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Case No: SE126/14

Neutral Citation Number: [2015] EWFC 17 (Fam)

IN THE FAMILY COURT

Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2015

Before:

MRS JUSTICE THEIS

Between:

B	<u>Applicant</u>
- and -	
C	<u>1st Respondent</u>
- and -	
D	<u>2nd Respondent</u>
- and -	
A (A Child by Children's Guardian)	<u>3rd Respondent</u>
-and-	
The Local Authority	<u>4th Respondent</u>

Ms Alison Hunt (instructed by **Taylor Bracewell LLP Solicitors**) for the **Applicant**
C and D in person

Ms Ruth Cabeza (instructed by **Graysons LLP Solicitors**) for the **3rd Respondent**

Ms Nicole Erlen (instructed by the Local Authority) for the **4th Respondents**

Hearing date: 13th February 2015

Judgment

Mrs Justice Theis DBE:

Introduction:

1. This matter concerns an application for adoption concerning a young child, A, now 7 months old. A has lived with the applicant his biological father, B, since birth. All the reports describe B's care of A as being to a high standard.
2. A was born following a surrogacy arrangement whereby the gestational surrogate was B's mother, C. C's husband, D, fully supported this. C agreed to undertake this role when another maternal relation, who had offered to be a surrogate mother for B, had to withdraw prior to any treatment, due to her own medical position.
3. This, admittedly, unusual arrangement was entered into by the parties after careful consideration, following each having individual counselling and with all the treatment being undertaken by a fertility clinic licensed by the Human Fertilisation and Embryology Authority (HFEA) who are required under the HFEA code to consider the welfare of the child before embarking on any treatment.
4. Following an adoption application being made, the relevant Local Authority is required to investigate the circumstances in accordance with the detailed requirements of the Family Procedure Rules 2010 and file an Annex A report. This has been done, and supports the adoption order being made.
5. In addition, A is a party to the proceedings and his Guardian, who advises the court as to A's welfare, has filed a separate report, following her own enquiries and analysis, and recommends the adoption order is made.
6. C and D, are the legal parents of A under the provisions of the Human Fertilisation and Embryology Act 2008 (HFEA 2008). They are respondents to B's adoption application, and fully support the order being made.
7. Given the circumstances surrounding this application I am giving this short judgment, even though all the parties agree on the outcome.
8. The arrangement the parties entered into is not one, as far as I am aware, that either this court or the clinic has previously encountered and although highly unusual, is entirely lawful under the relevant statutory provisions set out below. I will make an adoption order today having been satisfied that A's lifelong welfare needs, the court's paramount consideration under section 1 of the Adoption and Children Act 2002 (ACA 2002), are met by the court making the order.
9. I will now briefly set out the background, the relevant legal framework and the rationale for the court's decision.

Relevant background

10. B is a man in his mid twenties, who lives alone and has worked since he left school. The papers show that for some considerable time he has wanted to be a father. He waited until his circumstances were settled in terms of a job and home to enable him

to provide the care a child would need. He sought advice from specialist fertility lawyers and licensed fertility clinics, to enable him to gain advice and understanding before embarking on any process of becoming a father. This is an issue that he has discussed openly with his family and close friends.

11. B had originally hoped that a female maternal relative would be able to act as a surrogate mother for his child; however that plan could not proceed, due to a medical condition the woman had.
12. It was at that stage C discussed with D the possibility of her being the gestational surrogate. They agreed they would suggest this to B. He accepted that offer and B, C and D were seen at the fertility clinic that was being asked to undertake the proposed treatment. They discussed the position with the medical director and each had individual and joint counselling sessions with the independent counsellor to discuss the long term implications of the proposed arrangement. Prior to the counselling taking place, the clinic had discussed what the medical director referred as this 'unique case'. Subject to nothing of concern arising in the required counselling, the clinic agreed it would proceed with the treatment. The counselling was completed and the treatment proceeded. An embryo was created using a donor egg and B's sperm, following transfer of the embryo to C she carried A and he was born at full term.
13. A has been in B's care since birth. C and D were recorded on the birth certificate as A's parents. On the day of A's birth B's solicitors wrote to the Local Authority notifying them of B's intention to issue an adoption application.
14. B's application is dated 28 August 2014. The matter was transferred to be heard by a High Court Judge and first came before me on 30 September 2014. I made a child arrangements order, which confirmed the de facto arrangement of A living with B, this order gave B parental responsibility for A. Directions were made for the filing of statements, the Annex A report from the Local Authority and the Guardian's report. All of those documents are before the court. The formal written consent by C and D to the adoption is also before the court.

Legal Framework

15. The legal parents of A are C and D as a result of the provisions in the HFEA 2008.
16. Section 33 (1) HFEA 2008 provides '*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.*'. C carried A, and is therefore the mother.
17. Section 35(1) HFEA 2008 provides '*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 her artificial insemination (as the case may be).*' D did consent to C's treatment and is therefore is to be treated as A's father.

18. Section 38 (1) and (2) HFEA 2008 provide '*(1) Where a person is to be treated as the father of the child by virtue of section 35 or 36, no other person is to be treated as the father of the child. (2) In England and Wales and Northern Ireland, sections 35 and 36 do not affect any presumption, applying by virtue of the rules of common law, that a child is the legitimate child of the parties to a marriage*'. Consequently B is not to be treated as A's father.
19. Section 48 (1) and (2) HFEA 2008 set out the effect of sections 33 to 47. It provides '*(1) Where by virtue of section 33,35,36,42 or 43 a person is to be treated as the mother, father or parents of a child, that person is to be treated in law as the mother, father or parent (as the case may be) of the child for all purposes. (2) Where by virtue of section 33, 38, 41, 45 or 47 a person is not to be treated as a parent of the child, that person is to be treated in law as not being a parent of the child for any purpose.*' Therefore, C and D are to be treated as A's mother and father for all purposes, and B is not to be treated as a parent for any purpose.
20. Under section 54 of the HFEA 2008 in situations where a child has been carried by another woman a parental order can be made by the court, this provides for a child to be treated in law as the child of the applicants. However, all the requirements under section 54 have to be met, one of which is that there have to be two applicants who are either married, civil partners or are '*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.*' (Section 54 (2)). A single person is therefore unable to apply for a parental order.
21. A single person caring for a child born via surrogacy is able to apply to adopt, subject to the provisions of section 92 ACA 2002. Section 51 (1) and (4) ACA 2002 provides
- (1) An adoption order may be made on the application of one person who has attained the age of 21 years and is not married.*
-
- (4) An adoption order may not be made on an application under this section by the mother or the father of the person to be adopted unless the court is satisfied that—*
- (a) the other natural parent is dead or cannot be found,*
- (b) by virtue of section 28 of the Human Fertilisation and Embryology Act 1990 (c. 37), there is no other parent, or*
- (c) there is some other reason justifying the child's being adopted by the applicant alone,*
- and, where the court makes an adoption order on such an application, the court must record that it is satisfied as to the fact mentioned in paragraph (a) or (b) or, in the case of paragraph (c), record the reason.*
22. B is over 21 years and not married; he is therefore entitled to make an adoption application by virtue of s 51(1). By virtue of the provisions of the 2008 Act he is not to be treated as being A's father, consequently an adoption order could not be made under s 51(4).

23. Section 42 ACA 2002 provides

(1) An application for an adoption order may not be made unless—

- (a) if subsection (2) applies, the condition in that subsection is met,*
- (b) if that subsection does not apply, the condition in whichever is applicable of subsections (3) to (5) applies.*

(2) If—

- (a) the child was placed for adoption with the applicant or applicants by an adoption agency or in pursuance of an order of the High Court, or*
- (b) the applicant is a parent of the child,*
the condition is that the child must have had his home with the applicant or, in the case of an application by a couple, with one or both of them at all times during the period of ten weeks preceding the application.

(3) If the applicant or one of the applicants is the partner of a parent of the child, the condition is that the child must have had his home with the applicant or, as the case may be, applicants at all times during the period of six months preceding the application.

(4) If the applicants are local authority foster parents, the condition is that the child must have had his home with the applicants at all times during the period of one year preceding the application.

(5) In any other case, the condition is that the child must have had his home with the applicant or, in the case of an application by a couple, with one or both of them for not less than three years (whether continuous or not) during the period of five years preceding the application.

(6) But subsections (4) and (5) do not prevent an application being made if the court gives leave to make it.

(7) An adoption order may not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant or, in the case of an application by a couple, both of them together in the home environment have been given—

- (a) where the child was placed for adoption with the applicant or applicants by an adoption agency, to that agency,*
- (b) in any other case, to the local authority within whose area the home is.*

(8) In this section and sections 43 and 44(1)—

- (a) references to an adoption agency include a Scottish or Northern Irish adoption agency,*
- (b) references to a child placed for adoption by an adoption agency are to be read accordingly.'*

24. S 42 (2) does not apply as B is not to be treated as A's father so he is not 'a parent' of A as provided for in the subsection. By virtue of s 42 (5) B would be prevented from making an application to adopt A until A has lived with him for 3 years, unless the court gives him leave under s 42 (6) to make the application sooner. I gave B permission to apply to adopt A on 30 September 2014.

25. In determining the adoption application A's welfare is the court's paramount consideration under section 1 ACA 2002, which provides

(1) This section applies whenever a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.

(3) The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.

(4) The court or adoption agency must have regard to the following matters (among others)—

(a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),

(b) the child's particular needs,

(c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,

(d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,

(e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,

(f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—

(i) the likelihood of any such relationship continuing and the value to the child of its doing so,

(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.'

26. The ACA 2002 provides restrictions on arranging adoptions in section 92, the relevant part provides

(1) A person who is neither an adoption agency nor acting in pursuance of an order of the High Court must not take any of the steps mentioned in subsection (2).

(2) The steps are—

(a) asking a person other than an adoption agency to provide a child for adoption,

(b) asking a person other than an adoption agency to provide prospective adopters for a child,

(c) offering to find a child for adoption,

(d) offering a child for adoption to a person other than an adoption agency,
(e) handing over a child to any person other than an adoption agency with a view to the child's adoption by that or another person,
(f) receiving a child handed over to him in contravention of paragraph (e),
(g) entering into an agreement with any person for the adoption of a child, or for the purpose of facilitating the adoption of a child, where no adoption agency is acting on behalf of the child in the adoption,
(h) initiating or taking part in negotiations of which the purpose is the conclusion of an agreement within paragraph (g),
(i) causing another person to take any of the steps mentioned in paragraphs (a) to (h).

(3) Subsection (1) does not apply to a person taking any of the steps mentioned in paragraphs (d), (e), (g), (h) and (i) of subsection (2) if the following condition is met.

(4) The condition is that—

(a) the prospective adopters are parents, relatives or guardians of the child (or one of them is), or

(b) the prospective adopter is the partner of a parent of the child.

Breach of s 92 is a criminal offence under s 93 ACA 2002.

27. For reasons set out above, B is not treated in law as the parent of A and neither is he the guardian of the child, or the partner of the child's parent. Therefore, unless B qualified as a relative of A; B, C and D would have all been guilty of offences under s.93 ACA 2002.

28. The term 'relative' is defined in S.144 ACA 2002 which provides

"relative", in relation to a child, means a grandparent, brother, sister, uncle or aunt, whether of the full blood or half-blood or by marriage [or civil partnership]

29. By virtue of the provisions of the HFEA 2008 set out above A and B have the same parents and, therefore, B is the legal brother of A. This means that in the unusual circumstances of this case, B met the conditions of s92 (4) (a) ACA 2002 with the result that when C and D placed A for adoption with B they were acting lawfully.

30. The parties have also drawn my attention to the fact that, were it not for the highly unusual fact that B is a relative of A, when C and D placed A into B's care, the placement would have fallen within the definition of a private fostering arrangement under the Children (Private Arrangements for Fostering) Regulations 2005 (SI 2005/1533).

31. These regulations impose an obligation on both the legal parents of a child, as well as the proposed carer, to notify the appropriate local authority of the intention to care for a child under a private fostering arrangement. The obligation in these regulations arises out of the Secretary of State's power to make regulations under paragraph 7 of Schedule 8 of the Children Act 1989 (CA 1989), which in turn supplements the provisions in s.66 of the CA 1989. Breach of the provisions of s.66 CA 1989 is an

offence under s.70 CA 1989. It is of note that when a child born as a result of a surrogacy agreement, is placed in the care of intended parents who intend to apply for a parental order, the placement is not treated as a private fostering arrangement because of the effect of The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 Sch 4 para 12).

32. What this case highlights, is that but for the close familial relationship between B and C, their actions would have breached these important statutory provisions and potentially left them liable to a criminal prosecution under both s.93 ACA 2002 and s.70 CA 1989.
33. It is therefore imperative that single parents contemplating parenthood through surrogacy obtain comprehensive legal advice as to how to proceed as adoption is the only means to ensure that they are the only legal parents of their child. The process under which they can achieve this is a legal minefield, they need to ensure that all the appropriate steps are undertaken to secure lifelong legal security regarding their status with the child.

Welfare

34. As set out above, the court's paramount consideration is A's lifelong welfare; the matters set out in s 1(4) are at the forefront of the court's evaluation of A's welfare needs.
35. The detailed reports before the court support an adoption order being made. The Annex A report followed a number of visits by the social worker to see the parties, A, the wider family and support network over a period of two and a half months. The careful analysis in her report considers the matters under section 1(4) ACA 2002 and concludes as follows

'An adoption order would be the most appropriate order in relation to [A]. [A] clearly has formulated a secure attachment to [B] and seeks him out for reassurance....[B] understands that [A] will need to know about how he was conceived and feels that he will utilise the security of the family structure to support [A] in understanding that he is a very much wanted child. An adoption order would afford [B] the overall parental rights and responsibility and provide permanence for [A] in accordance with the family wishes. This would also strengthen the bond which they already share...

[C] and [D] entered into the arrangements to help [B] have a child on a voluntary basis with the agreement and hope that [B] would be able to become a legal parent to [A]. They are aware that sometimes family relationships breakdown. This is not something they envisage due to their close relationships as a family. [C] and [D] feel confident they will continue to be a part of [A's] life but wish this in a grandparent role and for [B] to be able to continue to parent [A].'

36. The Guardian in her report stated

'[C] and [D] fully support [B's] application. The family received counselling via [the clinic] during the process of the surrogacy. They are both of the view that adoption will provide the legal framework and structure for [B] to be the legal

father as well as the biological father, with them being supportive grandparents to [A].

[C] and [D] report that they have always regarded [A] as their grandson. The family as a whole have been on a long journey to achieve the much wanted son for [B].

[C] and [D] are aware they will lose their legal parental rights for [A] should the order sought be granted. They are clear this is the appropriate step for [A] should the order sought be granted. They are clear this is the appropriate step for [A] and they do not wish to retain parental responsibility, which should lie with [A's] biological father [B].

Observations of [A] in the care of [B] demonstrates that he expects his needs to be met. [B] responds appropriately with care, affection and confidence to [A's] needs.

The family as a whole are clear and consistent in their view that [A] needs to be aware of his paternity and the circumstances surrounding his birth. Clearly [A] is not of an age to understand the nature of these proceedings. However [B] is committed to explain the circumstances surrounding of [A's] birth to him in an age appropriate manner in the future both to assist with his identity and enable him to understand the lengths the family went to for [A] to be born.'

37. What is apparent from the reports is that the parties thought carefully about this arrangement, pausing, reflecting and seeking advice at each stage. In my judgment a critical feature of this case are the obviously close relationships within this family; it is an arrangement that was entered into not only with the support of the parties to this application, but, importantly, also the wider family. The strength of these familial relationships, and the consequent support they provide now and in the future, will ensure A's lifelong welfare needs are met. An adoption order will provide the legal security to A's relationship with B, which will undoubtedly meet A's long term welfare needs.
38. Therefore, B's application will be granted and an adoption order made.