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Case No: WD23P70497

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2025

Before :

The Rt Hon SIR ANDREW MCFARLANE (President of the Family Division)

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RE: H (ANONYMOUS SURROGACY)

The Applicants appeared in person

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Hearing date: Friday 24th January 2025

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Judgment Approved by the court

Sir Andrew McFarlane P:

1. An application has been made for a parental order under the Human Fertilisation and Embryology Act 2008, s 54 ['HFEA 2008'] with respect to a baby girl, 'A', who is now aged nearly two years. The applicants, Mr and Mrs H, (a randomly chosen initial) are of Nigerian descent. Mrs H is a British citizen and Mr H, who is a Nigerian national, has leave to remain in the UK. The couple have been married for 8 years. After investigating other options, they embarked upon a surrogacy arrangement through a clinic in Nigeria which eventually resulted in A's birth. DNA testing has confirmed that Mr H is A's biological father. Whilst the situation is not entirely clear from the limited papers that have been supplied, the implication is that A's biological mother is the surrogate mother.

2. The difficulty in the case is that the surrogate is anonymous and her identity is unknown. Before a court may grant a parental order, it must be satisfied that the surrogate mother agrees unconditionally to the making of the order, unless the surrogate cannot be found or is incapable of giving agreement [HFEA 2008, s 54(6) + (7)]. The focus of this judgment is therefore upon the court's approach to a case such as this, where the identity of the surrogate is simply unknown.

The Factual Context

3. Mr and Mrs H met in the UK and began a relationship in 2007 and married some 10 years later. Mrs H is a support worker for adults with learning disabilities and Mr H is a senior social worker.
4. In 2022, Mr and Mrs H went to Nigeria and visited the Lifelink Fertility Clinic where they met its medical director, Dr Kemi. After preliminary testing the couple signed an agreement, as well as paperwork with the Nigerian court, to proceed with the surrogacy. The surrogate, however, remained anonymous throughout the process. Mr and Mrs H do not know her identity and do not know if she has a husband.
5. Successful embryo transfer, using Mr H's sperm, took place in mid-2022. During the pregnancy, the applicants attended appointments by telephone and by video call for the scans, at all times the surrogate mother kept her face covered. A was born in early 2023 at the clinic in Nigeria. The applicants were present at her birth. A was discharged from the clinic a few days later and, since then, A has been in the applicants' sole care. Mrs H took maternity leave and remained in Nigeria for 8 months following the birth. After return to the UK, A has lived in the care of the applicants in their home in Southern England. I have encountered Mr and Mrs H and A at a number of hearings. She is a delightful little girl and is clearly entirely at one with her de facto parents.

The Legal Context

6. The relevant parts of HFEA 2008, s 54 are:

> '(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.

(2) The applicants must be—

(a) husband and wife,

(b) civil partners of each other, or

(c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

(3) Except in a case falling within subsection (11), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born.

(4) At the time of the application and the making of the order—

(a) the child's home must be with the applicants, and

(b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.

(5) At the time of the making of the order both the applicants must have attained the age of 18.

(6) The court must be satisfied that both—

(a) the woman who carried the child, and

(b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43),

have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

(7) Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—

(a) the making of the order,

(b) any agreement required by subsection (6),

(c) the handing over of the child to the applicants, or

(d) the making of arrangements with a view to the making of the order, unless authorised by the court.

(8A) ….

(9) …

(10) Subsection (1)(a) 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 or her artificial insemination.

(11) …’

7. On the evidence before the court, I am satisfied that the requirements of subsections (1)-(5) are met. With respect to s 54(8) regarding payment, the evidence, which is not altogether satisfactory, indicates that Mr and Mr H may have paid a total of £4,000 to the clinic. In the circumstances, where A is well settled with the applicants and there is absolutely no prospect of returning her to the care of any other person, I am prepared to authorise that sum under s 54(8)(d).
8. As I have already indicated, the difficulty that Mr and Mrs H face arises from the anonymity of the surrogate. There is no evidence upon which s 54(6) can be satisfied. The focus is, therefore, upon s 54(7):

> '(7) Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.'

The Evidence

9. On 7 March 2024, Theis J ordered the applicants to file a statement addressing the steps that they have taken to identify the surrogate. The applicants filed a statement dated 28 May 2024 which did no more than to state that the surrogate was anonymous. Jane Houldsworth is the allocated Parental Order Reporter. Her report dated 2 July 2024 did not recommend a Parental Order be made. She reported that Mr and Mrs H told her that it was at their request that the surrogate was anonymous, and that they have never known anything about her identity. At this stage, Ms Houldsworth prepared her report with sight of the following documents:

    a. A letter from Dr Kemi at Lifelink Fertility Clinic dated 14 March 2023;
    b. A sworn affidavit for gestational host/carrier for LHS Clinics Ltd dated 28 November 2022;
    c. A treasury receipt dated 28 November 2022;
    d. A national identity document purporting to be related to a surrogate;
    e. An undated surrogate questionnaire;
    f. An undated surrogacy memorandum of understanding between a surrogate and Lifelink Fertility Clinic.

10. With respect to the identity documents relating to the possible surrogate, Ms Houldsworth observed that there is no documentation establishing that the individual identified there is either the person who entered into the surrogacy agreement with Mr and Mrs H, or was actually the surrogate mother of baby A. Equally, Mr and Mrs H are not able to confirm that the named individual is the surrogate.
11. From the perspective of A's welfare, Ms Houldsworth had no concerns about the care being provided by Mr and Mrs H, on the contrary A was described as a child who was thriving in their care.
12. The matter first came before me on 9 July. I directed the applicants to file a statement exhibiting copies of every document signed by them as part of the surrogacy arrangement, together with a letter from Dr Kemi confirming the same. Ms Houldsworth prepared an updated report dated 20 November 2024; again she was unable to recommend a Parental Order be made. The further documents provided by the applicants at that stage were as follows:

    a. A statutory declaration in relation to the application for a Parental Order, signed by the applicants, witnessed by a firm of solicitors, dated 28 February 2023;

b. An undated letter from a firm of legal practitioners and arbitrators in Nigeria stating that the surrogate mother had given her consent prior to and after the birth of A. This is signed on behalf of Lifelink Fertility Clinic and Dr Kemi. Accompanying the letter is a Form A101A, which is the UK form for a surrogate mother to sign giving evidence of her consent to the making of a parental order. The A101A form is unsigned by the applicants but is signed by Lifelink Fertility Clinic dated 15 July 2024. Importantly, the place where the surrogate mother should sign is entirely blank.
c. An undated letter to the High Court Family Division by Mr H setting out that the applicants paid the equivalent of £2,000 to the fertility clinic. It explains that they were told that the surrogate would only receive her travel expenses and that they are not aware any money was paid to her.

Ms Houldsworth's, understandable, view was that the additional documentation did not take the matter any further.

13. The matter came before me again on 13 December 2024. I ordered the applicants to file copies of any bank statements showing all of the payments that they have made with respect to the surrogacy agreement, and requiring a letter explaining why the surrogate has been anonymous, why she cannot be found, whether they were given copies of the surrogacy agreement and what attempts they have had in the past 6 months to engage with Dr Kemi and the surrogate. Ms Houldsworth provided a further updated Parental Order report dated 22 January 2025, with again no recommendation to make a Parental Order. By that stage, the applicants had provided the following:
    a. Three screenshots of WhatsApp messages between the applicants and Dr Kemi requesting that she complete an A101A form.
    b. A letter to the court from the applicants dated 24 December 2024 describing the progression of the surrogacy, and a letter from London Women's Clinic dated 10 September 2019 setting out their previous fertility difficulties.
    c. Two diagnostic unit forms issued by the Lifelink Fertility Clinic. The first notes a positive urine test indicating a positive pregnancy for a 27 year old female. The second notes a blood group for Mr H.
    d. Two documents setting out an itemised list of costs for the surrogacy issued by the Lifelink Fertility Clinic. These documents are undated and have no identifiable names or signatures. Both documents state different cost amounts for a single pregnancy.
    e. Banking documents showing payments made to Lifelink Healthcare Service Ltd on 12 November 2022 for 500,000 and 1,135,000 NGN Nigerian Naira and another in the sum of 20,000 NGN Nigerian Naira dated 14 April 2023. The total amount of 1,655,000 NGN Nigerian Naira is approximately £860.
    f. Mr H's bank statement showing payments made on 29 April 2022 (£2,000) and on 4 May 2022 (£1,140) to an individual, but it is not clear if that person is related to these proceedings.
    g. A letter from Dr Kemi dated 28 November 2022 confirming that the applicants underwent assisted reproductive technology with a gestational carrier and giving an expected gestational date.
    h. A scan photo taken during the early stages of pregnancy.

14. In their letter to the court, Mr and Mrs H describe the reasons behind requesting an anonymous surrogacy arrangement:

'[the clinic] offer surrogacy arrangement through an agent, and it is usually anonymous we are told that the reason is for both parties to have a rest of mind during and after delivery.

At that point we are satisfied that opting for an anonymous surrogacy will be our best option since we will not meet the surrogate mother and she will not know us. We thought this will remove all the problems people face when they do surrogacy and the stigma that surround it. We want safety, protection, security, and peace of mind. We didn't want unnecessary involvement and attachment; we just want to sign the contract without owing anybody obligation. We understand someone to do this is really giving us something special we don't want to carry this for the rest of our lives identifying the person will make us think we owe them gratitude for the rest of our life.'

15. The matter came before me for a further hearing on 24 January 2025. The applicants explained that they had that week at last made contact with Dr Kemi and that she had promised to send them a copy of the surrogacy agreement. Shortly after that hearing a copy of an agreement was received and filed with the court. It is dated 22 April 2022. The applicants are both named as the intended parents and they have apparently signed it. Where the surrogate's name should appear the form simply has the initials "O.S" and "not applicable" is listed with respect to the surrogate's husband or partner. The agreement, which is lengthy, has apparently been drawn up by lawyers and is in standard form. For example, it makes general provision in the event that the surrogate is married (which is said not to be the case here). Where the surrogate should sign there are simply the signed initials "O.S". The document is signed by a fertility nurse, the chief medical director and the secretary of Lifelink Fertility Clinic.
16. I am grateful to Ms Houldsworth who has provided further observations on this new document, which are, in summary:
    a. The document does purport to be a surrogacy agreement prepared by the clinic and signed by the applicants;
    b. The initials 'OS' coincide with the identification documents provided to Ms Houldsworth by Dr Kemi at the start of the proceedings;
    c. The agreement is dated one week before the first payment is said to have been made, albeit that it is not clear what connection the named recipient of the payment has with the surrogacy arrangements.
17. In a helpful analysis, Ms Houldsworth has balanced the very clear welfare benefits to A of continuing to be brought up by Mr and Mrs H against the lack of clarity in the documentation. She does, however, accept that the account given by Mr and Mrs H, together with the documentation that has now been provided, establishes that they did enter into a surrogacy agreement with the Lifelink Clinic and that some allowance has to be made for the fact that this is an international surrogacy and that it involves Nigeria, with the result that the level of documentation may differ from that which might be seen in other cases. In the circumstances, Ms Houldsworth now supports the making of a Parental Order to Mr and Mrs H as being in A's best interests and being better for A than simply leaving the present position which is that Mr H may have parental responsibility for A from being named as 'father' on the Nigerian birth certificate, but Mrs H does not have parental responsibility or recognition of parental status.

Discussion and Conclusion

18. The individual requirements set out in HFEA 2008, s 54 must be satisfied before a court may grant a parental order. Each of the elements stipulated by Parliament is of

importance. The court must scrutinise parental order applications with care to ensure compliance with the statute, particularly so when the application includes a foreign element.

19. With respect to Nigeria, it is to be noted that the UK has imposed special restrictions on adoptions from that country (Special Restrictions on Adoptions from Abroad (Nigeria) Order 2021). Guidance issued by the Department for Education lists the specific areas of concern relating to adoption from Nigeria as including:
    - difficulties confirming the background and adoptability of children;
    - unreliable documentation;
    - concerns about corruption in the Nigerian adoption system;
    - evidence of organised child trafficking within Nigeria; and
    - concerns about weaknesses in checks completed by Nigerian authorities in relation to adoption applications from prospective adopters who are habitually resident in the United Kingdom and therefore are likely to in fact be intended to be intercountry adoptions. This includes weaknesses in pre and post adoption monitoring procedures. There is an absence of checks as to whether the adoption is intended to be an intercountry adoption in light of the habitual residence of applicants and accordingly whether prospective adopters have been assessed and approved by a UK adoption agency and issued with relevant UK authority documentation (e.g. certificate of eligibility to adopt) to proceed with an intercountry adoption from Nigeria.

    Whilst there is no comparable statutory restriction on surrogacy cases originating from Nigeria, the need for care as to the reliability of documentation and the potential for the involvement of organised child traffickers underscores the need for caution in parental order applications involving a Nigerian surrogacy.

20. A further cause for concern in the present case is the anonymity of the surrogate mother. Not only does anonymity prevent the court from being able to be satisfied that the mother knows of the application and consents to it, it also raises the level of suspicion that the arrangement may have been otherwise than it is said to be. Whilst Mr and Mrs H have explained their motivation for opting for an anonymous surrogacy, their decision has, in fact, caused them a great deal of difficulty in presenting the present application. Those who follow in their footsteps in the future would be well advised to avoid engaging with an anonymous surrogate.

21. Having now received pieces of information and evidence from Mr and Mrs H, bit by bit, over a series of hearings, and, particularly, having now at last had sight of the purported surrogacy agreement, the court is in a position to determine the application.

22. On the balance of probability, on the basis of the material that has now been filed and on the basis of the insightful reports of Ms Houldsworth, I am satisfied that Mr and Mrs H did enter into a surrogacy arrangement with the Lifelink Fertility Clinic run by Dr Kemi in Nigeria. I am satisfied that Mr H is A's genetic father and that the surrogate mother was a woman known only as 'O.S.' in the agreement. I am satisfied that she is probably the person whose identity details were shown by Dr Kemi to Ms Houldsworth. I am further satisfied that the prospects of tracing her and securing her engagement with these proceedings are so remote as to hold that the reality is that she 'cannot be found'. HFEA 2008 s 54(7) is therefore satisfied on that basis, with the consequence that the application can proceed without the need to obtain her agreement under s 54(6).

23. On that basis, having already held that each of the other statutory requirements is met, the court has jurisdiction to make a parental order. That to do so is manifestly in the best interests of A is beyond any doubt. She is being well cared for by the only two people she has ever known as her mother and father. Whether or not an order is made, she will continue to be brought up in their care. Now that the statutory criteria have been met, A's welfare requires that a parental order be made so that, hence forward, Mr and Mrs H will be her parents under the law.

24. I will therefore direct that a parental order be issued in favour of Mr and Mrs H with respect to A.