IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

[2014] EWHC 1561 (Fam)

No. IL13P00264

Royal Courts of Justice

Tuesday, 1st April 2014

Before:

MRS. JUSTICE THEIS

(**In Private**)

B E T W E E N:

Re G and M

_____

*Transcribed by **BEVERLEY F. NUNNERY & CO***
Official Court Reporters and Audio Transcribers
One Quality Court, Chancery Lane, London WC2A 1HR
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

_____

J U D G M E N T

(Approved)

APPEARANCES

Mr Hassan Khan & Mr Colin Rogerson (instructed by Dawson Cornwell) appeared on behalf of the **Applicants.**

Ms. Melanie Carew appeared on behalf of **CAFCASS Legal.**

MRS. JUSTICE THEIS:

Introduction

1 This case provides yet another timely illustration of the legal minefield in international surrogacy arrangements. It underscores the critical importance of anyone considering this type of arrangement to secure expert advice, in particular legal advice in both jurisdictions at each stage of the process.

2 I am concerned with an application for a parental order concerning twins, G and M, born in March 2013. They were born following a commercial surrogacy arrangement entered into between the applicants, a same sex couple BB and BD, and the respondents, AM and BM, through a surrogacy agency based in the US. The married gestational surrogate mother gave birth to the children following the transfer of embryos from the gametes of the applicants and donor eggs. The applicants each have a biological connection to one of the children. The children were born in Iowa and following legal steps that secured the legal position of the applicants they returned to this jurisdiction where they have remained in their care.

3 The court is indebted in this case to the extremely helpful and thorough skeleton arguments submitted to the court, both by Mr. Khan and Mr. Rogerson on behalf of the applicants, and in particular by Ms. Carew on behalf of CAFCASS Legal. Ms. Carew, pursuant to an invitation made by this court on 5th March, agreed to become advocate to the court to assist the court in relation to two particular issues. Firstly, the question of domicile which is one of the criteria under s.54 of the Human Fertilisation and Human Embryology Act 2008 (HFEA 2008). Secondly, the effect of the adoption proceedings that had taken place in Iowa.

4 I shall deal with that second aspect first, before I turn to deal with the s.54 criteria.

Section 83 ACA 2002

5 Ms. Carew has rightly raised an issue about the effect of s.83 of the Adoption and Children Act 2002. The relevant parts of s.83(1) provides:

> *"1) This section applies where a person who is habitually resident in the British Islands -*
>
> *(b) At any time brings, or causes another to bring, into the United Kingdom a child adopted by the British resident under an external adoption effected within the period of six months ending with that time."*

6 The section then goes on to make various provisions including, importantly at s 83 (8), a person may be liable for a summary conviction in relation to contravention of that section. It sets out the maximum terms of summary conviction not exceeding six months, or a fine to the statutory maximum, or both.

7 There are, of course, very important policy considerations that underpin s.83 ACA 2002 to regulate entry of children into this jurisdiction who have been the subject of foreign adoptions, and who have not gone through the requisite procedures. That is set out very clearly in the relevant Convention provisions. Whether it was intended to

cover the situation that arose in this case in the context of a surrogacy arrangement where an application is made for a parental order may be open to debate.

8 The children were born in the State of Iowa. The legal position in that State concerning this situation is summarised in an email from Maxine Buckmeier who was the advocate who represented the applicants in the legal procedures that took place in April of last year. Her email states as follows:

> *"Commercial surrogacy is not prohibited in Iowa however there are no explicit statutes. Iowa Code Chapter 710 prohibits the purchase or sale of an individual and surrogacy agreements are specifically excluded from this prohibition. Iowa law does not prohibit gay or lesbian couples from adopting children or children of a same sex partner. Furthermore, Iowa allows same sex couples to marry under the laws of Iowa. Therefore, same sex couples are allowed to enter into surrogacy contracts.*
>
> *Absent court proceedings, the legal parents of a child born through surrogacy are the mother who births the child and her husband, if she is married. [So very similar to the situation in this jurisdiction]. Iowa does not differentiate between heterosexual and same sex intended parents, thus, the legal process is the same. The parental rights, or parent-child relationship, is terminated by court order with respect to the birth mother and legal father. The intended parents' biological relationship to the child is proven by scientific evidence (usually DNA), and the court establishes the intended biological parent as the parent, or parents, and then orders the Department of Vital Records to remove the legal father from the birth certificate, and to issue a new birth certificate showing the biological father or mother, as the case may be, on the birth certificate.*
>
> *In the case of same sex couples, the partner who is not the biological father or mother may adopt the partner's child and then be added to the birth certificate as a second parent [what would be termed here a step-parent adoption]."*

9 Ms. Buckmeier was asked some further questions. In her response shown to me today as to whether the court was made specifically aware of a surrogacy arrangement, she states:

> *"Court orders in this case do not refer to any surrogacy arrangement. However, the court was made aware of the surrogacy arrangement at the hearing and prior to the court signing the order."*

10 What happened in this case was what Mr. Khan described as a "five step process" through the court system in Iowa. I shall deal briefly with the position in relation to G which concerned BB; it was repeated in reverse in relation to M.

11 First of all, on 5th April 2013 there was what has been termed "an administrative step". A document was signed by the surrogate mother, AM, termed "release of custody". In that document she confirms that she is the natural mother of G, and confirms that:

> *"I release and surrender complete and total custody of the said child to Maxine Buckmeier of Sioux County, Iowa, knowing that the purpose of this*

release is to permit her to file a petition in the juvenile court for the termination of my parental rights of this child which would completely sever and extinguish the parent-child relationship between me and the said child.

I further state that I have read and understood all of the provisions contained in this release."

12 She then continues in that document, *"The identity of the putative natural father of G is BB of London, England",* and she confirms that she is married to BM and is over the age of 18. She acknowledges she understands what the legal effect of the release of custody is, and that she has had the opportunity to seek legal advice. She has also been offered three hours of counselling regarding her decision, and in that document agrees to waive that right. AM signs that document which completes the "first step".

13 The second step took place on the same day, 5th April. A document entitled "Acceptance of release" is signed by Maxine Buckmeier who is the advocate. She accepts the above release of custody of such minor child (the document referred to above). She specifically agrees to act as custodian for such child in accordance with the laws of the state of Iowa. That document is witnessed by both the applicants.

14 The third step took place on 10th April and that document is filed with the district court for Woodbury County in Iowa. It is a document that sets out the finding of who the biological father of G is, namely BB following the result of DNA tests. It sets out that BM, the surrogate husband, is removed from the birth certificate and it permits the change of name of the child.

15 The document records that the petitioner, BM, is not genetically related to the child. The court further finds the biological father of the child is BB. It is then ordered, adjudged and decreed the petitioner and legal father of the said minor, BM, be removed as the father of the child on the original birth certificate. It concludes:

"It has further ordered, adjudged and decreed that BB has hereby established that the child's biological father and his name shall be shown on the child's birth certificate, and the child's name shall be changed to G."

It also records this will be registered with the Iowa Department of Vital Records.

16 The fourth step was on 15th April. This is set out in an order signed by the court. It is an order terminating parent-child relationships. It is on the petition of Maxine Buckmeier, the lawyer, to terminate the parent-child relationships of G. The court finds it has jurisdiction in relation to the subject matter, it records present at the hearing Maxine Buckmeier and David Gill (who is described as the guardian ad litem of the said child on behalf of the child). AM and BM, the mother by birth and the legal father, are not present. It refers to evidence being heard by the court and the parties being given an opportunity to be heard. It records the various documents that have been signed, the release of custody and other documents I have already referred to. It then goes on as follows:

"The court therefore finds that the petition of Maxine Buckmeier to terminate the parent-child relationships of the above named minor be granted as to the mother by birth and the legal father of the said child, and that she be appointed

guardian and custodian of the said minor child. It is therefore ordered, adjudged and decreed that the parent-child relationship of the above named child, namely G, be terminated pursuant to the relevant provisions of the code of Iowa."

It effectively terminates the surrogate mother and her husband's parent-child relationship. At that stage, it brings into effect BB being the biological father of G.

17 The final step is an order on the same day, which is a decree of adoption. This relates to the petition for the adoption of G issued by BD who is not the biological parent of G. It records that present in court are the petitioner, BD, BB, G, the child to be adopted, David Gill (the guardian) and Maxine Buckmeier (the attorney). It records as follows:

"After being fully advised on premises, the court finds, firstly, that it has jurisdictional parties. All interest parties have waived notice of this hearing that G was born within the state of Iowa, and the various procedural requirements have been given that are listed in the order. It is therefore ordered, adjudged and decreed that G is hereby adopted by BD and the rights, duties and relationships between the said child and the petitioner shall henceforth be the same as exists between child and parent by lawful birth."

18 Having gone through that process, as a matter of law in the State of Iowa on 15th April, both these applicants had equal parental rights in relation to both G and M. As I have indicated the process was done in exactly the same way, but in reverse, in relation to M.

19 In reality the applicants had little option other than to undertake that legal process in Iowa. It was clearly in the children's interests that they secured their legal position in the State of Iowa regarding both children. It also meant they fulfilled the terms of the surrogacy arrangement which required them to take all necessary steps to secure their legal relationship with the children, and to extinguish the respondent's legal relationship and responsibilities regarding the children. It probably also assisted in them being able to secure the relevant immigration clearance to enable them to bring G and M to this jurisdiction, which they did very shortly thereafter, arriving back in this country on 21st April.

20 However the difficulty with having undertaken those legal steps in Iowa, not only to comply with the terms of the agreement that they entered into, but also to secure the appropriate orders to ensure that M and G's welfare needs were met whilst they were in that jurisdiction, the applicants left themselves open to potentially being in breach of s.83, namely bringing children into this jurisdiction without having gone through the required procedures having undertaken an adoption abroad.

21 The applicants were clearly between a rock and a hard place. It is clear that from a welfare standpoint, and because of their obligations under the surrogacy agreement, the steps they took in the US were the right steps to take and were done with the best of intentions and with the children's welfare uppermost in their minds. They had no idea that by undertaking those steps, they would potentially be in breach of s.83.

22 It is important this issue is highlighted. Intended parents who are about to embark on similar arrangements in the US may wish to take advice in the early stages when they are selecting surrogate mothers and consider whether the State in which the child is going to be born requires the same process as was undertaken in Iowa, so they do not find themselves in breach of s.83. The difficulties that arose in this case where parties are following surrogacy arrangements and intending to come back to this jurisdiction to issue applications for parental orders need to be highlighted to the Department of Health so they can consider whether this situation was intended to be caught by the provisions of s.83 that result in a criminal offence.

23 It is clearly an important issue to highlight but, as I shall come on to describe in a moment, in this case I am entirely satisfied the applicants undertook these steps because they felt that was the best way of securing their legal relationship with M and G in the State of Iowa. They were clearly following specialist legal advice as to what steps they should take. There is absolutely no suggestion in this case the applicants have done anything other than act in good faith and complied with all relevant authorities both in the US and here.

Section 54 criteria

24 I have been assisted by the full statement that has been filed by the applicants dated 18th March 2014. It sets out in a clear and coherent way the background to their decision to embark on this surrogacy arrangement and to have their own family. It also deals specifically with the evidence in relation to the s.54 criteria.

25 Save for two matters, I can take the criteria relatively shortly. The first is in relation to the biological connection between one of the applicants and the children, and whether the children were carried by a woman who was not one of the applicants. The evidence demonstrates that the children were carried by AM following the placing in her of two embryos. The DNA evidence in the papers establishes the biological connection between BB in relation to G and BD in relation to M, so that requirement is fulfilled.

26 As to the status of the applicants' relationship. The evidence confirms the applicants have been in a relationship since 2008. They entered into the equivalent of a civil partnership in France in 2009. They also undertook a ceremony of marriage in Woodbury County in Iowa on 15th April 2013. By virtue of the provisions of s 10(1)(b) of the Marriage (Same Sex Couples) Act 2013 (which came into effect following the relevant commencement order on 13th March 2014) this is a marriage recognised in this jurisdiction. The status of their relationship meets the relevant criteria (s 54(2)).

27 The application for a parental order must be made within six months of G and M's birth. They were born in March 2013. The application was made on 19th September 2013, so well within the six month period.

28 At the time the application is made, and at the time when the court is considering the order, the children's home should be with the applicants, and at least one of the applicants is domiciled in this jurisdiction.

29 G and M were discharged from hospital four days after their birth. They were discharged immediately into the care of the applicants. They have remained in the applicant's care in Iowa until they returned back to this jurisdiction on 21st April. They have remained in their care at their house in Fulham. This criteria is fulfilled (s 54 (4) (a)).

30 As regards domicile, I shall come back to that issue shortly.

31 Turning to the other criteria where there are no issues, both applicants have to be over 18 years of age. BB is 41 and BD is 35 years.

32 The court has to be satisfied that AM and BM consent to the making of a parental order and that they did so freely, unconditionally and with full understanding. In relation to AM that has to be more than six weeks after the birth of G and M. There are three documents that demonstrate this requirement is satisfied.

33 Firstly, there is a letter from the applicants' solicitor to AM and BM 2nd August 2013 explaining the legal implications in relation to a parental order.

34 Secondly, that was followed by both the respondents completing a form A101A on 7th August 2013 which has been signed by them and notarised. This sets out they consent to the making of a parental order and that they understand the implications in relation to that consent being given.

35 The final piece of evidence is the acknowledgement of service to this application which was signed by them on 10th March 2014. That confirms they consent and agree to the court making a parental order.

36 Turning to consider the financial aspects, the court has to consider any payments made, other than for expenses reasonably incurred s 54 (8). In this case, there are two payments which need to be considered by the court. Firstly, a payment of $20,750 which is the fixed agency fee paid to Circle Surrogacy. It is paid in two instalments, $12,750 and $8,000. Whilst there are additional payments to the agency, those relate to specific items of expenditure including matters such as insurance, legal fees, administration of the trust, and fees regarding egg donation. The $20,750 is a fee fixed by Circle Surrogacy. There is of course an element of profit in it. They are a commercial organisation operating lawfully within the legal framework of the jurisdiction they are based in. The level of payments are not significantly different than payments made, not only to this agency but other similar agencies that have been approved in other cases.

37 The second payment that attracts the scrutiny of the court is the total paid to the surrogate mother of $38,950. In their statement the applicants provide at paragraph 45 a detailed breakdown of that figure. They support this breakdown with schedules attached to their statement. There was a miscalculation regarding the additional payment paid because she was carrying twins, so the figure of $36,550 was increased to $38,950.

38 In considering whether the court should exercise its jurisdiction to authorise this payment, the court needs to consider a number of matters. Whether the sum was so disproportionate to reasonable expenses, whether the applicants had acted in good faith or had sought to get around any of the relevant authorities.

39 The sum of money paid to the surrogate is not significantly different to payments that have been made in similar cases involving US surrogacy arrangements. I am satisfied in this case that these applicants have done everything they can to be able to comply with all the regulatory requirements, not only in the US but also in this country. They have also acted in good faith at each step. I have set out above my analysis in relation to s 83, they are potentially in breach of its provisions but I am satisfied that for the purposes of this application they have done so in good faith. They have promptly made their application for a parental order. They have ensured that all information which has been requested by the court has been made available. They have been able to support each stage of the process with documentary evidence to corroborate what they have done.

40 Therefore, in the circumstances of this case, the payments that have been made other than for expenses reasonably incurred should be authorised by the court.

Domicile

41 Turning back to the issue of domicile. It is accepted that both applicants' domicile of origin is in France. However, what is submitted on their behalf is they have abandoned their domicile of origin and acquired a domicile of choice here.

42 The general principles in relation to domicile has been set out in a number of cases, in particular in a decision of mine in *Z and B v C* [2011] EWHC 3181 at paragraphs 13-18. It is accepted this is very much a question of fact. What the court needs to look at in particular is whether actual residence has been taken up and whether the intention of the relevant individual is to live here permanently and indefinitely. It is accepted that the burden of proving the abandonment of the domicile of origin and the acquisition of the domicile of choice here is on the applicants, and they must prove it on the balance of probabilities.

43 One of the issues here is the applicants have only relatively recently moved to this jurisdiction. They sold their main family home in Paris at the end of 2012 and purchased a family home here. They physically moved here in January 2013. The fact that the move has been relatively recent is a factor, but the court needs to look at it in the context of all of the other factors. In particular, the acceptance in *B v C (Domicile) [2012] 2 FLR 805* at para 25 where the court endorsed the academic commentary provided in Dicey's Conflict of Laws as follows:

> *"It is not, as a matter of law, necessary that the residence should be long in point of time. Residence for a few days is enough. Indeed, an immigrant can acquire a domicile immediately upon his arrival in the country in which he intends to settle. The length of residence is not important in itself, it is only important as evidence of the animus manendi."*

44 So it is only relevant in the context of looking at the question of intention. It is also important to recognise that the court does not have to be satisfied that the move here is irrevocable. What the court has to look at is whether there is an intention to make the home here permanent or indefinite. As was said in *IRC v Bullock* [1976] 1 WLR 1178:

"The true test is whether the person intends to make his new home in the country until the end of his days unless, and until, something happens to make him to change his mind."

45 The following facts are submitted to support the demonstration by the applicants in this case, on the balance of probabilities, that they had the intention to make their home in the United Kingdom permanent and indefinite.

46 Firstly, they have sold their primary residence in France and purchased a property here in London. It is right that they have retained two properties in France, firstly, a flat in Paris and, secondly, a holiday home in Biarritz. The flat in Paris is rented and has never been their main home. It is retained as an investment. The holiday home, as the name denotes, is a property that is used for the family to go to and be joined by other members of the wider family during the holidays. Their main family home was sold to enable them to purchase the property here.

47 The second matter relied upon is that both applicants have long term, permanent employment in this jurisdiction. They both pay tax and national insurance here and BB, as a result of his employment, is required to file tax returns. He has filed his first tax return in this jurisdiction. He informed the relevant tax authorities in France in December 2012 that he would no longer be a French resident. He also contributes to a United Kingdom pension plan.

48 Both the applicants have bank accounts here. They have registered the children at bilingual schools as it is their intention for both children to be educated here. They have both registered with the relevant health authorities, general practitioner, etc.

49 In addition they have also set out in their statement their motive for moving to this jurisdiction. One of the matters that they describe in their statement is the difference in societal attitudes between this country and France, in particular, in relation to same sex couples bringing up children. They say in their statement at para.50:

"When we moved to the United Kingdom we moved with an intention to remain living here on a permanent basis and making it our home. Having lived in the UK since December 2012, our intentions remain the same. We cannot see ourselves living anywhere other than the United Kingdom, and we certainly do not envisage returning to live in France.

We made the decision to move permanently to the United Kingdom to make it our home country as a result of our decision to start a family. General French society has, in our view, an underlying antipathy to same sex couples and particularly to the creation of families within same sex partnerships. The 2013 campaign against same sex marriage with a large protest gathering is but one case in point. We made a decision to protect our children that we hoped to have from such a discriminatory environment, whether overt or covert. We chose to make our future in England after much consideration and planning. In doing so, we each made a firm decision to abandon our domicile of origin."

50 Having considered all of the evidence, I am satisfied in this case that the applicants have demonstrated, on the balance of probabilities, that they have abandoned their domicile of origin and acquired their domicile of choice in this jurisdiction. Their

intention is clear, not only from what they have set out in their statement, but also by the independent steps that they have taken in terms of moving their family home to this jurisdiction and fully integrating within the system here in terms of tax, national insurance, bank accounts, and their intention to educate both children here long term.

51 The intention, as I can see from all of these different steps, is that they have permanently and indefinitely made their home here, and that is supported by what they have said in their statements and by their actions.

52 As a result I am satisfied each of the relevant requirements under s.54 HFEA 2008 are met.

Welfare

53 Even if the requirements under s.54 are satisfied, the court has to go on to consider whether each child's welfare needs will be met by the court making a parental order. S 1 ACA 2002 sets out that the paramount consideration for the court is the lifelong welfare needs of each child, having regard to the welfare considerations set out in s.1(4).

54 The court has been enormously assisted in this task by the report provided by John Power, the parental order reporter. His report is dated 31st January 2014 following his visit to the family home on 15th January of this year. He sets out in that detailed report his perceptive analysis of the welfare checklist between paragraphs 40 - 47 which I wholly accept and endorse. He concludes his assessment with the following:

> *"The applicants care for the children lovingly and have been proactive in ensuring that their needs are met. G and M demonstrate secure attachment to the intended parents. BB and BD are confident that AM entered into the surrogacy arrangement knowingly and willingly. They are confident that the amount paid was not such as to strongly influence or overpower the surrogate's freewill in making the arrangement.*
>
> *G and M's permanent home will be with BB and BD. A parental order will benefit them greatly as it will secure G and M in law as the intended parents' children, thus, affording them the greatest possible security. In the circumstances, I take the view that it is overwhelmingly in the interests of G and M for a parental order to be granted."*

55 I am entirely satisfied that each child's lifelong welfare needs can only be met by their legal relationship with the applicants being on the securest footing possible, and that can only be achieved by this court making a parental order.