired in multiple domains. The attendance note from Ms. Leivesley is an illustration of the problems that Ms. A has.

31. Given all the information that is before the court, it is not necessary or proportionate to adjourn the case to obtain a further, independent expert report as to Ms. A's capacity to

agree to the order, bearing in mind that, in accordance with s54(6) the requirement is that she 'freely, and with full understanding of what is involved, agreed unconditionally to the making of the order'. The evidence about that is already clear and cogent, in my judgement, that she is currently incapable of giving her agreement pursuant to s54(7). It is possible that could change in the future, but the extent and timing of that is unknown.

32. The only other condition that needs to be considered is s54(8). Having read the Guardian's report and considered all the circumstances of the case I am satisfied that the sums concerned should be authorised by the court.

33. The provisions of s54 having been met, therefore, I turn to consider O's welfare throughout his life. He has been living with Mr. and Mrs. R and L since he was only two weeks old. He is a much wanted and loved child, and the arrangement between the parties was always that Mr. and Mrs. R should bring him up. He needs a stable family life, and that is what they offer. He is the biological child of both Mr. and Mrs. R, and Ms. A never intended to be his mother; indeed the concern she was able to express (and is entirely understandable) was that they might wish to give O back to her. It is important for O for Mr. and Mrs. R to be recognised as his legal parents. O was born prematurely but is making great progress. He is well cared for in his home and there are no safeguarding concerns at all. He is part of an extended family. In time O will come to understand his life story, which will include knowing how he came to be conceived, and the identity of Ms. A. Mr. and Mrs. R are committed to this.

34. I note the evidence of Ms. A's partner suggests that she would have agreed to the making of a parental order had she been able to do so. It is quite clear from all the evidence before me that Ms. A has long been motivated to help others to have a baby they cannot carry themselves. There is no doubt that this is what she was doing when she so tragically suffered an allergic reaction to the anaesthetic she was given for the caesarean section.

35. In all the circumstances I make the parental order sought.