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COURT DISMISSES APPEAL FOR A DECLARATION OF PARENTAGE IN CASE WHERE A CHILD WAS BORN TO SAME SEX COUPLE BY DONOR INSEMINATION

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal for a declaration of parentage in a case where a child was born to a same sex couple by artificial insemination using a sperm donation.

A and J are a same sex couple who met O with a view to him donating sperm so they could have a child. A child, referred to as R, was born in 2014 and J was registered as his mother. It was agreed between A, J and O that R would be co-parented by A and J. J changed her surname to that of A so that all three had the same surname. There was agreement between the parties that a joint residence order in respect of R should be made in favour of A and J, although there was a dispute between O and A and J about the extent of any contact he should have with the child. The following year, A and J entered a civil partnership. Two further children have been born to J with A being registered on each birth certificate as the other parent.

In 2015, A petitioned for a declaration of parentage pursuant to Article 31B of the Matrimonial and Family Proceedings (NI) Order 1989 ("the 1989 Order"). This was refused by the trial judge. A Notice of Incompatibility was served on 10 March 2021 contending that insofar as sections 42 and 43 of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act") prohibited the making of a declaration of parentage the provisions were incompatible with the Article 8 and 14 ECHR rights of A ("the appellant"). Similarly, it was contended that insofar as Article 31B did not provide for the making of such a declaration it also was incompatible with the ECHR rights.

Sections 42 to 45 of the 2008 Act deal specifically with who is to be treated in law as the parent of a child born to a woman in a same sex relationship:

- Section 42 relates to the circumstances where the mother was a party to a civil partnership with another woman at the time of the artificial insemination and that the other party to the civil partnership was to be treated as a parent of the child unless it was shown that she did not consent to the artificial insemination. It was on that basis that the appellant was registered as the other parent of the two children born after she and A entered a civil partnership.
- Sections 43 and 44 deal with the situation where the same sex female partners were not in a civil partnership and in those circumstances, where the artificial insemination services were provided in the UK by a licensed person and written notice was given in advance by the mother, and the other female consenting to the other female being treated as a parent, then the other woman was to be treated as a parent of the child.

The court said the 2008 Act provided a "bright line legislative scheme" with the aim of recognising:

[1] The panel was Lord Justice Treacy, Lord Justice McCloskey, and Sir Declan Morgan. Sir Declan Morgan delivered the judgment of the court.

- The commitment to family life made by those entering into a marriage or civil partnership by treating the parties to the relationship as the parents unless it was demonstrated that the other person did not consent;
- In cases where the same sex couple who are not in a civil partnership or marriage wish to parent the child without reference to the donor the option of using a licensed clinic satisfies that requirement;
- There are various reasons why those involved may want to take a different approach in relation to the identity of the donor and the role that the donor should play in the child's life. The legislation permits such a course and in light of the circumstances which may cause parties to go down that route there is no attempt to alter the legal position of the donor;
- The purpose of the Act is to provide clarity and opportunity to define the roles of gestational, genetic and psychological parents in the upbringing of the child.

Articles 8 and 14 ECHR

The appellant contended that the failure to provide a mechanism for her to be registered as the parent of R constituted a breach of her right to family life under Articles 8 and 14 ECHR and further that the said failure also constituted a breach of both the private and family life of R. The trial judge had accepted that the appellant's family life was engaged by the failure to enable her to become registered as R's parent. The court said it was inclined to accept that the exclusion of the appellant's name on the birth certificate of R affects the family life of A and J but that it did not consider this affected the upbringing of R.

The court said the essential issue in this case was the striking of a fair balance, as required by Article 8, and that this assessment must be carried out in respect of the legislative scheme as a whole. The court made the following comments:

- It was important to recognise that this is an area of sensitive and conflicting moral, religious and ethical views in which states will often enjoy a wide margin of appreciation;
- The legislative scheme was the result of a careful and lengthy analysis by a range of interests resulting in a detailed report (the Warnock Report) which provided the basis for consultation within the community;
- The scheme had been the subject of direct consideration by Parliament resulting in primary legislation and in an area of this kind Parliament is the proper body to exercise the margin of appreciation;
- In substance, the appellant's case resolves to the proposition that where there is an enduring relationship in the course of which one party avails of artificial insemination by donation there is a positive obligation to ensure that the other party can be registered on the birth certificate with the exclusion of any rights of the donor. The court said this raises the issue of what constitutes an enduring relationship.

In examining the scheme, the court said it was also necessary to take into account that the statutory scheme includes the availability of a joint residence order under Article 8 of the Children (Northern Ireland) Order 1995 ("the 1995 Order") and with the consent of the mother a parental responsibility order under Article 7 (1A) of the 1995 Order which would give the appellant the rights, duties, powers, responsibilities and authority of a parent. That ensures, subject to the court being satisfied about the welfare of the child, that the person in the relationship who is not the mother has a full role to play in the upbringing of the child. The court commented that it was regrettable that artificial

insemination by donor was not available in this jurisdiction on the National Health Service until 2019. In her statement of evidence, the appellant indicated that she and the mother considered going through a clinic but unfortunately felt it was prohibitively expensive at the time. The court said there was no evidence about the means of the appellant or J or whether their researches caused them to consider approaching charities or other sources of funding but that it remained the position that the objective that the appellant was now seeking to secure was available to her under the statutory scheme:

> "All of these features support the conclusion that the fair balance test is strongly against any interference with the statutory scheme and we reject, therefore, the suggestion that sections 42 and 43 of the 2008 Act are incompatible with the appellant's Article 8 rights."

The appellant also pursued a claim for incompatibility based upon Article 14 ECHR which states that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The court considered that the test of whether the case fell within the ambit of any of the substantive ECHR rights invoked was satisfied by the engagement of Article 8. In this case, the comparator upon which the appellant relied was a person who is married or in a civil partnership where registration as a parent can take place regardless of whether the child was conceived through artificial insemination in a licensed clinic or elsewhere. The court accepted that this was a difference of treatment based upon marital status. The appellant also identified this as a difference of treatment based upon the birth status of R. The court accepted this submission that the difference in treatment was based on that status but added:

> "The issues of analogous situation and justification can be dealt with together. Justification in this case must also depend upon an analysis of the statutory scheme rather than the individual circumstances of the appellant. The cases indicate, however, that the effect on the appellant is a factor to be taken into account in looking at the scheme. We consider that the arguments advanced in relation to Article 8 essentially apply here also. By virtue of Articles 7 and 8 of the 1995 Order the appellant can play a decisive role in the upbringing of the child, R, and a full part in the family life of the children. We accept that the inability to register on the birth certificate is a source of frustration and disappointment to the appellant but that does not justify setting aside this carefully constructed statutory scheme."

Article 31B of the Matrimonial and Family Proceedings Order (Northern Ireland) 1989 ("the 1989 Order")

The application for the declaration of parentage in this case was made under Article 31B of the 1989 Order which provides for a person to apply to a court for a declaration as to whether or not that person is or was the parent of another person so named. Where an application is made the court may refuse to hear it if it considers that the determination of the application would not be in the best interests of the child.

The court said it was apparent, therefore, that the best interests of the child is a consideration which needs to be taken into account in considering the making of a declaration:

> "We have already set out the various ways in which the appellant will play a full part in the upbringing of the child, R. On balance we do not consider that the absence of the name on the birth certificate causes an interference with R's family life. We accept, however, that it does constitute an interference with the private life of R in terms of his identity. That interference has a direct effect in terms of inheritance but … does not have an effect on fundamental matters such as citizenship."

The court noted that Article 34 of the 1989 Order imposes a constraint on the making of a declaration where, if it was to do so, it would manifestly be contrary to public policy. The appellant submitted that case law supported the view that there was a degree of flexibility in the statutory scheme which could allow for the making of the declaration. The court, however, considered that neither of the cases put before it justified any departure from the public policy approach established by the 2008 Act. It said it would be directly contrary to that public policy to make declarations on a case-by-case basis introducing the uncertainty and confusion which the statutory scheme sought to avoid: "Public policy prevents the making of a declaration of parentage."

Conclusion

The court did not consider that sections 42 and 43 of the Human Fertilisation and Embryology Act 2008 or Article 31B of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 are incompatible with the appellant's Article 8 or 14 Convention rights. It agreed that the trial judge was correct not to make a declaration of parentage in this case. The appeal was dismissed.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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