Neutral Citation Number: [2018] EWFC 68

Case No: MK18P00365

IN THE FAMILY COURT
SITTING AT ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2018

Before:

MRS JUSTICE THEIS

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Between:

RQ	**Applicant**
- and -	
PA	**1st Respondent**
- and -	
TSA	
(Through her Children's Guardian Ms Janet Sivills)	**2nd Respondent**

- -
- -

Mr Martin Kingerley (instructed by **Purcell Solicitors**) for the **Applicant**
Ms Melanie Carew (instructed by **Cafcass Legal**) for the **2nd Respondent**
The 1st Respondent Was Not Present

Hearing dates: 10th July 2018

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Judgment Approved

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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 Theis DBE:

Introduction

1. This matter concerns an application for a declaration of non-parentage in respect of TSA, born 14 March 2013 now age 5. The application is not opposed by PA, or by Ms Carew on behalf of the Children's Guardian. At the hearing on 10 July the declarations were made, with reasons to be given later. This judgment sets out the reasons for that order.

2. This case highlights, once again, the need for parties embarking on fertility treatment, in particular involving a clinic outside the United Kingdom, to consider carefully the legal relationship they will have with any child born as a result of such treatment. Additionally, this case emphasises the differences in other jurisdictions of the relevant

provisions that may, or may not, enable any child, born as a result of such treatment, to obtain any information relating to the sperm or egg donor from which the embryo was created that resulted in their birth.

3. It may be stating the obvious that the availability, or not, of such information may have lifelong implications for the child, relating to matters such as identity and any medical conditions. It may be said that those embarking on such fertility treatment have, at the very least, a moral responsibility to any child born as a result of such treatment to have considered these matters at the early stage of any such treatment. Additionally, those clinics that operate here may need to carefully consider what information they give to people who seek their advice who they suggest and/or recommend should seek such treatment abroad.

4. In light of the issues raised by this case I am going to direct that Ms Carew brings this judgment to the attention of the relevant authorities, including the Department of Health and the Human Fertilisation and Embryology Authority, and this judgment will be reported on Bailli.

5. TSA was joined as a party at an earlier directions hearing. Although on the documents there was agreement between the parties, in my judgment this application affected her legal status as between the parties and, as a result, she should have a separate voice in these proceedings bearing in mind the lifelong implications for her of any declaration made by this court. Due to the fact that the history in this case was agreed there have only been limited welfare enquiries undertaken by the Children's Guardian.

6. Both the applicant and Children's Guardian are legally represented, and the court has had the enormous benefit of detailed written submissions from both of them. The court is particularly grateful to Mr Kingerley, and his instructing solicitor, who are both acting pro bono. The court is extremely fortunate to have such comprehensive submissions from advocates with such expertise in this area of the law.

Relevant Background

7. The parties commenced a relationship in about 2011 and in due course decided they wished to have a child together. Medical assistance was going to be required as PA had had a vasectomy and RQ was over 40. They sought the assistance of UK Fertility Clinic, and in particular Dr P (Consultant in Reproductive Medicine). She advised that the chances of retrieving suitable eggs was low due to RQ age.

8. According to RQ the clinician they consulted suggested they may wish to consider embryo adoption, though a clinic based in Spain. Dr P wrote on 26 March 2012 to RQ and PA setting out her advice, which included the option of embryo adoption. She concluded that letter as follows *'Whichever way you decide you want to proceed you will need infection screens and a number of forms to be completed…'.*

9. They decided to pursue embryo adoption and signed a number of documents on 18 April 2012.

10. They both signed a document that is entitled *'Embryo Adoption Consent'* which amounts to a declaration by both of them as to the following matters, helpfully summarised in Mr Kingerley's submissions as follows:

(i) That they had received '*detailed information not only regarding the assisted reproduction technique they will undergo but also the fact that the technique…will use cryopreserved embryos form the Embryo Bank in Spain, having previously been donated by another couple'*;

(ii) That, by consenting to the use of this technique they will not be able to contest the '*affiliation'* of the child born as a result of the treatment;

(iii) That the donation was made voluntarily and was altruistic in nature;

(iv) That they had been informed that the donor couple had undergone legally required analyses in respect of matters relating to psychological and physical disorders and issues of chromosomal, genetic and metabolic pathologies; and

(v) That data concerning the donor couple was to be kept in the utmost secrecy.

11. On the same date they signed a document entitled *'Authorisation for the sending of information to the Patient'*, this document gave permission for UK Fertility Clinic to send personal information concerning RQ and PA to the clinic in Spain. In addition, the document provided consent for documents concerning certain specified medical tests, treatment instructions and bills being sent to RQ and PA. A further document was signed entitled *'Authorisation for the sending of patient information to the referral doctor'* where RQ and PA gave consent for the clinic in Spain to send all information relating to their treatment to Dr P.

12. They both signed a further document entitled *'For Patients having treatment abroad for the purpose of the HFEA Licence'* which included agreement by them that *'they agree that no HFEA licensed treatment is taking place at the clinic'.* As well as being signed by both RQ and PA, it is also signed by Dr P from the clinic.

13. In her statement for these proceedings RQ said *'as far as I was aware it was the intention of both the Respondent and I that we would be the legal parents of any child that was subsequently born to us. This is despite it being a donor egg and sperm.'*

14. It appears RQ and PA were sent the HFEA Form PP (consent to being a legal parent) by the clinic here which was not completed. Dr P states in her letter dated 18 July 2014 that these forms were not completed as they went abroad to have treatment, she stated *'The forms that you refer to for legal parenthood with the HFEA do not apply to treatment undertaken abroad. These were in fact supplied to RQ and PA, but they did not complete these as they went abroad to have treatment.'*

15. The embryo was transferred to RQ at the clinic in Spain in June 2012.

16. TSA was born here on 14 March 2013, and her birth was registered here on 25 April 2013 by both parents and records her father as PA.

17. RQ and PA separated in September 2013, TSA remained in the care of RQ. Since separation PA has had no contact with TSA and has not sought to do so. TSA has remained in RQ's care, and all the evidence suggests she is settled and thriving.

18. In June 2014 RQ's solicitors wrote to PA regarding payment of child maintenance. He responded stating that as he was not TSA's biological father he was not liable to pay

child maintenance. RQ sought further legal advice, which resulted in this application where she seeks a declaration that PA is not TSA's father and that such declaration is communicated to the Registrar General so that TSA's birth certificate may be amended by re-registration.

19. According to RQ, neither she nor PA were aware of the implications regarding their legal status in relation to TSA until they received a letter from Dr P dated 18 July 2014.

20. RQ issued her application seeking a declaration in April 2018, the matter was allocated to me and directions were made on 17 May, which included joining TSA as a party and directing a position statement on behalf of the Children's guardian to address the following:

    (a) The outcome of any safeguarding checks/welfare enquiries;

    (b) Consideration in respect of any discussion held with the applicant and/or the respondent; and

    (c) Whether the application is supported on behalf of the child.

21. RQ has filed a statement setting out the relevant history and PA confirmed in writing on 10 May 2018 his agreement to the declarations sought.

22. The position statement on behalf of the Children's Guardian, dated 28 June 2018, confirmed there were no safeguarding/welfare concerns and that the Children's Guardian had spoken to both the parties. She reports that whilst PA did not wish to play any part in TSA's life he was wholly supportive of RQ, considered her to be a devoted and caring mother and was confident RQ would tell TSA of her history when she was old enough to understand it. In her discussions with RQ the Guardian was satisfied that RQ will provide a narrative to explain her origins and to help her understand PA's role, and the need for this to be a process rather than an event in TSA's life. She recognised the earlier she is informed the easier it will be for her to accept.

Relevant legal framework

23. Section 55A family Law Act 1986 provides as follows:

    (1) Subject to the following provisions of this section, any person may apply to the High Court or the family court for a declaration as to whether or not a person named in the application is or was the parent of another person so named.

    (2) A court shall have jurisdiction to entertain an application under subsection (1) above if, and only if, either of the persons named in it for the purposes of that subsection—

    (a)is domiciled in England and Wales on the date of the application, or
    (b)has been habitually resident in England and Wales throughout the period of one year ending with that date, or
    (c)died before that date and either—

(i)was at death domiciled in England and Wales, or
(ii)had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

(3) Except in a case falling within subsection (4) below, the court shall refuse to hear an application under subsection (1) above unless it considers that the applicant has a sufficient personal interest in the determination of the application (but this is subject to section 27 of the Child Support Act 1991).

(4) The excepted cases are where the declaration sought is as to whether or not—

(a)the applicant is the parent of a named person;
(b)a named person is the parent of the applicant; or
(c)a named person is the other parent of a named child of the applicant.

(5) Where an application under subsection (1) above is made and one of the persons named in it for the purposes of that subsection is a child, the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child.

(6) Where a court refuses to hear an application under subsection (1) above it may order that the applicant may not apply again for the same declaration without leave of the court.

(7) Where a declaration is made by a court on an application under subsection (1) above, the prescribed officer of the court shall notify the Registrar General, in such a manner and within such period as may be prescribed, of the making of that declaration.

24. There is no issue that RQ is entitled to make an application for a declaration of non-parentage, she is domiciled and habitually resident in England and Wales and is the parent of the named person, who is the child.

25. The statutory framework governing RQ and PA status in relation to TSA is contained in the Human Fertilisation and Embryology Act 2008 (HFEA 2008).

26. RQ legal position in relation to TSA is clear, she is treated as TSA's mother and legal parent as a result of s 33 HFEA 2008 which states:

s.33. Meaning of "mother"

(1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

(2) Subsection (1) does not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child.

(3) Subsection (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.

27. The HFEA 2008 draws a distinction between whether the mother was married or unmarried at the time of treatment. If RQ and PA were married at the time the embryo was placed in RQ then PA would have been treated as TSA's father and legal parent unless he was able to demonstrate that he did not consent to the placement of the embryo into RQ. This is provided for in s 35 HFEA 2008, which states as follows:

s.35 Woman married at time of treatment

(1) If—

(a)at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage, and

(b)the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then, subject to section 38(2) to (4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1)(a).

28. As s 35 (2) makes clear in cases involving married women it does not matter whether the woman in whom the embryo was placed was in the UK or not at the time of the procedure.

29. This contrasts to the position if the woman was not married at the time of treatment, which is the position with RQ and PA.

30. Sections 36 and 37 HFEA 2008 provide as follows:

s36 Treatment provided to woman where agreed fatherhood conditions apply

If no man is treated by virtue of section 35 as the father of the child and no woman is treated by virtue of section 42 as a parent of the child but—

(a) the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies,

(b) at the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed fatherhood conditions (as set out in section 37) were satisfied in relation to a man, in relation to treatment provided to W under the licence,

(c) the man remained alive at that time, and

(d) the creation of the embryo carried by W was not brought about with the man's sperm, then, subject to section 38(2) to (4), the man is to be treated as the father of the child

s37 The agreed fatherhood conditions

(1) The agreed fatherhood conditions referred to in section 36(b) are met in relation to a man ("M") in relation to treatment provided to W under a licence if, but only if, —

(a)M has given the person responsible a notice stating that he consents to being treated as the father of any child resulting from treatment provided to W under the licence,
(b)W has given the person responsible a notice stating that she consents to M being so treated,
(c)neither M nor W has, since giving notice under paragraph (a) or (b), given the person responsible notice of the withdrawal of M's or W's consent to M being so treated,
(d)W has not, since the giving of the notice under paragraph (b), given the person responsible—

(i)a further notice under that paragraph stating that she consents to another man being treated as the father of any resulting child, or
(ii)a notice under section 44(1)(b) stating that she consents to a woman being treated as a parent of any resulting child, and

(e)W and M are not within prohibited degrees of relationship in relation to each other.
(2) A notice under subsection (1)(a), (b) or (c) must be in writing and must be signed by the person giving it.

(3) A notice under subsection (1)(a), (b) or (c) by a person ("S") who is unable to sign because of illness, injury or physical disability is to be taken to comply with the requirement of subsection (2) as to signature if it is signed at the direction of S, in the presence of S and in the presence of at least one witness who attests the signature.

31. The criteria under s 36 are not met in this case as the treatment was not provided by a licensed clinic in the United Kingdom (as required by s 36 (a)), the initial advice was sought here, but the embryo transfer took place at the clinic in Spain. Additionally, the fatherhood conditions in s 37 were not met (as required by s36 (b)). By virtue of s 36 as RQ and PA were not married at the time the embryo was placed into RQ it is a requirement that PA consented to being treated as the father of any children born as a result of that treatment. In order for that consent to be effective it has to be given in a particular way, as set out in s37 HFEA 2008. That is what is meant by the *'agreed fatherhood conditions'* referred to in s 36(b), none of which are met by PA.

32. Mr Kingerley correctly, and helpfully, sets out in his written submissions the conclusions as to legal parentage as follows:

    (i) RQ is TSA's mother and her legal parent;

    (ii) PA is not TSA's father or her legal parent;

    (iii) PA is not, therefore a 'parent' as defined by the Child Support Act 1991;

(iv) PA is not a 'parent' within the meaning of the Children Act 1989 (although not defined by the Children Act 1989 'parent' is generally taken to mean either a biological parent or a parent by operation of law);

(v) PA is not a parent by operation of law because:

(a) RQ and PA were not married at the time the embryo was placed into RQ;

(b) As they were unmarried, the treatment services they received needed to be both provided in the UK *and* PA was required to consent to being the father of any child born of the treatment received *and* such consent was required in the proper form as set out within the HFEA 2008;

(c) On their return to the UK, PA neither:

(i) adopted TSA; or

(ii) obtained a Parental Order.

33. One matter that is not specifically addressed in either of the written submissions is the position in relation to whether PA had parental responsibility, by virtue of being named on the birth certificate.

34. Section 4 of the Children Act 1989 (CA 1989) provides as follows:

(1) Where a child's mother and father are not married to each other at the time of his birth the father can acquire parental responsibility for the child if (a)he becomes registered as the child's father under any of the enactments specified.

The specified enactments include Births and Deaths Registration Act 1953, in practice the unmarried father of the child acquires parental responsibility if the birth is registered naming him as the father.

There is no definition of *'father'* in the CA 1989. Mr Kingerley and Ms Carew jointly submit that the father must *in fact* and *in law* be the father to be able to take advantage of this route to obtaining parental responsibility. In this case, it is established pursuant to the relevant provisions of the HFEA 2008, outlined above, that PA is not the legal father therefore the inclusion of his name on the birth certificate as the father cannot be correct in the light of the court's declaration. It follows, therefore, if he is not the father he does not have parental responsibility because section 4 CA 1989 does not apply (to an individual who is not the father). Although not directly relevant to the application this court is being asked to determine, those submissions make logical sense and I accept their analysis.

Discussion and Decision

35. TSA has been cared for solely by her mother. In practical terms she is TSA's only parent and is the only person exercising any form of parental responsibility for her. PA, who has no biological connection with TSA, has been consistent over the last four years that he does not wish to play any part in TSA's life. Other than his involvement with RQ in the arrangements leading up to the embryo transfer as

outlined above, and his presence in the family home for the first few months of her life he has no other connection with TSA.

36. By reason of the registration of her birth, jointly by RQ and PA, TSA does not share RQ surname. Mr Kingerley submits that TSA's birth certificate in its current form reflects an inaccurate picture of her paternal heritage and it is in TSA's best interests that a document as important as her birth certificate is accurate.

37. Both Mr Kingerley and Ms Carew agree that as the treatment services received by RQ took place outside the United Kingdom the provisions of the HFEA 2008 regarding treatment do not apply. In practical terms this means the parties did not undertake the counselling, complete the relevant WP/PP forms (Form WP 'your consent to your partner being the legal parent' and Form PP 'your consent to being the legal parent') or act in any other manner that would have demonstrated compliance with the terms of the HFEA 2008. On the contrary, the only form completed by the parties which indicates their intentions is entitled *'For Patients having treatment abroad for the purpose of the HFEA Licence'* and appears to expressly exclude the provisions of the HFEA 2008. As a consequence, they submit, it is not open to the court to form the view that the situation in the instant case falls within the broad relief provided for by *Re Human Fertilisation and Embryology Act 2008 (Cases A,B,C,D,E,F,G and H) [2017] 1 FLR 366 FD*. There the court was able to make declarations of parentage in circumstances where the record keeping by the relevant clinics had fallen below what was required. This case is the reverse in that the reality for TSA is that she was born as a result of assisted conception, she has one legal parents but as Ms Carew observed an *'administrative falsehood exists in that her birth certificate names a person who is not her legal or indeed her genetic or even her psychological parent as her father and the court is being asked to rectify the record'.*

38. In this case it appears the only significance of treatment services having been undertaken in Spain, other than placing the parties outside the relevant provisions of the HFEA 2008, is in terms of donor anonymity. Under the relevant Spanish law (14/2006) sperm donors are granted complete anonymity, which means they cannot be traced in later life by any child who is conceived as a result of their sperm donation. This is in contrast to the position in the United Kingdom, which allows for a record to be kept of the names and details of sperm donors which enables any child born as a result to identify their donor for medical, social and emotional reasons notwithstanding the absence of any obligations to or responsibility for any child conceived as a result of their donated sperm (see *Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004).*

39. What is perhaps noteworthy in this case, and I suspect many other similar situations, is that little, if any, consideration was given by the parties in this case, or on the information the court has seen, by the clinic in the United Kingdom of the legal ramifications of the course the parties were about to embark on regarding their legal relationship with the child who would be born following such treatment.

40. From the child's point of view any parties embarking on fertility treatment, particularly involving a clinic abroad, should give careful consideration as to what their respective legal position will be with any child born as a result of such treatment. Additionally, they should carefully consider what the child's position will be in the

future about any details he or she may want to seek about any donor sperm and/or eggs that resulted in their birth.

41. Having considered the detailed submissions I am satisfied that by virtue of the fact that the relevant treatment was not provided by a licensed clinic in the United Kingdom and the fatherhood conditions under ss 36 and 37 HFEA 2008 were not met PA is not TSA's father, and that the declaration sought should be made.