Neutral Citation Number: [2019] EWFC 21

Case No: FD18P00537

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2019

Before:

MRS JUSTICE THEIS

- -

Between:

K	**Applicant**
- and -	
L	**1st Respondent**
- and -	
N (by her children's Guardian Ms Teresa Julian)	**2nd Respondent**

- -

Ms Julie O'Malley (instructed by **On A Direct Access Basis**) for the **Applicant**
Ms Deirdre Fottrell Q. C. & Ms Melissa Elsworth (instructed by **Andrew Spearman of A City Law Firm**) for the 1st **Respondent**
Mr Christopher Osborne (of Cafcass Legal) for the 2nd Respondent

Hearing dates: 5th – 7th February 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

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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 matter concerns two applications concerning N, who was born in 2017 and is now 16 months old.

2. The first is a joint application for a parental order made by K and L. The respondent to that application is the gestational surrogate mother, P, a married surrogate with two children of her own and her husband, Q. P gave birth to N in Canada, following the surrogacy arrangement entered into between the parties there.

3. The second is an application for a child arrangement order to determine the time N spends with K and L. The applicant in that application is K and the respondent L.

4. Although the matter was listed for a three-day hearing K and L, with the assistance of their respective legal teams, have been able to reach agreement on all matters. They have an agreed child arrangement order that sets out the time N will spend with each of them, which I have approved. Whilst she is still pre-school age, they have agreed a regime whereby she will divide her time between them. It is sincerely hoped that this agreement will pave the way for more constructive and flexible arrangements in the future depending on their respective availability and, most importantly, what arrangement best meets N's welfare needs.

5. N is separately represented by Mr Osbourne in both applications, though her Children's guardian Ms Julian. They have both been involved in the discussions outside court and endorse the child arrangements order that has been agreed and approved by the court.

6. The remaining application concerns K and L's joint application for a parental order. Both K and L invite the court to make the parental order which is supported by N's Guardian, Ms Julian.

7. Having read the papers and heard legal argument at the end of the first day of the hearing I announced my decision that a parental order would be made with the reasons to follow in a judgment, which are set out below.

Relevant Background

8. This can be taken relatively shortly.

9. K and L commenced their relationship in 2013, they started living together and purchased their own property.

10. They decided they wanted a child and began to look at what options there were. They agreed surrogacy was the preferred option and decided to enter into an arrangement in Canada, having made contact with a surrogacy agency based in Canada through an agency based in the US.

11. In Canada altruistic surrogacy is permitted with a system in place for payment of expenses.

12. In 2016 the applicants were introduced to P, who lived in Canada and they instructed Canadian lawyers to draw up the surrogacy agreement. Arrangements were made for P to have her own legal advice and the agreement was signed by the parties in December 2016.

13. The embryo created with K's gametes and a donor egg were transferred to P at a clinic in the US in January 2017.

14. N was born in Canada in 2017. Following a few weeks in Canada K and L returned back to the UK with N in late October 2017 to their family home in London.

15. The application for a parental order was issued in March 2018, with directions for the filing of evidence being given by the court on 14 August 2018. On 14 August, the court also made a child arrangement order in K and L's favour and granted both K and L parental responsibility.

16. By that stage the applicants' relationship was in difficulties. Following an incident when the police were called in late August 2018 when the parties had a disagreement about the care of N, L returned to his mother's home where he required some psychological support. There was an issue between the parties about the day to day care arrangements for N which lead to K making an application for a child arrangements order.

17. That application first came before Parker J on 23 August, then Cobb J on 24 September and 12 December.

18. Those orders set out the interim arrangements for N's care during this period; essentially sharing her care between K and L.

19. Following the filing of Ms Julian's two reports the parties were able to reach agreement on those arrangements, as outlined above.

20. That left the issue of the parental order. The parties agreed that although the majority of the criteria pursuant to section 54 Human Fertilisation and Embryology Act 2008 ('HFEA 2008') were satisfied, two of the criteria required more careful consideration.

Legal Framework

21. For this court to make a parental order it must be satisfied that the relevant criteria set out in s 54 HFEA 2008 are met and that the order will meet the lifelong welfare interests of the child, in accordance with s 1 Adoption and Children Act 2002 (ACA 2002).

22. In this case it is accepted the following s 54 criteria are met:

(i) There is a biological link between one of the applicants (K) and N and she was carried by P (s54 (2).

(ii) The application was made in March 2018, within 6 months of N's birth (s54(3).

(iii) L's domicile of origin is this jurisdiction (s54(4)(b)).

(iv) Both applicants are over 18 years (s54(5).

(v) P and her husband have consented to the court making a parental order, freely and with full understanding of what they were consenting to. They have each signed a Form A101A which is notarised and they have had notice of this hearing. Such consent in the case of P was given more than 6 weeks after N's birth (s54 (6) and (7)).

(vi) In accordance with the surrogacy arrangement the applicants paid the expenses set out in their joint statement in support of this application. The agreement provided for an expenses cap of $2,000 per month, receipts were submitted and reimbursed, in addition to lost wages. It is accepted and agreed these amounted to *'expenses reasonably incurred'* and consequently did not require the authorisation of the court (s54(8)).

23. The two criteria that require more detailed consideration are

(i) S 54 (2) which provides *'the applicants must be…(c) two persons who are living as partners in an enduring family relationship…'*
(ii) S 54 (4) which provides *'At the time of the application and the making of the order (a) the child's home must be with the applicants'*

Taking them each in turn.

Enduring family relationship

24. The question as to whether the parties are in an enduring family relationship is a question of fact (see *P and B v Z [2017] 2 FLR 168).*

25. There is no requirement in s 54(2) that the applicants must be in an enduring family relationship at the time of the making of the application and the making of the order. By contrast, s 54(4) expressly provides for the child's home to be with the applicants at the time of the application and the making of the order.

26. To date this specific issue has not been addressed in any previous decision.

27. In *A v P (Surrogacy; Parental Order: Death of Applicants) [2012] 2 FLR 145* the intended father died after the application had been made but before the order. As a consequence, the applicants were married at the time of the application, but due to the intended father's death the marriage no longer subsisted at the time the court

made the order. Although the focus in that case was on s 54 (4)(a) the broad and purposive construction of s 54 to achieve the transformative effect of the parental order required the court to read the provisions of s 54 to give effect to the right to family life in accordance with Art 8 (1).

28. This approach was endorsed by Munby P in *Re X (A Child) (Surrogacy: Time Limit) [2015] 1 FLR 349 [59] – [61]*

'59. I agree entirely with Theis J's powerful and compelling reasoning. Her focus was on section 54(4)(a), but in my judgment her reasoning applies mutatis mutandis with equal force to section 54(3).

60. I add two things. First, I draw attention to the fact that Theis J was prepared to read down – and in my judgment correctly prepared to read down – section 54(4)(a) to enable her to make a parental order after one of the commissioning parents had died notwithstanding that section 54(4)(a), in contrast it may be noted to section 54(3), seemingly requires the relevant condition to be satisfied both "at the time of the application" and "at the time of … the making of the order." If that degree of 'reading down' is permissible in relation to section 54(4)(a) – and Theis J held that it was, and I respectfully agree – then the lesser degree of 'reading down' required in relation to section 54(3) is surely a fortiori.

61. The other point is this. Theis J focused on that aspect of Article 8 which protects "family life", but Article 8 also protects "private life", and 'identity', on which she appropriately laid stress, is an important aspect of "private life". So, any application for a parental order implicates both the child's right to "family life" and also the child's right to "private life". The distinction does not matter in the circumstances of the present case (see further below) but I make the point because it is, I suppose, possible to conceive of a case where, on the facts, it might be more difficult or even impossible to demonstrate the existence of "family life." '

The child's home

29. A number of cases have already set out a broad and purposive construction of what is meant by *'the child's home'* in s 54 (4) (a).

30. In *Re X (A Child) (Surrogacy: Time Limit) [2015] 1 FLR 349* the intended parents were separated at the time of the application, although reconciled by the time the court was making an order. Munby P set out why he considered in that case s 54 (4) (a) was satisfied at paragraph [67]

'There are, in my judgment, two reasons why this question should be answered in the affirmative. In the circumstances as I have described them at paragraph 8 above, X had his 'home' with the commissioning parents, with both of them, albeit they lived in separate houses. He plainly did not have his home with anyone else. His living arrangements were split between the commissioning father and the commissioning mother. It can fairly be said that he lived with them.'

31. This flexible treatment of what constitutes *'home'* in s 54(4)(a) has been applied in subsequent cases, such as *Re Z (foreign surrogacy: allocation of work: guidance on parental order reports) [2016] 2 FLR 803* and *DM & LK v SJ & OJ [2017] 1 FLT 514.* In each of those cases the applicants did not share the same physical home but on the facts of each case the court, adopting a broad and purposive construction of s 54 (4)(a), concluded that the child did have their home with the applicants at the relevant time.

Discussion and Decision

32. All parties share common ground in their submissions.

33. Whether the applicants were in an enduring family relationship is a question of fact. There is no issue that K and L were in a settled relationship at the time their application was made in March 2018. They had been together for over 4 years, had lived together for at least 3 years, purchased a property, jointly embarked on the surrogacy arrangement and following N's birth had jointly cared for her.

34. Unlike other provisions in s 54, s 54 (2) is silent as to the need for the requirement to be linked to any particular time. In those circumstances the court should be alert not to read in any requirement that is not there in the primary legislation.

35. It is of note when looking at the debates in Hansard at the time of the passage of the HFEA 2008 there was no further elucidation on the issue of timing in connection with an enduring family relationship. In *P and B v Z [2017] 2 FLR 168* Russell J considered at [22] - [28] the relevant extracts of the debate which set out the government's intention to leave what was an enduring family relationship to the courts. Dr Primarolo, the Minister of State, stated

> *'I am sure that the hon Gentleman would agree with the principle that the family division of the High Court, with its experience, is the best place to test whether a relationship is an enduring one. That decision is better made by the courts that by Parliament seeking to put in arbitrary time periods or definitions, however well-meaning we may want to be. The ultimate test when issuing the parental order is what is best for the child.'*

36. Turning to the question of whether N has her home with the applicants at the time when the application is made and when the court is considering making an order, as required by s 54(4)(a) there is no issue N had her home with the applicants at the time of the application. It is submitted, adopting the flexible construction to the concept of home, that her home has continued to be with them, albeit they have been living in separate homes since August. There is no suggestion N has any other home apart from when she is with either K or L.

37. The aim of s 54 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants. The article 8 rights of the applicants and the child are engaged. N has lived with the applicants all her life and is biologically related to K. The effect of not making an order will be an interference with that family life in that their factual relationship will not be

recognised by law, there will be no legal relationship between N and the applicants, she would be denied the social and emotional benefits of recognition of that relationship and would not have the legal reality that matches the day to day reality.

38. When considering the provisions in s 54 (2) in that purposive light it is clear the applicants were in an enduring family relationship at the time they made their application. S 54 (2) requires that the applicants must be two persons who are living as partners in an enduring family relationship, which they were when they made their application. In my judgment, in the absence of any other express time requirement, that requirement is satisfied in this case.

39. The requirement in s 54 (4) (a) is also met as the evidence demonstrates that even though the applicants have been living in separate homes since August, N has always been with one of them since then and as a result her home has been with them, albeit divided between two properties.

40. The criteria under s 54 having been met the court is required to consider whether making a parental order will meet N's lifelong welfare needs having regard to the criteria set out in section 1 (4) ACA 2002. It is clear N's home with K and L is the only home she has known, whilst making the order will extinguish her legal relationship that exists in this jurisdiction with P and her husband, N has had no contact with them, and they have agreed to this court making a parental order. A parental order will secure in a lifelong way her legal relationship with K and L, with the emotional and psychological benefits that come with that security and will provide a legal reality to match her day to day life. The order is supported by Ms Julian, who has provided two detailed reports setting out her recommendation.

41. I have no doubt on the evidence the court has a parental order will provide N with the security and stability her lifelong welfare needs require, and in those circumstances that order will be made.