Neutral Citation Number: [2024] EWHC 586 (Fam)

Case No: ZC23P01205

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 March 2024

Before :

Sir Andrew McFarlane
PRESIDENT OF THE FAMILY DIVISION

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Between :

FG and GH	**Applicants**
- and –	
IJ and KL	**First and Second Respondents**
-and-	
AB (Through his Children's Guardian, Catherine Callaghan)	**Third Respondent Child**
-and-	
Secretary of State for the Department of Education	**Intervener**

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Ms D Gartland KC and Mr E Bennett (instructed by **Mills & Reeve LLP**) for the **Applicants**
The First and Second Respondents not appearing
Ms S Jaffar (of **Cafcass Legal Service**) for the **Guardian**
Mr T Wilson (instructed by **Government Legal Department**) for the **Intervener**

Hearing dates: 06 March 2024

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Approved Judgment

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This judgment was delivered in private [and a reporting restrictions order OR transparency order is in force]. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version

of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Sir Andrew McFarlane P:

1. These proceedings relate to a child ['AB'] who was born as a result of a gestational surrogacy arrangement in the USA. The commissioning parents have applied to this court for a parental order pursuant to Human Fertilisation and Embryology Act 2008, s 54 ['HFEA 2008'].

2. Apart from the need for the court to extend time, the applicants would be entitled to the order that they seek, which is amply justified on welfare grounds, save for the fact that, in 2022, the applicants adopted AB pursuant to an adoption order made in the USA. The question for this court is whether the existence of the USA adoption order, which is recognised as a full adoption in England and Wales, prevents the court from granting a parental order.

3. Although it is not uncommon for the legal status of the commissioning parents to be established through adoption in a number of foreign countries following surrogacy, and although there are reported (and presumably unreported) cases of parental orders being made in England and Wales in such circumstances [for example *Re G and M* [2014] EWHC 1561 (Fam) and *Re C & DD* [2014] EWHC 1307 (Fam)], the issue identified in the present case has not seemingly been previously determined.

4. Having identified the issue at a preliminary hearing, the proceedings were adjourned with an invitation to the Secretary of State for Education ['the Secretary of State'], who takes the lead on matters relating to adoption policy, to assist the court by intervening. I am grateful to the Secretary of State for accepting the court's invitation, and I am particularly grateful to Mr Tom Wilson, counsel, who has provided a detailed skeleton argument agreeing with and supporting the detailed submissions

made by Ms Dorothea Gartland KC and Mr Edward Bennett, counsel for the applicants. The application is also supported by the Parental Order Reporter and children's guardian, through submissions by her solicitor Ms Shabana Jaffar (the child having been joined as a party at the previous hearing). Following receipt of the detailed skeleton arguments, I communicated to the parties that I, too, was in agreement with those submissions and that a parental order would therefore be granted. The purpose of this judgment is to record the reasons for making that order.

Factual Background

5. In circumstances where, in welfare terms, a parental order is plainly justified, it is not necessary to describe the factual background in any detail.

6. AB was born as a result of a gestational surrogacy arrangement involving an embryo created using the female applicant's egg and donor sperm provided by the USA clinic. Prior to birth the Superior Court of California declared the commissioning parents, who are married and who were residing in the USA at that time, to be the legal parents of the unborn child in accordance with the surrogacy agreement that had been made. Baby AB was placed in the care of the commissioning parents immediately following birth and was discharged from hospital in their care the following day. The surrogacy arrangement and the present application are fully supported by the surrogate mother and her husband. The commissioning parents continued to reside in the USA with AB and in 2022 an adoption order was made with respect to AB by the Superior Court of California, naming them as the child's legal parents.

7. The adoption order, which as I will shortly describe, is automatically recognised in the United Kingdom and it has been entered into the Adopted Children Register maintained by the Registrar General for England and Wales.

8. Subsequently, the parents have been advised that there is a need for them to apply for a parental order with respect to AB, notwithstanding their status as their child's adopted parents. The need arises with respect to a family trust which predates the reform of UK adoption law in 1976.

9. The parental order application was made on 24 July 2023. To comply with HFEA 2008, s 54(3), any application must be made within six months of the child being born.

10. All necessary requirements for the making of a parental order are otherwise satisfied. In particular, the applicants have filed satisfactory evidence that the surrogate mother and her husband consent to the application. Payments to the surrogate mother by way of a monthly allowance, compensation for the pregnancy and pregnancy related expenses are said by the Parental Order Reporter to be in line with payments made to other surrogates in the USA.

11. The Parental Order Reporter, having assessed and analysed all of the factors relevant to AB's welfare, recommends the granting of a Parental Order on the basis that that would be in the child's life-long best interests.

The Legal Context

12. The central provision with respect to adoption for the present purposes is Adoption and Children Act 2002, s 67(1) ['ACA 2002']:

> '(1) An adopted person is to be treated in law as if born as the child of the adopters or adopter.'

13. The provision in HFEA 2008 which requires particular consideration is s 54(1)(a) which, in common with s 54A(1)(a) relating to a single applicant, sets out one of the

necessary factual criteria that must be established for a court to have jurisdiction to make a parental order:

> '(1) On an application made by two people ('the applicants'), the court may make an order providing for a child to be treated in law as the child of the applicants if:
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> a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,'

14. In its order inviting the Secretary of State to intervene, the court posed the question:

> '…whether s 67(1) of the Adoption and Children Act 2002 precludes the court from treating the [US surrogate mother] as a woman who is not one of the applicants as having carried the child as provided for by s 54(1)(a) of the Human Fertilisation and Embryology Act 2008.'

Put shortly, the question is whether the mandatory requirement in s 67(1) that AB must be 'treated in law as if born' to the female applicant precludes the court from holding, under s 54(1)(a), that 'the child has been carried by a woman who is not one of the applicants'.

15. Before turning to that central issue, it is necessary to establish the validity of the USA adoption under English law. In that regard, ACA 2002, s 66(1)(d) provides that the meaning of 'adoption' in Chapter 4 of the ACA 2002 includes 'an overseas adoption'. The term 'overseas adoption' is defined in s 87(1):

> '(1) In this Act, "overseas adoption":
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> (a) means an adoption of a description specified in an order made by the Secretary of State, being a description of adoptions effected under the law of any country or territory outside the British Islands, but
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> (b) does not include a Convention adoption.'

By the Adoption (Recognition of Overseas Adoptions) Order 2013, an adoption of a child is specified as an overseas adoption if it was effected under the law of a country or territory listed in the Schedule to that Order. The USA is a country listed in the

Schedule. A USA adoption is therefore automatically recognised as an adoption in England and Wales as coming within the definition of 'adoption' in s 66(1)(d).

16. Once a valid adoption under English law is established, its effect on the legal status of the child is retrospective, as well as prospective, as, under s 67(1), the child will be treated 'as if born' as the child of the adopter(s). The effect of the US adoption in the present case is that AB is to be treated, in law, as if born to the applicants.

How can HFEA 2008, s 54(1) be resolved with ACA 2002, s 67?

17. Given the unity of view urged upon the court on behalf of the applicants and the Secretary of State, and the support for that view on behalf of AB's children's guardian, and whilst the court is most grateful to counsel for their respective skeleton arguments, it is not necessary to set out the separate submissions that each has made. In circumstances where I accept the analysis that is put forward, I propose to move straight on to set out the construction that I agree is the correct one and is one by which the court does have jurisdiction to make a parental order despite the fact that AB is, as a matter of English law, already the adopted child of the applicants.

18. There is an essential distinction to be drawn between ACA 2002, s 67 and HFEA 2008, s 54 and it is that, whilst adoption and s 67 in particular are concerned about the **status** of the child, HFEA 2008, s 54 is concerned with the **factual criteria** necessary for a court to have jurisdiction to make a parental order. The focus on status in s 67 is most conveniently described by MacDonald J in *H v R (No 1)* [2020] EWFC 74; [2021] Fam 349 at paragraphs 46 and 47 [emphasis in original]:

> 46. By contrast, section 67 of the Adoption and Children Act 2002 deals with the identity of a child's parent or parents as a matter of *law*. Pursuant to sections 67(1), 67(2) and 67(3) of the Adoption and Children Act 2002, once a person is made the subject of an adoption order, as a matter of *law* that person ceases to be

> the child of his or her birth parents and is to be treated in *law* as not being the child of any person other than the adoptive parents, the child being treated in *law* as if born as the child of the adopters and the legitimate child of the adopters. Section 67 has effect from the date of the adoption, but is retrospective in its effect on the *legal* status of the child and the adoptive parents. Save for the matters dealt with by sections 67(3), 67(4) and 74 of the 2002 Act (which are of no application in this case), there are no exceptions to the operation of section 67 of the Adoption and Children Act 2002.
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> 47. Within this context, section 67 of the Adoption and Children Act 2002 concerns the question of who are the parents of the child as a matter of *law* and not wider questions of *fact* such as the child's biological parentage. This is made clear in the Explanatory Notes attached to the Adoption and Children Act 2002 that deal with the operation of section 67 of the Act:
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> > 193. The provisions in this section are intended only to clarify how an adopted child should be treated in law. They do not touch on the biological or emotional ties of an adopted child, nor are they intended to."

19. MacDonald J went on, at paragraph 48, to refer to the distinction drawn in the House of Lords in *Re G (Children) (Residence: Same-sex Partner)* [2006] 1 WLR 2305 by Baroness Hale of Richmond (at paragraph 32) who stressed that 'there is a difference between natural and legal parents'. MacDonald J continued at paragraph 49:

> '49. A further example of the dichotomy Baroness Hale sought to illustrate in para 32 of *In re G (Children) (Residence: Same-sex Partner)* is provided by adoption. Namely, the birth parent of the adopted child remains as a matter of fact the child's biological, or natural, parent but is not the child's legal parent by reason of the retrospective and prospective operation of sections 67(1) and 67(3) of the Adoption and Children Act 2002.'

20. MacDonald J's interpretation in *H v R (No 1)* was applied by Cobb J in *Re L and Re M* [2022] EWFC 38; [2022] Fam 315. In that case the court considered whether a declaration of parentage should be made with respect to adult adopted children. As Cobb J explained [paragraph 30], the wording of ACA 2002, s 67 and subsequent case-law stressing the fundamental and retrospective change of status created by adoption, did not 'at first blush' fit comfortably with the applicants' case 'that they could obtain a declaration of *parental* status with respect to someone who had in law

ceased to be their parent' [emphasis in original]. Relying on *H v R (No 1)*, which also involved a declaration of parentage after adoption, Cobb J said [paragraph 33]:

> '33. MacDonald J's decision was founded largely on the distinction between parentage as a matter of *law* and parentage as a matter of *fact*. The applicant in his case remained the parent in fact, even though his legal parental status had been expunged by the adoption order.' [emphasis in original]

Cobb J, having reviewed MacDonald J's judgment in detail, concluded at paragraph 35:

> '35. The nub of MacDonald J's decision is his conclusion that within the context of two statutory frameworks (FLA 1986 and ACA 2002), it remains possible for a birth parent to establish the truth of the proposition contended for, namely that he or she is as a matter of *fact* the parent of the adopted child, without that factual determination coming into conflict with the status *in law* of the child and the adoptive parents.' [emphasis in original]

21. Separately, Theis J, when comparing and contrasting an adoption order made under Iranian law with adoption under English law in *X v Y (Secretary of State for the Home Department intervening)* [2020] EWHC 1829 (Fam), summarised the essence of the approach in English and Welsh law at paragraph 66(1):

> 'The effect of an adoption order made in this jurisdiction is to sever *the legal relationship* between the child and *the biological parents* as provided for in s 46 (2) and s 67 (1) ACA. S 67 provides that if an adoption order is made the child will be treated as 'if born as the child of the adopters'. After an adoption order *the biological parents* have no continuing *legal relationship* with the child.' [Emphasis added]

22. I agree with, and readily endorse, the approach taken by MacDonald, Cobb and Theis JJ in the cases to which I have referred and, although they were dealing with the impact of the status of adoption on differing statutory provisions to those in the present case, there is no reason for departing from the approach that they have applied of separating the legal status generated by an adoption from the underlying factual history when considering the present case. That a child may be treated 'in law' as being the child of their adopted parents does not alter the biological facts surrounding their birth.

23. The language chosen by Parliament in HFEA 2008, s 54(1)(a) and s 54A(1)(a) is deliberately precise:

> '… the child has been carried by a woman who is not one of the applicants'.

It is not couched in terms of legal status. It does not use terms such as 'mother' or 'parent', rather, it focusses on a precise factual context, namely that of the surrogate carrying the baby in her womb during pregnancy. That a particular person is, or is not, the 'natural' or 'birth' mother of a child is a given fact for all time. Whilst the child's status and that of his adopters will be retrospectively changed and established as a matter of law by adoption, so that he or she will be treated 'as if' born to the adopters and that he 'is to be treated in law … as not being the child of any person other than the adopters or adopter' [ACA 2002, s 67(3)(b)], that adopted legal status does not change the fact that the child was 'carried' by another woman. As Mr Wilson, counsel for the Secretary of State, correctly puts it: 'The answer to the factual question as to who carried the child is not altered by virtue of the fundamental change in legal status effected by an adoption order'. Ms Gartland and Mr Bennett are also correct to stress that 54(1) is not concerned with legal status, but with a factual criterion; there is nothing in the HFEA 2008, they rightly submit, which requires the woman who carried the child to be a 'legal parent' at the time of the parental order application.

24. Shifting the focus up from s 54(1)(a), it can be seen that the overall context of HFEA 2008, s 54(1) is also concerned with the factual arrangements around the establishment of the surrogate's pregnancy:

> '(1) On an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if:

(a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,

(b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and

(c) the conditions in subsections (2) to (8A) are satisfied.'

25. Further support for this interpretation is to be gained from HFEA 2008, s 33 which defines 'mother':

'S 33

(1) 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.

(2) Subsection (1) does not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child.

(3) Subsection (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.'

26. Under s 33(1), a surrogate mother is treated as the child's legal mother prior to the making of a parental order. However, under HFEA 2008, s 33(2), the surrogate will not be treated as the child's mother as a matter of law if there has been an adoption. HFEA 2008, s 33 is therefore consistent with an interpretation of the 2008 Act which draws a distinction between the legal status of 'mother' and to the underlying factual determination required by s 54(1) upon a woman who carried the baby (during pregnancy).

27. Rather than relying upon adoption to deliver the status of parenthood to commissioning parents following a birth through surrogacy, Parliament created the regime of parental orders under HFEA 1990 [predecessor of the 2008 Act] as being a more appropriate legal means of doing so. A parental order avoids the inappropriate

outcome of a biological parent, following a surrogate pregnancy, adopting their own child [*Re A and B (Children)* [2015] EWHC 911 (Fam); [2016] 2 FLR 530].

28. In words that have been subsequently endorsed by the Court of Appeal in *Re C (Surrogacy: Consent)* [2023] EWCA Civ 16 (at paragraph 25), in *Re A and B (Surrogacy Consent)* [2016] EWHC 2643 (Fam), Theis J described the significance of a parental order, as distinct from an adoption order:

> "29. A parental order was devised specifically for a surrogacy arrangement, recognising the biological connection of the applicants as intended parents of the child. Whilst the respondents have indicated they would not object to an adoption order being made that does not reflect the reality, these children are the biological children of the applicants. An adoption order treats the children as if they were the children of the applicants, which they already are.
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> 30. This issue arose in *AB v CD* [2015] EWFC 12 where I set out the differences between the two orders as follows at [70]:
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> > '(3) …section 67 (1) ACA 2002 which provides 'An adopted person is to be treated in law as if born as the child of the adopters or adopter.' This is what demarks the difference between the two orders. Adoption orders create a presumption in law that the child is treated as if the biological child of the adopters. A parental order does not require that presumption to be made. Both orders are transformative, but a parental order proceeds on the assumption one of the applicants is the biological parent. That is one of the key criteria in s 54 HFEA. It doesn't change the child's lineage as an adoption order does; a parental order creates a legal parentage and removes the legal parentage of the birth family under the provisions of the HFEA 2008. Unlike adoption there is already a biological link with the applicants before the parental order application is made. Its purpose is to create legal parentage around an already concluded lineage connection.
> >
> > (4) From the point of view of the child the orders are different. An adopted child is seen to have had a family created for it, whereas in a surrogacy arrangement the child's conception and birth has been commissioned by the parents, the child has a biological connection and the same identity as one of the parents. The latter arrangement is more congruent with a parental order than an adoption order.
> >
> > (5) These differences are important welfare considerations from the child's perspective. These are the reality of the identity issues children will need to resolve. In surrogacy situations the court by making a parental order settles the identity issue and does not leave other fictions to be resolved, which could be the case if an adoption order was made in these situations."

Conclusion

29. Turning, more generally, to the requirements of HFEA 2008, s 54, I am satisfied that the evidence establishes that:

i) For the reasons that I have given, the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination, and that the female applicant's gametes were used to bring about the creation of the embryo [s 54(1)];

ii) The applicants are married [s 54(2)(a)];

iii) The application for a parental order was filed well outside the 6 month period provided for in s 54(3). I am satisfied that the reasons put forward explaining why this was so, namely a period spent living in the USA and parental status having been settled in accordance with US law by the adoption, are acceptable. I therefore direct that time for filing be extended so as to permit the application to proceed;

iv) The child has always had their home with the applicants and that one of the applicants is domiciled in the UK [s 54(4)];

v) Both applicants are over the age of 18 years [s 54(5)];

vi) The woman who carried the child and her husband have both freely, and with full understanding of what is involved, agreed unconditionally to the making of the parental order [s 54(6)];

vii) All monies that have been paid with respect to the surrogacy are either reasonable payment for expenses or payments which the court should now, retrospectively, authorise [s 54(8)].

30. Finally, and most importantly, I am entirely satisfied that the making of a parental order is in the child's long-term welfare interests. The making of the order confirms that the applicants are the child's parents in law, as they have always been in every other respect.

Post-script

31. Before concluding this judgment, I should make clear that it is confined to determining the single issue of whether or not the commissioning parents of a child born through surrogacy, who have already adopted their child, are nevertheless entitled to have a parental order granted in their favour under HFEA 2008. No other issue has been raised for determination. Whilst accepting that the difference between ACA 2002, s 67 and HFEA 2008, s 54, one being concerned with status and the other with facts, enables the applicants to qualify for a parental order, the court has in no manner engaged in determining the legal impact on the status of the child as the result of his/her parents having the dual status of being parents under a parental order and being his/her adopted parents. The act of making of a parental order does not discharge the extant US adoption order, which remains recognised as a full adoption in England and Wales.

32. It is also right to be clear that, although this application has been brought in order to enhance AB's status as a beneficiary of a family trust, the details of that trust have not been, and did not need to be, disclosed in the proceedings and any question of entitlement is, obviously, one for the trustees in the light of the outcome which is that

AB is an adopted child, but that his/her parents also have a parental order with respect to him/her.