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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: OHA11324

ICOS No: 14/077343/05

Delivered: 02/10/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

Between:

B

Applicant:

and

K

and

L

and

THE OFFICIAL SOLICITOR

Respondents:

and

ATTORNEY GENERAL FOR NORTHERN IRELAND

REGISTRAR GENERAL FOR NORTHERN IRELAND

Notice Parties:

and

THE SECRETARY OF STATE FOR HEALTH

Intervenor.

O'HARA J

The parties in this judgment have been anonymised so as to protect the identity of the child to whom the proceedings relate. Nothing must be disclosed or published without the permission of the court which might lead to the identification of the child or of the various adults.

Introduction

[1] On 1 June 2016 I issued an interim ruling in this case. I set out my findings as to the circumstances in which the child, a girl who will be referred to as Y, was born in 2012 and had been raised. Her natural mother is K, who at the time was in a civil partnership with B, the Applicant. They separated in 2014. The natural father is L. As the interim ruling relates B and K brought about a situation in which, contrary to law, a birth certificate was issued naming B as the second female parent. L's name is absent from the birth certificate on which Y was given the same surname as B.

[2] I refer to the earlier ruling which sets out what can only be described as the unfortunate mess which these actions have caused. The question is how best to put this right. I start this judgment by stating that it is simply not possible to put everything right but it is necessary to try to do so.

[3] I have received representations and submissions from and on behalf of the three adults. In addition I have received submissions from the Attorney General, the Registrar General, the Secretary of State for Health and the Official Solicitor. I am grateful to all involved for the submissions they made and the assistance which they have provided.

Overview

[4] On behalf of B Mr Scofield QC with Mr Tim Ritchie set out her two primary concerns. They are:

- (i) That B's "proper status" is recognised in respect of Y.
- (ii) That her contact with Y is not eroded.

[5] Mr Scofield submitted that B is entitled to have and should maintain parental responsibility for Y. He proposed three ways in which this could be done:

- (a) By her continuing to be recognised on the birth certificate as second female parent.
- (b) By her being granted parental responsibility as a step-parent under Article 7(1A) of the Children (NI) Order 1995.
- (c) By the making of a joint residence order under Article 8 of the 1995 Order - this was a fall-back position.

[6] In advancing the claim that B should remain on the birth certificate Mr Scofield submitted that the domestic legislation, specifically section 42 of the Human Fertilisation and Embryology Act 2008, is incompatible with B's rights under Articles 8 and 14 of the European Convention on Human Rights.

[7] If this proposition is rejected, it was further submitted that B should be given parental responsibility under Article 7(1A) of the 1995 Order along with K and L. Mr Scoffield contended that the legislation does not impose any limit on the number of people who can have parental responsibility for a child. In each case the question is what is in the child's best interests since Article 3 of the 1995 Order provides that the paramount consideration is the child's welfare.

[8] Beyond the issue of parental responsibility there are also issues about B's contact with Y, what Y's surname should be and, depending on what rulings I make, what information B should continue to receive about Y and her life.

[9] Before analysing these issues in turn I should say something about each of the three adults whose concerns and interests are at the heart of this case, subject to Y's welfare. In addition to what appears in my interim ruling the following matters are relevant:

B

[10] B played a major part in Y's care until she and K separated. Her role, albeit reduced, has continued beyond that time. In fact the social worker reporting in this case recommended at one point that B's contact with Y should increase because of the quality of her relationship with Y. I am satisfied that if the separation of B and K had not been so acrimonious, and if L had not become involved in Y's life, that B would have continued to play some role, perhaps not that far removed from the role that she had played beforehand. It is however impossible to ignore the breakdown of her relationship with K and what followed from that. It is also impossible to ignore the reality of how Y was conceived and her birth registered.

K

[11] While K made contact with L twice about Y, before she was born and soon afterwards, she is otherwise as responsible for excluding him from Y's life as is B. I refer to paragraph 19 onwards of my interim ruling. K's plan at one point, her incoherent plan, to move to Wales indicates that she cannot always be fully trusted or relied upon to put Y's interests first.

L

[12] L was the victim of a "set-up" planned by B and K which led to K becoming pregnant. While there was some delay on his part in coming forward to play a role in Y's life he is entitled to have his paternity fully recognised. Since he has come forward he has sought to play a role. Furthermore he has proved in his unchallenged evidence that he is a hardworking and reliable man with reports before me showing he has been in a settled and good relationship. It has to be recognised however that some of the support he has received from K may well be due to her animosity towards B. Nobody can be sure that this belated openness on K's part will necessarily continue.

The 2008 Act and incompatibility

[13] The 2008 Act made important amendments to the Human Fertilisation and Embryology Act 1990 and the Surrogacy Arrangements Act 1985, in particular, regarding the persons who in certain circumstances are to be treated in law as the parents of a child. The purpose of the 2008 Act was to ensure that the 1990 Act was revised to keep pace with new avenues of scientific research and to reflect wider changes in society.

[14] Sections 42-47 of the 2008 Act provide for cases in which another woman (in addition to the mother) is to be “the other parent.” Section 42 deals with circumstances where there is an existing civil partnership or marriage to a woman. It provides that if at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination the birth mother was a party to a civil partnership or a marriage with another woman then subject to certain conditions the other party to the civil partnership or marriage is to be treated as a parent of the child unless it is shown that she did not consent to the placing in the natural mother of the embryo or the sperm and eggs or to her artificial insemination.

[15] It is clear from section 42 that it expressly requires either IVF treatment or artificial insemination. It is not applicable in circumstances where the child is conceived as a result of natural intercourse between a man and a woman.

[16] One important effect of section 42 can be seen in section 45 which provides that where a woman is treated by virtue of section 42 as a parent of the child, no man is to be treated as the father of the child. This means that a person (such as B) who is treated as a parent of a child (such as Y) under section 42 is treated as such to the exclusion of the father of that child (such as L) but only if the conditions specified in section 42 are satisfied.

[17] The consequence of these provisions is that Article 10(4A) of the Births and Deaths Registration (NI) Order 1976 allows the woman who is a parent by virtue of section 42 to be registered as the second parent.

[18] It is acknowledged by B, as it must be, that Article 10(4A) applies to children conceived through artificial insemination provided as a result of “treatment” as defined in the 2008 Act. B falls outside the terms of section 42 because Y’s conception was as a result of sexual intercourse between K and L. It is clear therefore that B should never have been registered as the second parent under the 1976 Order and is not the legal parent under the statutory scheme provided under the 2008 Order nor the recipient of automatic parental responsibility under the 1995 Order.

[19] The conception of Y as a result of the deception of L is said to have come about because B and K could not afford IVF treatment through the National Health Service. It is, of course, unfortunate for them that that is so. But sections 42 and 45

of the 2008 Act are framed as they are in part to avoid a scenario such as the present where a man is deceived into impregnating a woman and then denied by the 2008 Act of the right to be treated as a father.

[20] It was accepted in submissions by Mr Scoffield that there is no case comparable to the present which has led to the result which B seeks i.e. her name on the birth certificate. His contention was that this denies B her right to family life under Article 8, partly because she has limited financial resources which involves her rights under Article 14 also.

[21] In my judgment that proposition simply cannot be accepted as a correct analysis. First, there is no absolute right to be the parent of a child so B is not being denied any identifiable right. Secondly, section 42 creates a right to be a second parent only in defined circumstances which do not apply here where the conception was by way of intercourse. The European Court of Human Rights has recognised the ethical and moral difficulties associated with assisted conception, an area in which there is no consensus among member states. For that reason it has given a wide margin of appreciation to the steps taken within states to develop their laws and mechanisms to cope with the complications which follow. Within the United Kingdom the law has been extended by the 2008 Act but that extension has been made in such a way as to make clear to women and to any man involved what are the demands and consequences of the statutory provisions. It may not be perfect but it is not contrary to any recognised right. In some cases the terms of the Act have been interpreted generously so that a technical or minor breach of its requirements has not proved fatal to registration of the second female parent. That isn't what is sought here. Instead the application is to hold that section 42 is incompatible because it prevents B from being registered as second female parent when the father is known, the conception was by way of intercourse and the Registrar was misled. I acknowledge that B created a family life for herself with Y, with the support of K, but that family life was based on a lie.

[22] In this case the Registrar was wrong to register B as the second female parent. The relevant official was misled by the information provided (or not provided) by B and K. Y has a natural mother and a father. B benefitted from the induced error by being registered as second parent when she clearly should not have been. B was not, and is not, entitled to be registered on the birth certificate of a child who is not hers unless the provisions of the 2008 Act are satisfied. The failure of the law to allow her to be registered otherwise is not a breach of any identifiable right whether under Article 8 or 14 of the Convention. And the requirements imposed by the 2008 Act are both necessary and proportionate. Accordingly, I am satisfied that the 2008 Act is entirely compatible with the Convention.

[23] For B it was also argued that Articles 5 and 7 of the Children (NI) Order 1995 breach Article 8(14) of the Convention because they fail to recognise her as a parent of Y. In fact, Article 7(1A) and (1C) read together allow B to apply to the court for parental responsibility even if she is neither the mother nor father. That discretion can be exercised by a court in circumstances where it is satisfied that it is in the

child's best interest to grant parental responsibility. Accordingly, I am satisfied that no provision of the Children Order is incompatible with the European Convention in this regard. Parental responsibility will not be acquired automatically in this situation but in the circumstances it is sufficient that it can be acquired by court order.

[24] The consequence of this ruling will be that the registration of Y's birth must be corrected. In order to achieve that I will make a declaration in terms which are to be agreed between the parties to the effect that L is Y's father and K is her mother. In all probability this will lead to reconsideration of Y's surname. I cannot see how or why Y should continue to carry B's surname on the basis of an illicit agreement made between B and K to the exclusion of the father L.

Parental Responsibility

[25] Perhaps the most contentious issue in this case is really whether B should have parental responsibility for Y. Article 6(1) of the 1995 Order defines what parental responsibility is:

“6. – (1) In this Order “parental responsibility” means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.”

[26] It is normal (obviously) for a mother and father to have parental responsibility for a child but there are some circumstances in which others may also be awarded parental responsibility. It is not unheard of for more than two people to have parental responsibility but that should only happen where the child's interests require it.

[27] B's case for having parental responsibility is that she and K intended that to happen, that she has acted as a significant and important carer for Y and that she wants to continue to do so. In this context she accepts that K and L will have parental responsibility since they are Y's birth parents but she contends that this should not be to her exclusion.

[28] There are examples in the case law of situations in which courts did or did not award parental responsibility to individuals. They are however of limited value and do not particularly assist in answering the question in this case because they are so fact specific. Having considered all the material before me and all the oral evidence I conclude that the claim by B for parental responsibility should fail for four reasons:

- (i) B's role only came about as a direct result of the deception of L by K.
- (ii) There is no meaningful or positive level of trust between the three adults. This in itself is a major impediment to parental responsibility being shared on a three-way basis.

- (iii) If I give parental responsibility to B she would have equal rights with K and L since there is no hierarchy of parental responsibility. I cannot see how this would not lead to conflict in the future.
- (iv) For these reasons it would simply not be in Y's best interests to have these three adults each holding parental responsibility for her.

Other Issues

[29] That does not bring an end to the case. B has also submitted that as a last resort, in her eyes, the court should award her a joint residence order. I do not accept that such an order is any more appropriate in the circumstances of this case than shared parental responsibility. While joint residence orders can sometimes be made in cases where there is conflict between the adults that is far from being an ideal background for them. Furthermore the father, L, will most likely have a significant role to play in Y's life and it would be inappropriate, in my judgment, for B to share with K the residence for Y.

[30] Having said that I am alert to the positive reports which have been provided about B's relationship with Y and about B's contact with Y. It seems to me to be important that B maintains some defined presence in Y's life. In my judgment that can be achieved through a combination of two orders. The first is an order for defined contact between B and Y, the terms of which should be discussed between the parties. In the absence of agreement the court will have to decide what the level of contact should be. In addition to that I am satisfied that it would be appropriate to make a specific issue order within the meaning of Article 8 of the 1995 Order. However unsatisfactorily it came about, the fact is that B has played a role in Y's life and there is evidence to suggest that that role has been and may continue to be beneficial to Y. It is for that reason that I have decided to order defined contact. For the same reason I believe it is appropriate that B should be kept informed by K of Y's progress in terms of health and education. She may learn some of this in any event through contact but she should also be kept informed of any significant developments and of the decisions which have been taken by K and L in these spheres. I emphasise that this does not mean that she has a decision making role in Y's life so far as health or education are concerned. It simply means that she knows what is happening and is not cut adrift.

[31] I will allow the parties some time to discuss the terms of the orders which are necessary to give effect to this judgment. In the event that no agreement is reached, or that agreement is incomplete, the matter can be relisted for final disposal.