Neutral Citation Number: [2018] EWFC 15

Case number omitted

IN THE FAMILY COURT
Sitting at the ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 March 2018

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the matter of X (A Child)

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Ms Deirdre Fottrell QC (instructed by Goodman Ray) for the applicants

Hearing date: 28 February 2018

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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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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. I have before me an application by the parents of their much-loved child for a parental order in accordance with section 54 of the Human Fertilisation and Embryology Act 2008. The application arises out of a foreign surrogacy.

2. I propose to say very little about the facts. There is no need for me to do so. It would be wrong to disclose, even in anonymised form, matters which are, of their very nature, intensely personal and private. The applicants have set out in moving and powerful language, and with complete candour, the journey which has brought them to court. The application has been prepared, with their usual meticulous attention to detail, by Ms Jemma Dally of Goodman Ray and Ms Deirdre Fottrell QC. It rightly has the unqualified support of the Cafcass parental order reporter, Ms Kay Demery, to whose careful, thoughtful and insightful report I wish to pay tribute.

3. I have not the slightest doubt that I should make the parental order which is so manifestly in the best interests of the child.

4. There is no need for me to go through section 54 in detail. I focus on what matters.

5. I cannot make a parental order unless the requirements of section 54(1) and sections 54(2)-(8) are satisfied. In the present case, only two of these give rise to the slightest query: the requirements of section 54(2)(a) and section 54(4)(a). Neither, I am satisfied, in fact gives rise to any obstacle. I shall take them in turn.

6. So far as material for present purposes, section 54(2)(a) provides that:

> "The applicants must be … husband and wife."

The applicants were indeed, and remain, married to each other. Their relationship is deep and of long-standing. But, one of them is, as the other has always known, gay, and their relationship and marriage is thus, as Ms Fottrell puts it, platonic and not romantic. Does this in any way affect their ability to satisfy the requirement of section 54(2)(a)? The answer, in my judgment, is a plain and unequivocal, No.

7. The marriage, which took place in this country, complied with all the requirements of the Marriage Act 1949. There is, as Ms Fottrell has demonstrated, no ground upon which the marriage could be declared voidable, let alone void. There can be no question of the marriage being a sham. In short, the marriage is a marriage. The fact that it is platonic, and without a sexual component, is, as a matter of long-established law, neither here nor there and in truth no concern of the judges or of the State. One needs look no further than Nigel Nicolson's *Portrait of a Marriage*, his acclaimed account of the unusual marriage of his parents, Vita Sackville-West and Harold Nicolson, to see how happy and fulfilling a marriage, more or less conventional, more or less unconventional, can be. But it is really none of our business. As the first Elizabeth put it, we should not make windows into people's souls.

8. A sexual relationship is not necessary for there to be a valid marriage. The law was stated very clearly, if in Latin (for the use of which I apologise), by Sir James Wilde in *A v B* (1868) LR 1 P&D 559, 562:

> "The truth is, *consensus non concubitus facit matrimonium*."

The law has always recognised that a couple may take each other as wife and husband *tanquam soror vel tanquam frater* (as sister and brother), as our ancestors would have put it applying the canonists' maxim: see Sir John Nicholl in *Brown v Brown* (1828) 1 Hagg Ecc 523, 524, Sir Cresswell Cresswell in *W v H (falsely called W)* (1861) 2 Sw&Tr 240, 244, and, more recently, *Morgan v Morgan (otherwise Ransom)* [1959] P 92.

9. Section 54(4)(a) provides that:

> "At the time of the application and the making of the order … the child's home must be with the applicants."

In the present case the applicants have different homes, with each of which the child is very familiar. When the child is not with both parents, the child's time is split between them and their homes. The child does not live with anyone else. I need not go into further detail. In my judgment it is clearly established on the authorities that, in the circumstances of this case, the child's "home" was and is "with" the applicants: see the judgments of Theis J in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, *Re A and B (Parental Order)* [2015] EWHC 2080 (Fam), [2016] 2 FLR 446, and *DM and Another v SJ and Others (Surrogacy: Parental Order)* [2016] EWHC 270 (Fam), [2017] 1 FLR 514, and my own judgment in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349; see also the judgments of Russell J in *In re Z (Children) (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)* [2015] EWFC 90, [2017] 4 WLR 5, and Pauffley J in *KB and RJ v RT* [2016] EWHC 760 (Fam).

10. Accordingly, and with great pleasure, I make the parental order sought by the applicants.