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**IN THE FAMILY COURT
AT NORTH SHORE**

FAM-2011-044-000371

IN THE MATTER OF THE ADOPTION ACT 1955
AND IN THE MATTER OF An application by A L H and S F D H to
adopt a child

Hearing: 11 August 2011

Appearances: K Elliot for the Applicants

Judgment: 11 August 2011

RESERVED JUDGMENT OF JUDGE J H WALKER

[1] Mr S H and Mrs A H have applied for an adoption order in respect of T S R H, born in January 2011. Although there have been some irregularities in this adoption process which are discussed below, I made an interim adoption order on 2 August 2011. I reserved the reasons for my decision.

Background

[2] T was conceived by way of a private surrogacy arrangement in which Mrs A J was the surrogate and birth mother. Mr H is T's genetic father but is not T's legal father. The reason for this is because Mrs J is married to Mr K J who, in his own words, gave his wife "the blessing to do this pregnancy". Consequently, as will be detailed below, Mr J is deemed to be T's legal father by virtue of s 18 of the Status of Children Act 1969.

[3] Before an interim adoption order can be made s 11 of the Adoption Act 1955 requires the Court to be satisfied that the Applicants are "fit and proper" persons to adopt and that the adoption will promote the welfare and best interests of the child. To assist the Court with this determination, s 10 stipulates that a social worker must provide the Court with a report on the application.

[4] A report on the present application dated 30 June 2011 was furnished to the Court by Child, Youth and Family. The report concluded that, although the Applicants are "fit" to adopt T, they are not "proper" persons in terms of s 11(a). This conclusion was based on certain procedural requirements that have not been satisfied rather than any concern with the Applicants' ability to parent T.

[5] In particular the report expressed concern with the fact that T was placed in the Applicants care without the prior approval of a social worker, as required by s 6 of the Adoption Act. There was also concern that Mr J, as T's legal father, has not provided consent to the adoption in accordance with s 7 Adoption Act. The report also notes that the Applicants' affidavit does not appear to specifically advise the Court of the surrogacy arrangement.

[6] I have considered these concerns but for the following reasons have decided that an interim adoption order is nevertheless appropriate in the circumstances.

Assuming care of the child without prior approval

[7] Although it is unlawful to receive or keep a child in a home for the purpose of adoption without prior approval of a social worker, the fact that this has occurred does not preclude the Court from making an interim adoption order. Section 6(3) Adoption Act provides that an interim order may be made notwithstanding that a Social Worker has refused to grant prior approval. This matter was considered in *Re Adoption of G DC Invercargill*, Adopt 6/92, 3 February 1993, Neal J where breaches of the Adoption Act, including assuming care of the child without prior approval, did not bar the making of adoption orders but were factors for the Court to consider when assessing the applicant's suitability as parents.

Is Mr J's consent required for this adoption?

[8] With regards to Mr J's failure to provide consent in accordance with s 7 Adoption Act, I accept that consent is required. Section 18 of the Status of Children Act deems a woman's non-donor partner, ie Mr J, to be a parent if the arrangement proceeded with his consent. Section 18 provides:

18 When woman's non-donor partner is parent, and non-partner semen donor or ovum donor is not parent

- (1) This section applies to the following situation:
 - (a) a partnered woman (woman A) becomes pregnant as a result of an AHR procedure:
 - (b) the semen (or part of the semen) used for the procedure was produced by a man who is not woman A's partner or, as the case requires, the ovum or embryo used for the procedure was produced by, or derived from an ovum produced by, a woman who is not woman A's partner:
 - (c) woman A has undergone the procedure with her partner's consent.
- (2) In that situation, woman A's partner is, for all purposes, a parent of any child of the pregnancy.

[9] As noted above, Mr J acknowledges that he consented to the arrangement, although he wishes to have no further part in it.

[10] T's birth certificate however, records Mr H and not Mr J as T's birth father. Although the issue has not been raised by Counsel or in the Child, Youth and Family report, my understanding is that Mr H should not appear on the birth certificate as T's father until an adoption order is made and the details of this order are recorded pursuant to Part 4 of the Adoption Act.

[11] Section 9(1) of the Births, Deaths and Marriages, and Relationships Registration Act 1995 requires the [legal] parents of a child to jointly notify the registrar of a child's birth. Subsection (3) provides that a person who is not the child's parent [in law] must not notify the Registrar of a child's birth and is not capable of doing so. Mr H was not a father in law. Section 89 makes it an offence to provide information knowing it to be false in relation to any particular matter required to be notified or recorded under the Act.

[12] If Mrs J had been unmarried or had proceeded with the surrogacy without her husband's consent, it seems that there would have been nothing in the Births, Deaths, Marriages and Relationships Registration Act preventing Mr H's name being recorded on the birth certificate with Mrs J's consent. However, because Mrs J was married and proceeded with the arrangement with her husband's consent, it would appear to be unlawful for the genetic father's name to be recorded on the birth certificate as has been done here.¹ This is a confusing area of law and I have no doubt that the parties in this case have acted with honest intentions. I do not wish to attribute blame to any of the parties for the steps taken.

[13] In any case, s 26 of the Status of Children Act expressly covers the situation where there is a conflict between paternity as recorded on a birth certificate and paternity as deemed by s 18. Although s 8(1) states that the father's name recorded on a birth certificate is ordinarily prima facie evidence of paternity, s 26 clarifies that the deeming provision in s 18 will prevail where there is conflicting evidence:

8 Evidence and proof of paternity

(1) If, pursuant to—

[[a) Any provision of the [Births, Deaths, Marriages, and Relationships Registration Act 1995] or the corresponding

¹ See also paragraphs 3.26 and 3.28, Law Commission *New Issues in Legal Parenthood* (NZLC PP54, 2004) at pp 23 – 24

provision of any former Act (within the meaning of that Act); or]]

- (b) Any provision of any law of any country to which [[section 141, or any of sections 145to149 of the Evidence Act 2006]] applies,—

the name of the father of the child to whom an entry relates has been entered (whether before or after the commencement of this Act) in the Register of Births, or, in the case of any country to which [[section 141, or any of sections 145to149 of the Evidence Act 2006]] applies, in a register of that country relating to births, a certified copy of the entry made or given and purporting to be signed or sealed in accordance with that Act or that law shall be prima facie evidence that the person named as the father is the father of the child.

26 Conflicting evidence of paternity

Sections 18, 21, and 22 have effect despite—

- (a) any conflicting evidence under section 8 that the man who produced the semen was the father of the child of the pregnancy:
- (b) any conflicting declaration of paternity made under section 10 that the man who produced the semen was the father of the child of the pregnancy:
- (c) any other evidence that the man who produced the semen was the father of the child of the pregnancy.

[14] The birth certificate issue is related to the matter before the Court but is not essential to it. I have considered the matter in an effort to establish whether Mr J's consent to the adoption is required, and I have found that it is.

[15] In reaching this conclusion I have also considered Counsel for the Applicant's submission that s 5 Status of Children Act "contains an overriding proviso that any presumption as to parenthood is in the absence of evidence to the contrary". As Mr J has stated in a letter that he is not T's father, Counsel submitted that this constituted "evidence to the contrary" and therefore Mr J is not T's legal father and does not need to provide consent.

[16] However a presumption can only be displaced where the surrogate's husband is *presumed* to be the legal father (as under s 5). Where the surrogate's husband is *deemed* to be the father under Part 2 of the Act, which includes s 18, the commissioning father needs to adopt the child to become a legal parent. Section 26 makes it clear that it is the provision in s 18, not the proviso in s 5, which has

overriding effect. As T's legal father, Mr J's consent to the adoption is required unless the Court dispenses with it.

Should the Court dispense with Mr J's consent to adoption?

[17] Mr J has made his views on this surrogacy and adoption very clear. In a letter provided to Child, Youth and Family on 21 January 2011 he records that, although he has supported his wife throughout, he wants no involvement whatsoever in the present arrangements and expresses resentment at pressure he perceives has been or may be placed on him and his family. The *Submissions in Support of Application for Adoption* dated 18 July 2011, note "the extreme reluctance of K to be involved and the practical difficulties of actually getting him to go to a Solicitor and sign a formal consent [to the adoption]".

[18] As I acknowledged in my Directions of 22 July 2011, Mr J's reluctance to provide written consent to the adoption is understandable given that he is not the biological father and has never had any intention of playing a role in the child's upbringing. I have sympathy for lay persons who are faced with comprehending not only this complex area of law, but the fictions this legislation creates. Mr J has no biological or social connection with the child and Mr H does; and yet Mr J has a legal relationship with the child and Mr H does not.

[19] Section 8(1)(a) of the Adoption Act specifies situations in which consent to adoption may be dispensed with:

8 Cases where consent may be dispensed with

- (1) The Court may dispense with the consent of any parent or guardian to the adoption of a child in any of the following circumstances:
 - (a) If the Court is satisfied that the parent or guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child; and that reasonable notice of the application for an adoption order has been given to the parent or guardian where the parent or guardian can be found:

[20] The failure to exercise the normal duty and care of parenthood must go beyond isolated failings, and should involve "a broad assessment over the whole life

of the child down to the hearing”: *Director General Social Welfare v L* [1990] NZFLR 125 at 129.

[21] Judge Murfitt in *KAF v RDC* FC Hawera, FAM-2008-021-219, 9 October 2009, citing the decision of Jefferies J in *E v M*, M361/79, 13 September 1979, listed parental duties that may be relevant under s 8. The duties identified include the provision of shelter, clothing and food, together with love and attentive physical and emotional involvement in the child’s life. It is clear that none of the parties ever envisaged that Mr J would bear these responsibilities, and I am satisfied that Mr J has no desire or intention to assume these responsibilities in future. T has been in the Applicants care almost since birth, and Mr J’s position has been firm throughout this surrogacy and adoption process.

[22] When I met with the Applicants on 22 July it was apparent that it would be very difficult to obtain Mr J’s written consent to the adoption, notwithstanding his assertions that he wants nothing to do with the child. For that reason I directed that Mr J be served with a copy of the application for adoption and be given reasonable notice of the application being heard today. Counsel for the Applicants has provided an Affidavit of Service dated 1 August 2011 confirming this notice has been served.

[23] I am satisfied that Mr J has failed to exercise the normal duty and care of parenthood on which the welfare of T depends, and that he has been given reasonable notice of the application for adoption. There has been no objection to the application proceeding today and I am satisfied that the discretion to dispense with consent should be exercised in this case.

Are the Applicants fit and proper persons to adopt?

[24] Having dispensed with Mr J’s consent, it remains to be decided whether the Applicants are fit and proper persons to adopt T in terms of s 11 Adoption Act. I am satisfied that the Applicants satisfy both criteria. The report provided to the Court describes the Applicants as having provided “a safe and secure environment” for T over the past five months, and states that the Applicants have all the necessary resources and support to provide for the child’s needs. The adoption will promote the

welfare of best interests of T, particularly given that the adoptive father is also T's biological father. I am not of the view that the procedural defects identified above should negate that finding.

[25] For these reasons I granted Mr and Mrs H's application for an adoption order in respect of T. The matter is set down in a Registrar's list in 5 months with respect to a formal order.

J H Walker
Family Court Judge

Signed 11 August 2011 at 4 pm