

CHILDRENS COURT OF QUEENSLAND

CITATION: *RPR & Anor v TMK & Anor* [2021] QChC 4

PARTIES: **RPR &
MGB**
(Applicants)
v
**TMK &
PK**
(Respondents)

FILE NO: 317/2021

DIVISION: Civil

PROCEEDING: Application

ORIGINATING
COURT: Childrens Court of Queensland, Brisbane

DELIVERED ON: 12 March 2021

DELIVERED AT: Brisbane

HEARING DATE: 8 March 2021

JUDGE: Richards P

ORDER:

1. That pursuant to section 22(1) of the *Surrogacy Act 2010 (Qld)* parentage of FRB born 14 August 2020 be transferred from the birth parents TMK and PK to the intended parents RPR and MGB.
2. That TMK and PK relinquish to RPR and MGB custody and guardianship of FRB and that the presumption of parentage pursuant to the provisions of the *Status of Childrens Act 1978 (Qld)* which are applicable and declarable until this order be declared inapplicable.
3. That RPR and MGB become permanently responsible for the custody and guardianship of FRB.
4. The following details are set out pursuant to section 34 of the *Surrogacy Act 2010 (Qld)*. It is declared that:
 - i. The name of the child before the Order was made was FRB;
 - ii. The name of the child on the making of the Order is FRB;

- iii. **The child, FRB was born on 14 August 2020 at Rockingham, Western Australia;**
- iv. **The Applicants' names addresses and occupations are respectively RPR, Prahran in the State of Victoria, Project Manager and MGB, Prahran in the State of Victoria, Senior Project Officer;**
- v. **The Respondents' name, address and occupation are respectively, TMK, Rockingham in the State of Western Australia, Homemaker and PK, Rockingham in the State of Western Australia, Business Owner.**

5. That pursuant to section 26 of the *Births, Deaths and Marriages Registration Act 1998 (WA)*, the Applicants and Registrar of Births, Deaths and Marriages are to take all steps to register this Parentage Order and hence register the transfer of parentage of the child, FRB Western Australia Birth Certificate Registration number 0022745V/2020 registered in Perth, Western Australia on 31 August 2020.

6. No order as to costs.

CATCHWORDS: SURROGACY ARRANGEMENT – PARENTAGE ORDER – DISPENSATION OF REQUIREMENT – EXCEPTIONAL CIRCUMSTANCES – where the applicants intended to relocate to Queensland – where the applicants were unable to relocate to Queensland for various reasons and currently reside in Victoria – where the applicants have not complied with the requirement set out in s 22(g)(ii) of the *Surrogacy Act 2010 (Qld)* – where the parties seek dispensation from that requirement in accordance with s 23 of the Act – whether there are exceptional circumstances to give dispensation

LEGISLATION: *Births, Deaths and Marriages Registration Act 1998 (WA)* s 26

Penalties and Sentences Act 1992 (Qld) s 9(4)

Status of Childrens Act 1978 (Qld)

Surrogacy Act 2010 (Qld) s 6, 22, 23, s 34

CASES: *R v BCX* [2015] QCA 188

SOLICITORS: S Jefford for the applicants
Respondents appeared on their own behalf

Introduction

- [1] The applicants in this case are in a stable and supportive relationship, having met nine and half years ago. They have lived together in various locations around the world and have settled in Melbourne.
- [2] The respondents live in Western Australia and have two children together aged five and four. They also have a foster son who is 17 years of age and now lives independently. The applicant, MBG and the respondent TMK met through work in 2005 and have remained friends since. As a result of that friendship both couples have become friends, although they do not live in the same city. In 2017 TMK offered to be a surrogate for the applicants. After further discussion and considerable planning, an embryo was implanted in the female respondent in Brisbane at Life Fertility on 2 December 2019. The embryo was created as a result of a fertilization procedure between a known egg donor and RPR.
- [3] On 14 August 2020 FRB was born by caesarean section at Rockingham General Hospital in Western Australia. Both applicants were present at the hospital at the time of the birth. She has been in their care since this time.

The Law

- [4] The applicants have made an application pursuant to the *Surrogacy Act 2010* (Qld) ('the Act') for a parentage order.
- [5] Section 22 of the Act provides:
- “(1) On an application under this part, the court may make a parentage order for the transfer of parentage of a child to the applicant, or joint applicants.*
 - (2) The court may make the parentage order only if it is satisfied of all of the following matters—*
 - (a) the proposed order will be for the wellbeing and in the best interests of the child;*
 - (b) the child—*
 - (i) has resided with the applicant or joint applicants for at least 28 consecutive days before the day the application was made; and*

- (ii) *was residing with the applicant or joint applicants when the application was made; and*
- (iii) *is residing with the applicant, or joint applicants at the time of the hearing;*
- (c) *the applicant, or joint applicants are entitled to apply under section 21;*
- (d) *there is evidence of a medical or social need for the surrogacy arrangement;*
- (e) *the surrogacy arrangement—*
 - (i) *was made after—*
 - (A) *the birth mother and birth mother's spouse (if any), jointly or separately; and*
 - (B) *the applicant, or joint applicant (jointly or separately);*

obtained independent legal advice about the surrogacy arrangement and its implications;
and
 - (ii) *was made after each of the birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants, obtained counselling from an appropriately qualified counsellor about the surrogacy arrangement and its social and psychological implications; and*
 - (iii) *was made with the consent of the birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants; and*
 - (iv) *was made before the child was conceived; and*
 - (v) *is in writing and signed by the birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants; and*
 - (vi) *is not a commercial surrogacy arrangement;*
- (f) *the birth mother and the birth mother's spouse (if any) were at least 25 years when the surrogacy arrangement was made;*
- (g) *the applicant, or each of the joint applicants—*
 - (i) *was at least 25 years when the surrogacy arrangement was made; and*
 - (ii) *is resident in Queensland;*
- (h) *the birth mother, the birth mother's spouse (if any), another birth parent (if any) and the applicant, or joint*

applicants, consent to the making of the parentage order at the time of the hearing.

(i) a surrogacy guidance report under section 32 supports the making of the proposed order.”

[6] The applicants have complied with all but one of the requirements of s 22 of the Act and have filed their application for a parentage order within the statutory time limit prescribed by s 21 of the Act. They have not complied with s 22(g)(ii) which mandates that they must be residents in Queensland at the time of the order. They have therefore sought a dispensation from that requirement in accord with s 23 of the Act which relevantly states:

“23 *Dispensing with the requirement*

(2) The court may dispense with the requirement mentioned in section 22(2)(b) to (d), (e)(i), (ii) or (v), or (f) to (i) only if the court is satisfied—

(a) there are exceptional circumstances for giving of the dispensation; and

(b) the dispensation will be for the wellbeing and in the best interests of the child.”

Relevant facts

[7] In relation to the factual basis for the application for dispensation with the requirement, the applicants have sworn that at the time of exploring surrogacy they were living in Victoria and intended to relocate to Queensland to live. They sought and were given legal advice that they should enter into a surrogacy agreement pursuant to the Queensland law because they expected to be living in Queensland at the time of applying for the order. They understood that they would need to apply for a parentage order in the State where they lived at the time of applying for the order and intended to be living in Queensland shortly after entering into the arrangement and before the birth. However, their intended course was not viable and they have remained in Victoria. They are now unable to apply for a parentage order in Victoria because the legislation in Victoria requires that the fertility treatment must occur in Victoria for the court in that state to have jurisdiction.

[8] A further affidavit filed in this proceeding explains the situation further. The applicant RPR is the partner with the higher income and therefore the couple focused on his employment opportunities as a priority in the move to Queensland. Throughout 2018 and 2019 he applied for various relevant jobs based in Queensland and obtained two job interviews both of which were unsuccessful. They regularly reviewed real estate prices for rent and sale in Brisbane and surrounding areas as well as on the Gold Coast. They were prepared to move to Queensland without jobs prior to the birth of FRB but due to COVID-19 the employment landscape changed and they decided that employment security was more important than lifestyle. Further, because the birth mother was in Western Australia they shifted their focus from relocating to obtaining permission to travel from Victoria to Western Australia for the final stages of the pregnancy and the birth of the child.

Exceptional circumstances

[9] Exceptional circumstances are not defined in the Act and therefore fall to the discretion of the judge. The Court of Appeal in *R v BCX*¹ considered the phrase “exceptional circumstances” in the context of s 9(4) of the *Penalties and Sentences Act 1992 (Qld)* where there was no statutory definition of what may amount to exceptional circumstances. The Court noted when talking about exceptional circumstances in cases where an offender should normally be jailed:²

“What is required is a careful consideration of all the circumstances in order to determine whether, alone or in aggregation, they constitute exceptional circumstances so as to warrant the conclusion that the offender should be spared imprisonment. ...

When undertaking such an assessment it should not be thought that a combination of circumstances, none of which is individually exceptional, can never be regarded as exceptional, because it may be that it is only in combination that particular circumstances take on an exceptional quality.”

[10] It was also noted that whether circumstances are exceptional will always be a matter of discretionary judgment for the judge and it should be accepted that judicial minds may well differ on the subject.

¹ [2015] QCA 188.

² *R v BCX* page 9 [29].

- [11] In this case the fertilization procedure took place in Queensland. The surrogacy agreement was made in Queensland. The procedure involved a number of different trips by the birth mother and the applicants to Queensland as the embryo transfer was not initially successful. In those circumstances it is clear that it was the original and sincere intention of the applicants to move to Queensland and for the child to be raised in Queensland. Unfortunately this could not take place because of the impact of COVID-19 on the job market and the ability of the parties to travel freely between the States. The combination of these factors in my view amount to exceptional circumstances.
- [12] The child has been with the applicants since birth. The child lives in Melbourne with the applicants. By all reports the child is well settled with the applicants.
- [13] The guiding principles of the Act are found in s 6 and include the following:
- “(1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.”*
- [14] This is a case where the child is in a stable, safe and nurturing family home. The birth mother and her partner have no desire to continue their status as the legal parents. They have children of their own and they have never intended to raise the child. It is in the best interests of the child to have her birth certificate and her legal status reflect her reality. It is in the best interests and wellbeing of the child that the parentage order be made.

Orders

- [15] The orders are these:
1. That pursuant to section 22(1) of the *Surrogacy Act 2010 (Qld)* parentage of FRB born 14 August 2020 be transferred from the birth parents TMK and PK to the intended parents RPR and MGB.
 2. That TMK and PK relinquish to RPR and MGB custody and guardianship of FRB and that the presumption of parentage pursuant to the provisions of the *Status of Childrens Act 1978 (Qld)* which are applicable and declarable until this order be declared inapplicable.
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