Neutral Citation Number: [2019] EWFC 43

Case No: ZC18P00540

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2019

Before:

MRS JUSTICE THEIS

- -

Between:

Mr Z	**1st Applicant**
- and -	
Ms Y	**2nd Applicant**
- and -	
Ms X	**1st Respondent**
- and -	
The Children (Through their Children's Guardian John Power)	**2nd & 3rd Respondents**

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Mr Z & Ms Y: Did Not Attend Court
Ms X: Did Not Attend Court
Ms Melanie Carew (Instructed by **Cafcass Legal)** Appeared on behalf of the **2nd & 3rd Respondents**

Hearing date: 18th June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE THEIS DBE

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 Theis DBE:

Introduction

1. This short judgment is to explain the reasons for the court giving permission for the applicants, Mr Z and Ms Y, to withdraw their application for a parental order.

2. The applicants made their application for parental orders concerning two children, who were born following a surrogacy arrangement the applicants entered into in Country A. The respondent surrogate is an unmarried national of Country A. The children were born in Country A. The applicants have an older child who was conceived naturally and is now over 18 years.

3. The applicants are nationals of Country B and have both lived in this country since 2004. They are both British Citizens and the children are British Citizens, obtaining such status as a result of Mr Z's British Citizenship as the surrogate was unmarried.

4. The application for a parental order was made in April 2018. Following a number of adjourned directions hearings, the applicants filed a statement in January 2019 setting out the evidence they relied upon to satisfy the criteria under section 54 Human Fertilisation and Embryology Act 2008 (HFEA 2008) to enable the court to consider making a parental order. They had assistance, pro bono, from Ms Hollmann for which the court is extremely grateful.

5. The report from the parental order reporter followed.

6. At the hearing in March 2019 directions were given for further information to be filed relevant to two of the s 54 criteria; the consent of the surrogate (s 54 (6)) and the payments made by the Applicants, in particular whether they were for expenses reasonably incurred, or exceeded that amount thereby requiring the courts authorisation (s 54 (8)). The parental order reporter was directed to file an addendum report addressing these issues and the matter adjourned to a hearing in May 2019.

7. Following the March hearing the applicants sent a detailed email to the court and the parental order reporter. They felt strongly that the court should have made a parental order on the information the court had already received and that, as a result, they decided they did not wish to continue with their application.

8. The May hearing was adjourned to enable the parental order reporter to make further enquiries with the applicants, and to seek to re-engage them. When the matter was next listed the court joined the children as parties, appointed the parental order reporter as the Children's Guardian who was represented by Ms Carew, from Cafcass Legal. The email from the applicants was treated as an application for leave to withdraw their application pursuant to rule 29.4 Family Procedure Rules 2010

(FPR 2010). In deciding such an application, the welfare of the child is the court's paramount consideration. Directions were made for the Children's Guardian to file a further report and for the applicants to attend the next hearing on 18 June.

9. Ms Carew wrote to the applicants on 24 May setting out clearly the legal implications for them and the children if they did not pursue their application for a parental order. In particular, she drew attention to the limitations of the parental responsibility they had pursuant to the child arrangements order and how that contrasted with the legal effect of a parental order.

10. On 1 June the applicants emailed the court and the Children's Guardian as follows:

> *'Our decision in the [March email] was a very rational and formal decision. Now we still insist on this decision. That is, give up the application of PO.'*

11. Later in the email the applicants refer to the courts ability to make a parental order on the information the court has although they were not prepared to engage further in the process.

12. The Children's Guardian filed an addendum report. He considered, in the absence of the information the court required, he could not recommend a parental order was made but echoed the matters set out in Ms Carew's letter about the implications of a parental order not being made regarding the children's status vis a vis the applicants.

13. The applicants did not attend the hearing on 18 June and have taken no further part in the proceedings other than emailing the court on 7th June stating *'For us, everything is over. We and our children have returned to normal life. Thank you again for all your work.'*

14. In her position statement for the hearing on 18 June, which was sent to the applicants, Ms Carew submitted that in the absence of the additional information being provided the court could not make a parental order. Whilst she recognised the court could make a parental order without the attendance of the applicants as the rules (rule 13.9 FPR 2010) only require the attendance of the applicants at the directions hearing, that was not a course she supported. This is an order that, if made, changed the status of the children and required participation (save in exceptional circumstances) in the process by the applicants. The last time anyone saw or had anything other than email contact with the applicants was in mid-March, some three months ago.

Discussion

15. The options available to the court in this unusual situation are as follows:

(1) Adjourn the application to a fixed date to see if the applicants can be further encouraged to participate in their application.
(2) Adjourn the application generally with liberty to restore.
(3) Make the parental order.
(4) Give leave for the applicants to withdraw their application.

16. The court is required, when considering an application for a parental order, to consider whether the criteria in s 54 HFEA 2008 is satisfied and have regard to the lifelong welfare needs of the child in accordance with *Re L (a minor) [2010] EWHC 3146 (Fam)* para [9] and [10].

17. In this case, due to the non-participation by the applicants, the court is placed in a difficult position. On the one hand there remains some outstanding information for the court to consider in order to satisfy itself that the s54 criteria are met, yet on the other there are powerful welfare considerations that point towards a parental order being made to provide the lifelong security such an order will provide for the children in securing their legal status with the applicants.

18. Turning to consider the options outlined above.

19. First, to adjourn the application to a further hearing. That would be of benefit if there was some prospect of the applicants re-engaging with the court and attending a hearing. Both Ms Carew and the Children's Guardian have made extensive efforts to contact the applicants to outline the possible consequences of their position. To date none of those efforts have met with a positive response and there is no evidence to suggest any change in the applicant's position.

20. Second, to adjourn the application generally with liberty to restore. That has only been done in two cases (*Re Z (No 2) [2016] EWHC 1191; Re AB (Surrogacy: Consent) [2016] EWHC 2643).* In each of those cases the facts justified that particular course. In *Re Z* it was to ensure the applicant would be able to restore the application in the event of a change in the law to enable single applicants to apply, and in *Re A*B it was to enable the application to be restored in the event the surrogate gave her consent. In this case, although it is an option the applicants may change their mind there is no sign of that to date and it is not a course that is proposed by the applicants. If permission was given to withdraw the application, it would be open to the applicants to make another application.

21. Third, to make a parental order. Whilst on one view this will meet the welfare needs of the children as it will secure their legal status with the applicants in a lifelong way the position remains that there are evidential gaps in the information the court requires to satisfy the s 54 criteria. In addition, even if those gaps could be filled there remains the fact that any information about the applicants and the circumstances of the children are now somewhat out of date. The applicant's position whilst explicable through what they see as the court requiring further information (that they do not consider necessary) remains, in my judgment on the

information the court has, lacking focus by them on the lifelong welfare needs of the children in their care. By taking the position they have they have risked the children's lifelong welfare needs being met by pursuing their application.

22. Fourth, to grant the applicants deemed application for leave to withdraw the application under r 29.4 (1) FPR 2010. Such an application can only succeed with the permission of the court (r 29.4 (2) FPR 2010). As the court's decision involves a question with respect to the upbringing of a child the child's welfare is the courts paramount consideration (s 1 (1) Children Act 1989). This course is supported by the Children's Guardian as although he considers the applicants position to be contrary to the welfare needs of the children he cannot see any advantage to the children for the application to be left in abeyance without any prospect of the applicant's changing their mind. In any event, if they did it would be open to them to make a fresh application. Although such an application would be after the period of 6 months following the birth of the children had expired (s 54 (3) HFEA 2008) the court is very likely to allow the application to proceed, as such an order will meet the welfare needs of the children. If the application was withdrawn it would be on the basis the child arrangements order remains in place. That ensures the applicants retain parental responsibility.

23. Ms Carew has also submitted that the court should make a separate free-standing parental responsibility order under s 4 CA 1989. She supports that by drawing the courts attention to s 12 CA 1989. This provides that where the court makes a child arrangements order in favour of the father and it is a live with order, then the court 'must' make an order under s 4 CA 1989 giving the father parental responsibility when the father has not otherwise acquired it (s 12 (1) CA 1989) . Mr Z in this case does not have parental responsibility by virtue of being on the birth certificate when the children were registered in Country A, as the birth certificate is not recognised here for the purposes of s 4 (see s 4 (1A) CA 1989) and he had not acquired it any other way. He is, however, the father by virtue of his biological connection and the fact that the surrogate was not married. Consequently, he is the father (as there is no-one else who is deemed the father) but does not have parental responsibility by virtue of the CAO made previously by the court, therefore the court is required to make an order under s 4. As Ms Carew points out, it is only a parent who can be given an order under s 4. Ms Y cannot have such an order as her parental responsibility arises only from the child arrangements order, as the surrogate remains the legal mother. This means, as a matter of law, her parental responsibility could be said to be more precarious as it would be discharged automatically on the discharge of the child arrangements order. Whereas parental responsibility under s 4 can only be discharged by an application to the court or the making of an order that affects status, such as an adoption order. As Ms Carew submits there is no difference to the quality of the parental responsibility, but an order under section 4 is a status independent of any other order, such as the child arrangements order.

24. Having considered the options that are open to the court in the very unusual circumstances of this case, I have concluded the court should give permission for

the application for a parental order to be withdrawn. I have reached that conclusion for the following reasons:

(1) There is no evidence that the applicants are likely to change their mind. Whilst there is potential benefit to the children in the application being kept effective (by either adjourning to a fixed date or adjourning generally) it is not something sought by the applicants.
(2) There remain evidential gaps regarding fulfilment of the s 54 criteria, which further adjournment is not going to change. Whilst there are clear welfare advantages to the parental order being made it is difficult to see how that can be achieved with those gaps remaining, in circumstances where the applicants have withdrawn from the process and there is no updated information of the circumstances of the applicants and the children.
(3) In giving permission for the application to be withdrawn it will enable, should circumstances change, a further application to be made. Whilst the consequences for the children are that the surrogate remains their legal mother (with parental responsibility), the applicants are their de-facto parents and through the child arrangements order, with the order under s 4 CA 1989, both will have parental responsibility which will secure their welfare whilst they are under 18 years.

25. As Ms Carew's letter so carefully explained to them, the applicants need to be aware of the limitations on their legal relationship with the children as a result of their decision not to proceed with the parental order application. This can have implications both in the short and long term. For example, the applicants will need to consider such matters as what provision is made following their deaths, as their status in relation to their eldest child and the younger children is different. They will need to ensure this difference is properly provided for, to make sure that whatever provision they intend should happen actually takes place.