



Supreme Court New South Wales

Medium Neutral Citation: Application of MM & KF re FM [2012] NSWSC 445

Hearing Dates: Friday 4 May 2012

Decision Date: 04/05/2012

Jurisdiction: Equity Division - Adoption List

Before: Brereton J

Decision: Order for the transfer of the parentage of the child.

Catchwords: FAMILY LAW AND CHILD WELFARE - Surrogacy - application for parentage order under (NSW) Surrogacy Act 2010 in relation to child of a surrogacy arrangement entered into pre-commencement of Act - application by same sex couple

Legislation Cited: (NSW) Assisted Reproductive Technology Act 2007
(NSW) Births Deaths and Marriages Registration Act 1995
(NSW) Surrogacy Act 2010
UCPR r 56A.7, r 56A.9

Cases Cited: Application of AP [2011] NSWSC 1389

Category: Principal judgment

Parties: MM and KF

File Number(s): A23/2012

JUDGMENT

- 1 The plaintiffs MM and KF, a male same sex couple in a de facto relationship, apply for a parentage order under the (NSW) *Surrogacy Act* 2010 in respect of the child FM who was born on 26 April 2010, the natural mother being CE. While I outlined the general operation of, principles in and procedure under the Act in *Application of AP* [2011] NSWSC 1389, this is the first application under the Act of which I am aware in which the intended parents are a same sex couple.
- 2 The Act commenced on 1 March 2011. A parentage order is an order made by the Court under the Act for the transfer of the parentage of a child. By s 12, the Court may, on application, make a parentage order in relation to a child of a surrogacy arrangement, and the purpose of a parentage order is to transfer the parentage of a child of a surrogacy arrangement. By s 39, on the making of the parentage order in relation to a child, the child becomes a child of the intended parent or parents named in the order and they become the parents of the child, and the child stops being a child of a birth parent and the birth parent stops being a parent of the child; accordingly, the child of the surrogacy arrangement has the same rights in relation to the intended parent or parents named in the order as a child born to the parent or parents, and the intended parent or parents named in the order have the same parental responsibility as the birth parent had before the making of the order. In the Act, a reference to the birth mother is reference to the woman who agrees to become pregnant or to try to become pregnant with a child, or is pregnant with a child, under the surrogacy arrangement, and a reference to an intended parent is a reference to a person to whom it is agreed the parentage of a child is to be transferred under the surrogacy arrangement.
- 3 The surrogacy arrangement in this case was made orally, in or around March 2009. It is, therefore, a pre-commencement surrogacy arrangement.
- 4 This application was commenced on 1 March 2012. The Act having commenced on 1 March 2011 it is therefore made not more than two years after its commencement, and thus within the time permitted by the Act in respect of a pre-commencement surrogacy arrangement.
- 5 In compliance with s 17 and with UCPR r 56A.7, a report of an independent counsellor has been filed, which includes the counsellor's assessment that each affected party understands the social and psychological implications of the

making of a parentage order (both in relation to the child and the affected parties), that each affected party understands the principle that openness and honesty about a child's birth parentage is in the best interest of the child, that suitable care arrangements are proposed by the applicants in relation to the child, as to the contact arrangements in place and proposed in relation to the child and the birth mother, that the applicants have good parenting capacity, and that all consents given by the affected parties are informed consents, freely and voluntarily given. Given the child's age, the child's wishes were not the subject of report.

- 6 I am satisfied that, having regard to the surrogacy arrangement, and the care arrangements for the child since birth, the making of the parentage order would be in the best interests of the child.
- 7 I am satisfied that this was not a commercial surrogacy arrangement.
- 8 I am satisfied that the surrogacy arrangement was a pre-conception surrogacy arrangement.
- 9 I am satisfied that at the time of entering into the arrangement, the intended parents, being the plaintiffs, were a couple, being a person and that person's de facto partner.
- 10 I am satisfied that the child being not quite two years of age is under eighteen years of age, but not of sufficient maturity to express the child's own wishes.
- 11 I am satisfied that the birth mother CE was at least twenty-five years old, when she entered into the surrogacy arrangement.
- 12 I am satisfied that both plaintiffs were at least eighteen years old when they entered into the surrogacy arrangement.
- 13 As the intended parents were not at the relevant time under twenty-five, the requirement of s 29 that the intended parent be of sufficient maturity to understand the implications of the making of the parentage order does not apply; and it does not apply for the further reason that this is a pre-commencement surrogacy arrangement.
- 14 If necessary, I would be satisfied that there is a social need for a surrogacy arrangement, as there are two intended parents who are both men [s 30(2)(b)(ii)], but this precondition also does not apply to a pre-commencement surrogacy arrangement.
- 15 I am satisfied by the affidavits of each of the affected parties (MM, KF and CE) that each consents to the making of the parentage order.
- 16 The applicants reside in this State, and the child is living with the applicants at the time of hearing.
- 17 Although the surrogacy arrangement was oral, the requirement for writing does not apply to a pre-commencement surrogacy arrangement. Nor does the requirement that each of the affected parties be counselled by a qualified counsellor before entering into the surrogacy arrangement; although the evidence satisfies me that they were each well informed and fully comprehended the social and psychological implications before doing so.
- 18 Because this is a pre-commencement surrogacy arrangement, the requirement of s 36 that each of the affected parties has received legal advice about the surrogacy arrangement before entering into it does not apply. Similarly, the requirements of UCPR r 56A.9, for an affidavit by a legal practitioner as to advice given prior to entering into the surrogacy arrangement, do not apply.
- 19 All information about the surrogacy arrangement that is registrable has been provided to the Director-General of the Department of Health. The birth of the child has been registered in accordance with the requirements of the *Births Deaths and Marriages Registration Act 1995*.
- 20 I am therefore satisfied that it would be appropriate to make a parentage order. Accordingly:
 1. The Court makes an order for the transfer of the parentage of the child FM born on 26 April 2010 ("the child") from CE to the plaintiffs MM as father and KF as father and approves the name "M" as the surname and "FT" as the given names of the child.
 2. The Court directs that the Registrar give notice of this order:
 - a. pursuant to *Surrogacy Act* s 49 to the Registrar of Births, Deaths and Marriages;
 - b. pursuant to *Surrogacy Act* s 51 to the Director-General of the Department of Health.

does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.