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IN THE HIGH COURT OF JUSTICE NORTHERN IRELAND

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FAMILY DIVISION

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2015 /012181

IN THE MATTER OF THE MATRIMONIAL AND FAMILY PROCEEDINGS (NI) ORDER 1989

BETWEEN:

MS A

Applicant;

-and-

MS R

Respondent;

-and-

MR P

Notice Party;

-and-

THE ATTORNEY GENERAL FOR NORTHERN IRELAND
THE SECRETARY OF STATE FOR HEALTH
THE DEPARTMENT OF FINANCE

Notice Parties.

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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 his identification or the identification of the various adults.

Introduction

[1] In spring 2014 a lesbian couple, Ms R and Ms A, who were not in a civil partnership agreed with Mr P that he would provide sperm for Ms R to bear a child.

They all agreed that if and when a child was born it would be co-parented by Ms R and Ms A. A baby, C, was born in 2014. The only parent named on the birth certificate is Ms R. Mr P is content with that and does not seek to have his name added to the birth certificate.

[2] Unfortunately the details of the role that Mr P was to play in C's life were not definitively agreed. He contends that he was to play some part in C's life, including having at least one visit soon after C was born. When this did not materialise he made an ex parte application for contact, in February 2015. He was met with a response in April 2015 by way of an application for a joint residence order. Then in September 2015 Ms A issued an application for a declaration of parentage pursuant to Article 31B of the Matrimonial and Family Proceedings (NI) Order 1989 ("the 1989 Order") read compatibly with her rights under the European Convention of Human Rights. Subsequent to this on 27 November 2015 a Notice of a Devolution Issue and a Notice of Incompatibility were issued on behalf of Ms A. These notices concerned the interpretation of Article 31B and Article 34 of the 1989 Order and Sections 42 and 43 of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act").

[3] Regrettably there was never a written or agreed formulation of what role Mr P would play in C's life e.g. when he would see C, how often he would see C, how he would be introduced to him, how his children would be introduced to him or how he would be known to him. It is appalling that the planning between the adults for something so important and long lasting was so inadequate. People put more care into arranging a holiday than these three adults did for C. To the extent that there were discussions the outcome was incomplete and incoherent. Ms R and Ms A have challenged Mr P's right to seek contact on the basis that he is not C's father in any way which should be recognised by the court. Some very limited progress has been made on the contact issue in that leave to apply for contact has been granted and there has been input from the court children's officer. In the meantime the following is a list of those issues upon which there is agreement:

(i) Ms R is registered on the birth certificate as C's mother and will remain so.

(ii) Mr P does not seek to have his name added to the birth certificate even though he is the biological father.

(iii) C's surname is agreed to be that of Ms A, a surname which Ms R has also taken.

(iv) There can be a joint residence order in favour of Ms R and Ms A under the Children (NI) Order 1995.

[4] What Ms A and Ms R seek however goes much further. Ms A seeks a declaration of parentage naming her as C's second parent. This would enable her to

be added to the birth certificate. That declaration is sought pursuant to Article 31B of the 1989 Order which is in the following terms at paragraph (1).

> "Subject to the provisions of this Article, any person may apply to the High Court, a County Court or a court of summary jurisdiction for a declaration as to whether or not a person named in the application is or was the parent of another person so named."

The effect of such a declaration is set out at paragraph (7):

> "Where a declaration is made by a court on an application under paragraph (1), the prescribed officer of the court shall notify the Registrar General in such a manner and within such a period as may be prescribed of the making of that declaration."

[5] Article 34 of the 1989 Order then provides as follows at paragraph (1):

> "Where on an application for a declaration under this part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy."

[6] In making this application Ms A contends that the declaration should be made because she is entitled in law to be recognised as C's second female parent. She says that refusing her application is incompatible with her rights and those of C and Ms R to family life pursuant to Article 8 of the Convention and Article 14 insofar as she would be the victim of discrimination based on her status of being other than married or in a civil partnership.

[7] Ms A also contends that if the declaration is refused, a question would arise as to the compatibility of the provisions of the 1989 Order and Sections 42 and 43 of the 2008 Act with the European Convention.

[8] Ms A's case is fully supported by Ms R. They contend that while they were not civil partners until after C's birth they already had an enduring relationship which should be recognised and respected as being equivalent to a civil partnership or marriage.

[9] These submissions, both on the meaning and effect of the 1989 Order and 2008 Act, are resisted by Mr P, the Department of Finance, the Secretary of State for Health for England and Wales, the Attorney General and the Official Solicitor who agreed to be appointed to represent the interests of the child.

Human Fertilisation and Embryology Act 2008

[10] This Act amended the Human Fertilisation and Embryology Act 1990 and the Surrogacy Arrangements Act 1985. It made provision about the persons who in certain circumstances are to be treated in law as the parents of a child and extended those provisions beyond what had been provided for in 1990. It is necessary therefore to consider the provisions of the 2008 Act in some detail.

[11] Section 33 defines "mother" as follows:

> "(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."

[12] Section 34, headed "Application of sections 35 to 47" provides as follows at sub-section (1):

> "Sections 35 to 47 apply, in the case of a child who is being or has been carried by a woman (referred to in those sections as 'W') as a result of the placing in her of an embryo or of sperm and eggs or her artificial insemination, to determine who is to be treated as the other parent of the child."

[13] Section 35(1) provides as follows in relation to the meaning of "father":

> "If -
>
> (a) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage with a man, and
>
> (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,
>
> then, subject to section 38(2) to (4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)."

The consequence of this is that in a case where a woman who is married and has sperm placed in her from someone other than her husband, her husband is to be treated as the father of the child unless he did not consent to the placing in her of the sperm.

[14] Section 36 then provides for different circumstances where a woman (the mother) is not married to a man nor married to a woman or in a civil partnership. It provides at sub-section (1):

> "If no man is treated by virtue of Section 35 as the father of the child and no woman is treated by virtue of section 42 as a parent of the child but -
>
> (a) the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies,
>
> (b) at the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed fatherhood conditions (as set out in section 37) were satisfied in relation to a man, in relation to treatment provided to W under the licence,
>
> (c) the man remained alive at that time, and
>
> (d) the creation of the embryo carried by W was not brought about with the man's sperm,
>
> then, subject to section 38(2) to (4), the man is to be treated as the father of the child."

[15] Section 37 then sets out detailed conditions of fatherhood which require written and signed notices by the man that he consents to being treated as the father of any child resulting from the treatment and by the woman stating that she consents to the man being so treated.

[16] The consequence of these provisions is that a man who is not the natural father of a child is nonetheless to be treated as the father if the woman received treatment from a licenced provider and if he and the woman had each provided written and signed notices (which had not been withdrawn) at defined times giving their consent to the man being treated as the father. To emphasise the sensitivity of these matters there are further provisions at section 39 relating to the use of sperm or transfer of an embryo after the death of the man who provided the sperm and at section 40 relating to the death of a husband who did not provide sperm.

[17] Sections 42 to 47 are headed "Cases in which women to be other parent". These provisions are of direct relevance in the present case because Ms A contends that for C she is the woman who should be treated in law as the "other parent". The

sections mirror, insofar as it is possible to do so, sections 35 to 41 which have already been set out above.

[18] Section 42 headed "Woman in Civil Partnership or Marriage to a Woman at Time of Treatment" provides at sub-section (1):

> "If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership or a marriage with another woman, then subject to section 45(2) to (4), 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 W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)."

At the time which is relevant to this case Ms R and Ms A could have been but were not in a civil partnership. Had they been in a civil partnership when the sperm was placed in Ms R, Ms A would be treated as a parent of C (unless it was shown that she had not consented).

[19] Sections 43 and 44 then legislate in similar terms to two women as sections 36 and 37 legislate for a woman and a man. Section 43 provides:

> "If no man is treated by virtue of section 35 as the father of the child and no woman is treated by virtue of Section 42 as a parent of the child but –
>
> (a) The embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies,
>
> (b) At the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed female parenthood conditions (as set out in section 44) were met in relation to another woman, in relation to treatment provided to W under that licence, and
>
> (c) The other woman remained alive at that time, then, subject to section 45(2) to (4), the other woman is to be treated as a parent of the child."

[20] Section 44 follows the course of section 37 by providing for written consent notices signed by both women for the birth mother-to-be has received treatment services by a licence provider.

[21] The important additional consequences of sections 42 and 43 are clear from section 45 which provides:

> "(1) Where a woman is treated by virtue of section 42 or 43 as a parent of the child, no man is to be treated as the father of the child.
>
> (2) In England and Wales and Northern Ireland, sections 42 and 43 do not affect any presumption, applying by virtue of the rules of common law, that a child is the legitimate child of the parents to a marriage.
>
> (4) Sections 42 and 43 do not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child."

[22] Sections 46 and 47 provide, in equivalent terms, the same as sections 39 and 40 which have already been detailed above. Once again Parliament has tried to provide comprehensive coverage of the complexities arising from artificial insemination inside and outside civil partnerships and marriage in an area which calls for lines to be drawn sensitively but clearly. Its intention was to expand the categories of people to whom "parentage" would apply but do so within the framework of a tightly regulated regime – see the judgment of Cobb J in AB v CD [2013] EWHC 1418 (Fam) at paragraphs 90 to 95 in particular. In that judgment he declined to grant parental status where there had not been compliance with the statutory regime to which he attached considerable importance.

Consequences of the 2008 Act

[23] If Ms A fell within either section 42 or section 43 of the 2008 Act and was therefore "treated as a parent of the child" she would be entitled to a declaration of parentage under Article 31B of the 1989 Order – see paragraph [4] above. This would in turn pave the way for her to be registered on C's birth certificate as his second parent.

[24] On the face of the legislation she falls within neither section. She was not Ms R's civil partner until after C was born so section 42 does not apply. Section 43 does not apply either because Ms R did not receive treatment from a licensed services provider. Furthermore, the specified female parenthood conditions in section 43 have not been complied with in any way. One important element of the consent

forms referred to in section 43 is that the declaration made by the person signing acknowledges that she has been given information about the different options available, has been offered counselling, understands the implications of consent and is aware that the consent can be changed or withdrawn up to a certain point. All of that is absent in this case. These consents are not incidental matters, they are fundamental to the process.

[25] Notwithstanding the provisions of the 2008 Act Ms A advanced her case along the following lines, supported by Ms R:

A. The circumstances of this case engage Article 8 of the European Convention because Ms A has a right to family life and to recognition of the family unit with Ms R and C which can only be recognised properly is she is registered as C's "other parent" on his birth certificate.

B. Ms A is a parent to C in the social and psychological sense recognised by Lady Hale in *Re G* [2006] UKHL 43 at paragraph [35].

C. It is contrary to Article 8 and to Article 8 read in conjunction with Article 14 to deny legal parentage to Ms A because she was not a civil partner of Ms R at the relevant time. That constitutes discrimination on the ground of marital status or other status or rather the lack of marital status.

D. In the alternative the court could make of its own accord a finding that since Ms A is a social and psychological parent within Lady Hale's analysis the provisions of Article 31B are satisfied so that a declaration of parentage in her favour is appropriate.

E. Section 42 of the 2008 Act should be read so as to apply to Ms A because even if she was not married to Ms R or in a civil partnership with her she was in an "enduring relationship".

F. If the court is not satisfied in relation to parentage and holds that section 42 is not satisfied by an enduring relationship the court should find that section 42 is incompatible with Article 8 and Article 14. Similarly it should find that section 43 is incompatible because it requires Ms A to have received treatment services only through a licensed clinic.

G. Since Articles 8 and 14 are engaged an obligation lies on the respondents to justify that interference. No such justification is identified in any of the responses filed by the respondents nor is there any answer to the claim of discrimination.

H. It is not sufficient for Ms A to benefit from any of the orders which might be made under the Children (NI) Order 1995 such as an order for parental responsibility or a joint residence order with Ms R. These orders are of some value but they do not carry the permanence of registration as a legal parent on the birth certificate and are vulnerable to challenge as circumstances change. Nor would it be sufficient for her to become an adoptive parent. She can only have her position recognised adequately if she is declared to be a parent.

[26] The various respondents and notice parties advanced the following main submissions in reply:

> "I. Most (but not all) accepted that Article 8 is engaged.
>
> J. All contended that the extent of that engagement is limited.
>
> K. All contended that this is not a case in which Ms A was debarred by statute from having a route to legal parenthood. If she and Ms R had entered their civil partnership earlier Ms A could have been registered as second parent by virtue of Section 42.
>
> L. The carefully drawn provisions of the 2008 Act which stress counselling, advice and written consents to avoid uncertainty are all necessary and justifiable in order to avoid exactly the sort of issues and dispute which the circumstances of the present case illustrate.
>
> M. The variety of orders allowed for in the Children Order are more than adequate to meet the legitimate expectations and demands in this case and serve the best interests of C.
>
> N. The concept of psychological or social parenting is simply too vague and variable to serve as a basis for making an order under Article 31B. The same applies to the concept of an enduring relationship.
>
> O. In these circumstances there is no need to read any words into section 42, no basis for declaring sections 42 or 43 incompatible and no justification for making an order under Article 31B."

Discussion

[27] Ms A was not able to advance her case by relying on any authority showing that in comparable circumstances any court had accepted the case she advanced. That is not a reason to reject her case but it inevitably makes any court more circumspect when considering it.

[28] Significant reliance was placed by Ms A on the decision of the House of Lords in *Re P* [2008] UKHL 8. In that case the applicant was unable to apply to adopt a child because he and his partner (the mother) were an unmarried couple whereas the Adoption (NI) Order 1987 only permitted (and still only permits) applications from married couples or single people. The House of Lords held that excluding an unmarried couple from even being considered was discrimination on the grounds of marital status, or lack of marital status, within Article 14.

[29] I do not accept that *Re P* assists Ms A in any material way. The 2008 legislation recognises married couples, couples in civil partnerships and unmarried couples in Sections 42 and 43 subject to certain conditions. None of those conditions is one which Ms A could not have complied with. Had she and Ms R entered a civil partnership earlier they would have come within Section 42. Alternatively they could have gone through a licensed clinic and met the demands of section 43. They chose not to do so and now seek to avoid the consequences of their deliberate decisions.

[30] The 2008 Act amends and extends the provisions of the earlier Act of 1990 so that more people can be treated in law as parents of a child. But it does so carefully and precisely, at least in part because as is made clear in section 45 the consequences of a woman being treated by virtue of sections 42 and 43 as a parent of a child are that "no man is to be treated as the father of the child". In other words Mr P would not be the father in any respect despite the fact that Article 155 of the Children Order entitles him to be recognised as C's father.

[31] In my judgment this exclusion of any man as father by virtue of section 45 should only come about in the circumstances devised by Parliament after considerable public debate and consideration. To open the door wider than that only ends the certainty which the legislation has sought to achieve in this complex and difficult area. (In a few cases courts have exercised discretion to allow a second parent to be recognised even if the terms of the legislation were not complied with in every detail e.g. where the consent notices were completed but not at the correct time. But in those cases there was an effort to respect the law which is entirely missing here.) For the same reason I reject the contention that section 42 should be read to include people in "an enduring relationship". In *Re G (Unregulated Artificial Conception)* [2014] EWFC 1 Jackson J was invited to make a declaration of psychological parenthood as part of a declaration that family life existed under Article 8 at a time when a child was removed from the jurisdiction. He declined to do so and said:

> "I do not regard the existence or non-existence of psychological parenthood as an apt subject for a declaration."

[32] I accept that (inevitably) the circumstances of that case, like all of these cases, are different from the present but in this case Ms A seeks even more than Jackson J refused. She seeks a declaration of actual parentage, legal parentage, for the purposes of Article 31B. That seems to me to be asking much too much. Providing social or psychological parenting for a child is of enormous importance and value to a child as Lady Hale recognised. However, in my judgment, it is really quite different from what Article 31B contemplates and requires. At different times in a child's life one adult may leave the scene and another one arrive on it. That new adult might become central to the child's well-being and positive development on a long term basis. Wonderful as that is for the child it is not a basis for adding his or her name to the birth certificate.

[33] In this case the approach of Ms A and Ms R is very clear and disappointingly so. It is set out in Ms R's affidavit of June 2015 at paragraph (9) where she avers:

> "I do not accept that [Mr P] is [C's] natural father. [Mr P] provided the gamete by which fertilisation occurred but he is not the natural father of [C]. The natural parents of [C] are me and [Ms A]. I do not accept that [Mr P] has any parental rights in respect of [C]."

That is simply wrong – Ms A is not and cannot be the natural parent of C. Had she and Ms R taken one of the routes open to them they could have become the recognised legal parents. By failing to do so they have lost that opportunity, at least so far as Ms A is concerned.

[34] I agree with the submissions made by almost all parties that the Article 8 right to family life is engaged in the present case. To an extent that family right has been interfered with. However, in this case the interference is extremely limited and in my judgment justified for two main reasons. The first is that Ms A had the opportunity to become a legal parent through the routes provided by either section 42 or section 43 of the 2008 Act. It is not the law which denies second parentage to Ms A. On the contrary it is her failure to take any of the steps open to her by law. The second is that while the interference is necessary in order to introduce certainty into the complex area of parental relationships, it is limited by the variety and combination of alternative orders which can be made to cement Ms A's place in C's life. In particular orders can be made giving her parental responsibility and shared residence which, in the circumstances of this case, are likely to be long lasting in their effect since Mr P isn't seeking anything more than some form of contact.

[35] Insofar as Ms A complains that she has been discriminated against on the ground of marital or other status contrary to Article 14, I find against her. Section 42 allows for recognition as a second parent of a woman who is in a same sex marriage or civil partnership. Section 43 of the 2008 Act clearly allows for recognition as a second parent of a woman who is neither in a civil partnership or married. I find that Ms A has no comparator for the purposes of her complaint of discrimination.

[36] For all of the reasons set out above I decline to make a declaration of parentage under Article 31B of the Matrimonial and Family Proceedings (NI) Order 1989. I also decline to make a finding that any provision of the 2008 Act is incompatible with Articles 8 and 14 of the European Convention on Human Rights.

[37] Mr P has indicated that he does not seek parental responsibility. He has agreed that C be given the surname of Ms A. If necessary I will hear the parties in the terms of any further orders which are sought.