Neutral Citation Number: [2017] EWCA 1798 (Civ)

Case No: B4/2017/0064/FAFMF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
FAMILY DIVISION
MRS JUSTICE THEIS
FD16P00259

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2017

Before :

LORD JUSTICE McFARLANE
LORD JUSTICE HOLROYDE
and
LORD JUSTICE PETER JACKSON

- -

Between :

Re: H (A Child)

Re H (Surrogacy Breakdown)

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- -

Hannah Markham QC and Marisa Allman (instructed by **Freemans Solicitors**) for the **Appellant**
Deirdre Fottrell QC and Thomas Wilson (instructed by **Goodman Ray Solicitors**) for the **1st Respondent**
Seamus Kearney (instructed by **Cafcass Legal**) for the **2nd Respondent**

Hearing date : 12 October 2017

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JUDGMENT

McFarlane LJ:

Introduction

1. This is the judgment of the court following an appeal heard on 12 October 2017.

2. Our decision is that the appeal should be dismissed.

3. The appeal concerned limited but important elements of an order made by Theis J on 13 December 2016, following the breakdown of an intended surrogacy arrangement. When granting permission to appeal, King LJ identified the case as giving rise to issues about the proper approach in such cases.

4. Our essential conclusions are these:

   (i) We reaffirm the position stated by this court in the surrogacy case *Re N (a Child)* [2007] EWCA Civ. 1053. The essential question in every case is: all things considered, which outcome will be best for the child? The law does not take a special approach to decisions about surrogacy breakdown or other disputes within unconventional family structures. The welfare principle applies with full force in such cases; indeed, the more unusual the facts, the greater the need to keep the child at the heart of the decision, and to ensure that the interests of others prevail only where they are in harmony with the interests of the child.

   (ii) Although the appeal was trailed as involving novel legal issues about the interface between the Human Fertilisation and Embryology Act 2008 and the Children Act 1989, on examination these issues fell away and the argument ultimately boiled down to the question of whether the Judge erred in her evaluation of the evidence.

   (iii) As to that, our view is that the Judge rightly took a conventional welfare approach to an unconventional family structure. Her decisions about where the child should live (not appealed) and about the role that should be played by the other family (the focus of this appeal) were ones that she was entitled to reach on the evidence before her.

The background

5. The proceedings concern H, who was seven months old at the time of the hearing before the Judge. H's future was contested between two couples who had entered into a surrogacy arrangement. In this judgment, we call the first couple, male same-sex partners, A and B, and the second couple, a heterosexual married couple, C and D.

6. The outline history was concisely set out by the Judge:

> "C and D have five children of their own and C has twice been a gestational surrogate before. The parties met online for the first time in April 2015. They signed a surrogacy agreement in August 2015. C and A travelled to a clinic in Cyprus in September 2015 for the embryo transfer, using embryos created from A and B's sperm and a donor egg from a Spanish egg donor

> which resulted in C's pregnancy with H. A DNA test later confirmed A's paternity.
>
> In circumstances which are disputed, the relationship between the parties deteriorated in February 2016, to the extent that, by early March 2016, there was no communication between them. C's health had deteriorated due to difficulties with her back and she had to have keyhole surgery in January 2016.
>
> At some point in late March 2016, C and D sought legal advice and decided that they were not going to hand over the child to A and B, as had been agreed between the parties as recorded in the agreement they signed in August 2015. At this time, A and B were seeking to establish contact with C, but with no response.
>
> C gave birth to H in late April. It was a difficult birth and both she and H suffered ill-health immediately afterwards. They remained in hospital until 6th May 2016. The day before H's birth, C and D's then solicitor had written to A and B to inform them that they were not prepared to follow their surrogacy agreement and would not be giving their consent to a parental order.
>
> Even though there had been some correspondence with solicitors for the 10 days following H's birth, it was not until about 10th May 2016 that A and B were first informed of the birth. By that stage, C and D had registered H's birth with the name they had chosen rather than the name chosen by A and B. C and D's account for this delay in informing A and B is that it was due to the ill-health of C and E.
>
> Not surprisingly, A and B immediately issued legal proceedings following which arrangements for contact were made, and those arrangements increased to a shared care arrangement which has been in existence pending this hearing to determine the future care of H."

7. The Judge, whose experience of cases of surrogacy and intended surrogacy is unequalled, had conduct of the proceedings from a very early stage. The final hearing, which lasted for four days, was the sixth occasion on which the case had come before her. She heard evidence from the four adults and from the Children's Guardian, who had filed two reports. The fundamental question concerned where H should live. Once that was decided, the remaining questions were (a) how much contact there should be between H and the other couple, and (b) the extent to which that couple should be able to exercise parental responsibility.

8. H, through the Children's Guardian, was represented by Ms Logan before the Judge, and by Mr Kearney in opposition to the appeal. At the trial, and before us, A and B were represented by Ms Fottrell QC and Mr Wilson, while C and D were represented by Ms Markham QC and Ms Allman. They and their respective solicitors (Goodman Ray and Freemans) have acted *pro bono* on this appeal, and we express our appreciation for their altruism and for the way in which the case has been prepared and argued by all parties.

The legal setting

9. Although C has no genetic connection to H, as gestational mother she is the child's legal mother: s.33(1) HFEA 2008. Likewise, although D has no genetic connection to H, as C's husband he is to be treated as the child's legal father: s.35(1). C and D are therefore H's only legal parents. That situation could only change on the making of a parental order under s.54 of the 2008 Act or an adoption order.

10. So far as A and B are concerned, they each gained parental responsibility during the course of the proceedings by virtue of an interim child arrangements order under s.8 Children Act 1989 providing for H to live with them for part of the time, a position cemented by the final child arrangements order in their favour. Accordingly, H now has two legal parents and four adults who have parental responsibility.

11. The original intention of the parties was that once the child was born they would cooperate in obtaining a parental order in favour of A and B. This would have had the effect of transferring legal parenthood from one couple to the other. However, surrogacy arrangements are unenforceable (s.1A Surrogacy Arrangements Act 1985) and parental orders are unique as they can only be made if the legal parents unconditionally agree: s.54(6) of the 2008 Act. Further, a mother's agreement will be ineffective if given less than six weeks after the child's birth: s.54(7).

12. As originally framed, Ms Markham's argument proposed that as a matter of law, C and D, had the right *"to change their minds and keep H"*. It is undoubtedly correct that a surrogate mother has the right to change her mind, but Ms Markham wisely withdrew from the submission that such a mother also had the right to have her own way about where the child should live. She was also forced to concede that, while the six-week "cooling off" period protects a mother in relation to the important issue of consent to a parental order, it tells one nothing about what the best welfare arrangements for the child will be after birth. That will depend on the circumstances, which will include, in addition to the factors in the CA 1989 s.1(3) checklist, the child's gestational and legal parentage, his or her genetic relationships and the manner in which the intended surrogacy came about.

Professional advice

13. On the question of H's home, the Children's Guardian favoured the claim of A and B. In her first report, she recognised that H's ordinary physical, emotional and educational needs could be met by any of the parties, but she considered that the more complex emotional needs of a child born in these circumstances may not be fully met by C and D. She considered that A and B were more likely to promote C and D's role in H's life positively than if the arrangements were the other way around. She was concerned about C and D not accepting B as a valid parent. She found them less able to look at matters from the child's point of view. She therefore recommended that H should live with A and B and have visiting contact every three weeks with C and D. Longer periods of contact might be possible when H was about two years old.

14. In her second report, the Guardian modified her recommendation about contact. She remained concerned about the continuation of what she saw as undermining behaviour on the part of C and D. She advised that it would be emotionally harmful for H to move regularly between the two homes. The need for knowledge of the birth

family had to be balanced against the need for emotional stability. Contact should therefore take place six times a year.

The Judge's decision

15. The central task for the Judge was to identify H's main home. She directed herself with reference to *Re N* (above) and the well-known decision of the House of Lords in *Re G (Children)* [2006] UKHL 43, in which the possible significance of the various types of parenthood – gestational, biological, social and psychological – are considered.

16. The Judge was critical of C and D for the way in which they had behaved in the later stages of the pregnancy and immediately after H's birth. She described them as having embarked on a deliberate and calculated course of conduct and as having continued to put obstacles in the way of A and B in seeking to establish a relationship with H. She referred to them as being rigid, taking a position and sticking to it, and as having little or no capacity to resolve disputes or negotiate their way through difficulties. She contrasted this with the way in which A and B, having behaved in an ill-advised way in their use of social media, had tried to mend fences.

17. The Judge therefore concluded that it would be best for H to live with A and B because (1) H's identity needs as a child of gay intended parents would be best met by living with a genetic parent, (2) A and B could meet H's day-to-day needs in an attuned way, (3) A and B were best able to promote the relationship with C and D, having remained positive about their significance despite the difficulties, and (4) C and D were unlikely to significantly change their views about A and B.

18. As a result of that decision, which is not the subject of this appeal, H moved to live full-time with A and B two days later.

19. The remainder of the Judge's judgment, which deals with the matters now before this court, was brief:

> "105. I agree that the management of the day to day parental responsibility should be as set out in para. 2(iii) of the closing submissions of Ms Fottrell. Those arrangements will give security in relation to the day to day planning and management of H's life.
>
> 106. In relation to contact, I accept the recommendation made by [the Guardian] that contact should be on six occasions a year. I agree with her analysis that this will enable H's primary attachments to consolidate. Bearing in mind the history, any higher frequency at this stage risks further undermining of A and B's ability to care for H, which in turn gives rise to the risk of future emotional harm. I am satisfied A and B will promote H's relationship with C and D. There should be discussions between the parties after this judgement regarding any arrangements for Skype or indirect contact between contacts."

The Judge concluded by approving a change of H's name to reflect each of the adult surnames, by acknowledging how difficult the hearing had been, and by hoping that everyone would now look to the future and work in a way that meets H's needs.

20. Paragraph 2(iii) of Ms Fottrell's closing submission, which found its way into the resulting order, had advocated specific issue orders that:

    a. her clients should make the day-to-day decisions in respect of H

    b. they should decide on schooling, medical treatment and other parenting decisions

    c. they could remove H from the jurisdiction for longer than a month, subject to notifying C and D of the destination and travel plans. (Ms Fottrell's opening submission made clear that this was to allow for extended holidays, not emigration.)

21. The Judge had before her other proposals in relation to these matters from Ms Markham and from Ms Logan for the Guardian. Ms Markham's closing submission at paragraph 56(v)-(xi) set out a tighter, more detailed set of requirements. Ms Logan's position was that there should be consultation about major medical procedures or any other radical changes in H's circumstances.

The submissions on appeal

22. On behalf of C and D, Ms Markham and Ms Allman argued that:

    (1) By limiting their clients' contact and fettering their parental responsibility, the Judge has effectively made a parental order in all but name.

    (2) The Judge should have striven to provide H with two homes and four parents. Instead, she undertook no detailed analysis of the purpose of contact, neglected the Article 8 rights involved, and failed to explain why a level of 'identity contact' that marginalises C and D is necessary or proportionate.

    (3) The criticism of C and D for being rigid in wanting their legal child to live with them was unwarranted, and the Judge did not fairly balance it against the undoubted shortcomings of A and B. This imbalance reflected the Judge's treatment of the case as *"a surrogacy gone wrong"*, rather than a case to be approached on normal principles. It led her to adopt a punitive approach towards C and D for having withdrawn from the arrangement.

    (4) With reference to the parental involvement presumption at s.1(2A) Children Act 1989, the Judge should have treated the case like any other case of parental breakdown, where separated parents are reminded of the duties, and where the court has powers to support and enforce its orders.

    (5) The specific issue orders in relation to the exercise of parental responsibility and travel abroad are too wide and insufficiently precise.

23. In response, Ms Fottrell accepted that the provisions of the surrogacy legislation are of no legal relevance once a surrogate makes the decision not to abide by the arrangement. At that point the case moves into a different legal dimension and falls under the welfare provisions of the Children Act. No guidance is needed from this court – the law is clear and each case turns on its facts. Here, the Judge made findings that underpin all the elements of her decision: home, contact, and regulation of parental responsibility. The contact decision was justified by two threads in the

evidence: the possibility of conflict and undermining, and the Guardian's evidence on the need for H's primary attachments to be supported.

24. On behalf of the Guardian, Mr Kearney drew attention to the core of her evidence on the child's need for one home and protection from conflict.

Conclusions

25. We will address Ms Markham's arguments with reference to the numbered paragraphs at 22 above.

(1) We cannot agree that the Judge's order was equivalent to the making of a parental order. A parental order is transformative. It leaves the surrogate with no rights, and no right to apply to court. It would not provide for ongoing contact. Instead, in the very first paragraph of her judgment, the Judge expressed the hope that *"each adult will recognise the role they have and the contribution they will make to H's future"*. In characterising the Judge's order as they do, the Appellants are aiming at a target of their own making.

(2) Likewise, we were not impressed by the submission that the Judge was obliged to strive to provide H with two homes and four functioning parents. Even without the clear evidence of the Guardian, it would have been obvious that it was not likely to be in H's interests to have more than one secure home base, and one couple who could be clearly identified as parents. In consequence, there was inevitably going to be a radical reduction in the amount of time spent in the other home, however painful that would surely be. This was, in legal language, necessary and proportionate. In our view, the Judge could not have been criticised had she chosen a lower level of contact, but she was certainly entitled to accept the evidence of the Guardian. Nor do we accept that the level of contact could fairly be described as 'identity contact', an expression generally used to describe meetings once or twice a year that are just sufficient for a child to know who a relative is, but insufficient to allow a relationship to develop.

(3) We understand how C and D feel that in comparison to the criticism directed at themselves, A and B escaped lightly. However, we read the focus of the Judge's concern as relating less to what had happened in the past and more to the respective couples' ability to respond. She was not critical of C and D for wanting to keep H, or of A and B for wanting H to return to them. She repeatedly acknowledged the love that all four adults felt for the child, but she was clear that one of the couples was better placed than the other to negotiate the challenges of the future. This was an important finding, which was clearly open to her on the evidence. We see no sign that she arrived at it in a way that was punitive towards C and D; rather she assessed the evidence for what it told her about parenting capacity.

(4) Ms Markham rightly advocated that universally applicable principles should inform the approach to issues of parental responsibility and contact. For that very reason we, like the Judge, do not find it helpful to draw an analogy with a conventional case of separated parents. The law is the same but, as the Judge said, each case is different, different considerations apply and the court needs to analyse and carefully weigh those considerations. The range of family situations

is unending and the difficult task of identifying the right solution for a particular child is not helped by imposing a template forged in an entirely different context.

(5) We agree that the orders in relation to the exercise of parental responsibility and travel abroad might have been more fully and accurately expressed. The sequence of events following the delivery of the judgment was overshadowed by the transfer of H's care and seem to have led to these aspects not receiving the attention that they might have done. This observation does not invalidate the orders as they stand, but during the course of the hearing we invited the parties to supplement them, ideally by way of a parenting plan, as part of their ongoing sharing of parental responsibility.

26. For these reasons, we dismiss the appeal.

Finally

27. We wish to touch upon two matters in closing.

28. Firstly, we note that surrogacy is a complex area, ethically and legally, and that there are no internationally agreed norms. The subject has now been taken up as part of the Law Commission's current programme, and in parting from the case, we endorse the Judge's observations:

> "This case is another example of the complex consequences that can arise from entering into this type of arrangement. Even though C was an experienced surrogate, this case demonstrates the risks involved when parties reach agreement to conceive a child which, if it goes wrong, can cause huge distress to all concerned. For all the adults involved, who all clearly love H, the one thing I know they will agree is that their dispute and this contested litigation has been a harrowing experience for them all. This case is another example of the consequences of not having a properly supported and regulated framework to underpin arrangements of this kind."

29. Secondly, we record that at the outset of the appeal hearing, we were informed that publicity about the case had, most unwisely and unaccountably, been generated by A and B that very week. C and D were understandably distressed by this clear breach of agreements that had been made in the earlier proceedings. They therefore sought, and were granted, time to consider whether they wanted to amend their grounds of appeal and seek to file fresh evidence with a view to challenging the Judge's determination of where H should live. We directed A and B to file an immediate statement setting out their contact with the media and use of social media, and this was done. The outcome was that, after reflection, C and D did not seek to amend their grounds of appeal, but at the invitation of all parties, we made an order restraining A and B from generating further publicity about this matter.
