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CASE COMMENTARY

ADDICTED TO MOTHERHOOD – A CAUTIONARY TALE

Re P (Surrogacy: Residence) [2008] 1FLR 177

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The events in *Re P (Surrogacy: Residence)* [2008] 1FLR 177, are of such complexity and involve so many people that the *dramatis personae* below may be necessary to help the reader understand the tangled tale of the woman whose maternal instinct can only be described as insatiable.

- Mrs P - the 38 year old mother of five children all of whom had different fathers.
- Mr P - her 52 year old husband and not the father of any of her children. He had 4 children, now adults from a previous relationship.
- P - Mrs P's 20 year old son, father's identity uncertain but either Mr MD or MA.
- S - Mrs P's 19 year old daughter, father's identity uncertain but possibly Mr G. She lived with her 1 year old child and her boyfriend.
- T - Mrs P's 10 year old daughter, father's identity unknown.
- C - Mrs P's 6 year old daughter born of a surrogacy arrangement with Mr R.
- N - Mrs P's 18 month old son born of a surrogacy arrangement with Mr J.
- Mr J - the commissioning father of N, aged 47, he had a 2 year old son (exactly 1 year older than N) born as a result of a surrogacy arrangement with another woman.
- Mrs J - Mr J's wife, aged 50.
- Mr R - the commissioning father of C. He had a 19 year old daughter from a previous relationship.
- Mrs R - Mr R's wife.

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One can have nothing but sympathy for Coleridge J, in *Re P*, when faced with the difficult task of deciding the future of two children N and C, born by way of surrogacy agreements which went very badly wrong. The behaviour of their dysfunctional family stretches the imagination of even the most avid lover of television soap operas. The decision draws attention to the problematic, and unsatisfactory, nature of the law relating to surrogacy in England and Wales, and the potentially chaotic consequences for surrogates, commissioning parents, and the children born of surrogacy arrangements.

The children's mother, Mrs P, was a 38-year-old woman with an obsessive desire to procreate. By the time the law intervened in her life, she had given birth to five children all by different fathers. She satisfied this desire by both fair means and foul, although the latter tended to dominate. Mrs P had a tendency to regard men as sperm donors, and was not a great believer in their ongoing role in her children's lives. Prior to engaging in child production, she had worked as a prostitute and had been convicted for activities which form an essential part of this vocation. Mrs P also appeared unable to distinguish fact from fiction.

After giving birth to her first two children, P and S, Mrs P began to cohabit with a man, who had four adult children of his own; he was aged 52 at the time of the court hearing. They lived on state benefits. The identities of the fathers of P and S were somewhat uncertain, and they played no part in the children's lives.

In the light of Mrs P's addiction, her decision to live with the new man in her life was a rather bizarre because he was sterile after undergoing a successful vasectomy. She soon became desperate to acquire child number three, and fortuitously had read in the local newspaper about the abandonment of a newly born baby in Weston-super-Mare. She decided to invent a story in which she claimed that the baby was hers. To enable her to succeed in this plan, she voluntarily relinquished P and S, who were at the time aged one and two respectively, into the temporary care of the local social services department. She told the social workers that she felt unable to cope with them. A subsequent police investigation and a medical examination revealed that Mrs P could not be the abandoned baby's mother. Mrs P promptly reclaimed S and P, and moved on to her next scheme to satiate her craving; in that she persuaded her cohabitee to undergo an operation to have the vasectomy reversed. Sadly for her, the surgery failed to restore his fertility.

Undeterred in her ambition, Mrs P visited a licensed fertility clinic to investigate the possibility of in vitro fertilisation (IVF) treatment by using sperm from an anonymous donor. Later, Mr P (as he had then become) lied to the court and said that they had gone to the clinic to offer to donate Mrs P's eggs to help infertile couples. The clinic rejected her as unsuitable for infertility treatment on both social and medical grounds. Following this rejection, Mrs P regularly claimed to be pregnant and was admitted to hospital

on several occasions. Each time she was discovered not to be. It could not be established with any certainty whether she had ever been pregnant or whether her claims were merely vain hopes.

Mrs P decided that the next step in her constant search for an additional child was to achieve respectability by way of marriage to her cohabitant, and she and he duly became Mr and Mrs P. The newlyweds put themselves forward as potential adoptive parents. They expressed a preference for a child with Down's Syndrome in spite of the fact that they were already overwhelmed by the needs of S who had Crohn's Disease, cerebral venous thrombosis and suffered from psychotic episodes. In addition, P had autistic tendencies and severe behavioural difficulties. Their attempt to adopt was rapidly abandoned.

When P was aged 9, Mrs P finally achieved her aim, and gave birth to a daughter, T. Not surprisingly her father was unknown. Mr and Mrs P were adamant that she was their biological daughter, hardly a credible claim in the light of Mr P's sterility. They maintained that it was outrageous and scandalous for anyone to imply that Mrs P could possibly have committed adultery with another man. Nevertheless, Mr P refused to undergo DNA testing to establish his fatherhood. T was investigated for a mild form of cerebral palsy but was found to be healthy. Mrs P refused to accept the diagnosis and proceeded to collect a disability allowance on behalf of T, and convinced herself and inculcated the rest of the family with the belief that the child did indeed have the condition. Not only did Mrs P want children, she preferred sick children; they brought attention for her, as well as an increase in state benefits.

Three children did not satisfy Mrs P; she needed more. An organisation known as COTS (Childlessness Overcome Through Surrogacy) came to her attention. She offered to put her name on its register as a prospective surrogate mother. She was put in touch with Mr and Mrs R who had approached COTS for help; they were desperate to have a baby because their 19 year old daughter was an only child. An agreement was negotiated. Mrs P would be impregnated with Mr R's sperm by means of IVF treatment in return for a fee of £850 to cover the pregnancy and birth expenses. She rapidly became pregnant but early on in the pregnancy, Mr P telephoned Mr R and informed him that Mrs P could not complete on the deal because she had miscarried. He also told Mr R that Mrs P was not prepared to try again and wanted no further contact with him and his wife. Mr and Mrs R were devastated; they had no idea that Mr P was lying, and only learned four years later that the pregnancy had resulted in the birth of a baby girl, C, who was subsequently found to have a speech disorder which required therapy. Mr and Mrs P failed to keep appointments arranged with a speech therapist, and, as a consequence, C began school with significant speech difficulties.

Three years after C's birth, Mrs P began the search for her next child and after an abortive attempt to foster another Down's Syndrome child, she returned to COTS. Given that COTS knew about the supposed miscarriage, Mrs P had to overcome the problem of explaining C's existence. However, over the years, she had become an expert in fabrication. She told the agency that she had become pregnant with C very soon after the miscarriage and that Mr P was the father of C. Her story was believed, and COTS put her in touch with Mr and Mrs J who already had a baby born as a result of an earlier successful surrogacy arrangement made via COTS. An agreement was signed and Mrs P was impregnated with Mr J's sperm at a licensed fertility clinic. Soon after, she telephoned Mr and Mrs J and explained to them that their arrangement had come to an unfortunate end because she had miscarried. Her deception was almost successful but fate intervened.

A few months before Mrs P gave birth to Mr J's son, N, an explosive family row occurred between Mrs P and S. The pair had always had a very stormy mother and daughter relationship. S had not only suffered from physical illnesses but had also had many psychological and emotional problems throughout her life. She had been depressed and suicidal (and had self-harmed). The side effects of her medication had led to several psychotic episodes. Her mother had also led her to believe that she was registered blind and would ultimately be confined to a wheelchair. At the age of 19, S left home and went to live with a man whom she had met on the internet, and gave birth to a baby boy. To avenge her mother, S blew the whistle and telephoned COTS to let them know that Mrs P had cheated both Mr R and Mr J by lying about her miscarriages. By way of retaliation, Mrs P reported S to social services. She maintained that S was a serious danger to her baby. She also claimed that S, at one point, had attempted to smother C, and had taken a knife to school to harm another pupil. None of this was true but that did not deter this expert in mendacity; she added to the list of S's supposed misdemeanours the even wilder, and false, allegation that S was the surrogate mother of Mr and Mrs J's first child.

S's whistle blowing led Mr R to discover the existence of his 4 year-old daughter C, and Mr J to discover that Mrs P was about to give birth to N. Mr R immediately applied to the court for orders under the Children Act 1989.[1] He wanted C to be told about her paternity and for him to be awarded an order for contact. . At first, Mr and Mrs P maintained that they had continued to have a sexual relationship during the IVF treatment with Mr R and that C was their child. They reluctantly changed their minds after DNA tests showed otherwise. They agreed with Mr R that they would eventually tell C of her true paternity and would also allow him to have an ongoing visiting relationship with her. Somewhat surprisingly, given past history, Mr R

[1] (see ss 1, 8, 10).

believed that Mr and Mrs P would keep their word this time, and decided to withdraw his application for contact and the matter proceeded consensually. Nonetheless, the court decided that C should be made a ward of court which would allow C to be involved in all important future decisions about her life. The court also decided that all contact should be monitored by social services.

Mr and Mrs J took a very different stance. On learning Mrs P had not miscarried, they disregarded Mr and Mrs P's denial that Mrs P was still pregnant; the birth of N soon put paid to that particular lie. They also ignored Mr and Mrs P's claims that N was Mr P's biological child, and applied to the court for a residence order under the Children Act 1989 which would deliver N into their care. Their application and the necessary DNA testing to establish N's paternity took some time to be resolved, and by the date of the final hearing N was 18 months old. He had bonded with Mr and Mrs P and his siblings. However, it was also clear that the beginnings of a relationship between Mr and Mrs J and N had been established. At an earlier court hearing, the judge had ordered that they should be allowed to meet with N, every three weeks for one hour. These meetings, much against Mr and Mrs P's wishes, and sometimes without their cooperation, had gone on for six months and had been supervised by social services at a contact centre.

In the light of N's age, Coleridge J's task in deciding his future was not an easy one. He began his judgment by acknowledging that surrogacy arrangements are a mixed blessing.

> "When all goes according to plan, they are a way of remedying the agony of childlessness. However, when the arrangements do not go according to plan the result, in human and legal terms is, putting it simply, a mess."[2]

He could well have added that the law relating to surrogacy (discussed below) is itself a mess. He recognised that it was both understandable and natural for a surrogate mother to change her mind about giving up the child, which had been in her womb for nine months, and to whom she had given birth. However, he found that Mrs P had not merely changed her mind but had embarked on a deliberate, cruel and inhuman plan to trick two men, both desperate to have a child, into parting with their sperm. She had raised the expectations of them and their wives knowing that she and her husband had no intention other than to keep the children. The police had actually investigated the couple with a view to criminal prosecution but had decided not to proceed further. This deception was not, in itself, a sufficient reason to remove N from the only family he had ever known. The only question the

[2] *Re P (Surrogacy: Residence)* [2008] 1 FLR 177.

court had to ask itself, in accordance with the Children Act 1989, s.1, was which parents would secure N's best interests. In Coleridge J's words,

> "… the test here is a simpler one to formulate, though not necessarily to answer; namely, as between the two competing residential care regimes on offer from the two parents (with their respective spouses) and available for his upbringing, which, after considering all aspects of the two options, is the one most likely to deliver the best outcome for him over the course of his childhood and in the end be most beneficial. Put very simply, in which home is he most likely to mature into a happy and balanced adult and to achieve his fullest potential as a human? The fact that both families constitute one of the child's natural parents means that both sides start from the same position, neither side being able to claim that the blood tie should favour their claim."[3]

He emphasised that his decision did not involve penalising Mr and Mrs P for breaking their agreement and deceiving the commissioning parents. However, he acknowledged that their devious behaviour was relevant evidence in determining whether they or Mr and Mrs J would make suitable parents for N and should be balanced alongside all the other aspects of their conduct. He listened carefully to the statements from consultant paediatricians, social workers as well as lawyers about Mr and Mrs P's parenting skills which were surprisingly ambivalent. Several of them were quite positive. One health visitor had expressed shock that there was any problem with this 'lovely' family who had lots of toys in the house and who had a loving relationship with N. Other experts drew attention to the devastation which would be suffered by N in the immediate future if he were to go to live with Mr and Mrs J, 200 miles away from Mr and Mrs P, the only parents he had ever known. How would they be able to continue to remain in contact with him at such a distance? It would be difficult, impractical and unaffordable for a couple living on welfare benefits to travel to visit him. To disturb the strong familial bonds, which N had developed over 18 months with his parents and siblings, was not to be undertaken lightly. Why not leave N with Mr and Mrs P? After all they had agreed to let Mr and Mrs J see him on a regular basis.

To resolve the appalling dilemma which faced him, the judge centred his decision on the need for honesty and trustworthiness in parents. The opposing characteristics of lies and unreliability, which Mr and Mrs P had demonstrated in abundance, were hardly appropriate skills for parenting. They lied about everything; their distortions of the truth were unsurpassable. Not only had

[3] *Re P (Surrogacy: Residence*) [2008] 1 FLR 177.

they deceived the commissioning parents, they had lied to their own children about their medical problems, they had lied about their eldest daughter's treatment of her baby, they had lied about the identities of the fathers of their children, and they had lied about their reasons for visiting an IVF clinic. Indeed, the only matter they did not lie about was the possibility that Mrs P might decide to continue to satisfy her emotionally dysfunctional addiction and have another baby. She actually admitted to the judge that this was a possibility. According to Coleridge J, Mr and Mrs P,

> "… were often incapable of distinguishing fact from fiction and that they did indeed take grains of truth and amplify and distort them into unrecognisable factual conclusions. In the end I think they are prepared to make it up as they go along … on occasions they were hardly conscious of the extent to which they were fabricating."[4]

The Judge was convinced that Mr and Mrs P, in spite of their claims to be willing about ongoing contact, were likely to be grudging and would very likely sabotage it. He saw no hope of a change in Mrs P in the near future; her problems were deep rooted and stemmed from her early life experiences which only extensive psychotherapy could possibly resolve.

Mr and Mrs J, on the other hand, he considered to be quiet, intelligent, good, decent and honest people. He was a middle-income architect, and she had given up her professional career as an urban planner to become a full-time mother. They accepted ongoing contact between N and Mr and Mrs P and his siblings as crucially important to his balanced development. They felt that N would have a need to understand what had happened and that they would seek counselling to help them all to cope with it.

Coleridge J's decision, although undoubtedly correct, showed a certain lack of insight into the effect of separation on an 18-month-old child from the only parents and family he had ever known. He suggested that although a move would cause N short-term distress, probably for a period of about two months, he should be placed immediately with Mr and Mrs J on a long-term basis in order that his best interests be met in the future. N would be made a ward of court to allow his development to be monitored. The judge's words show an amazing optimism in the light of all that had gone before

> "If all sides put N's best interests above their own and move on, preferably with the help of a child psychologist there is every reason to be cautiously optimistic that N will be able to benefit fully from input in his life from both his biological families."[5]

[4] *Re P (Surrogacy: Residence*) [2008] 1 FLR 177.
[5] *Re P (Surrogacy: Residence)* [2008] 1 FLR 177.

An immediate appeal against Coleridge J's decision was made by Mr and Mrs P to the Court of Appeal; it was rejected.

The decision in *Re P* draws attention yet again to the problematic nature of the law relating to surrogacy in England and Wales.[6] It is law which is half-hearted and piecemeal; it gives conflicting messages, inter alia, engage in surrogacy at your peril, but the law will not protect you or your child if arrangements go wrong. There is ample evidence for this view.

First, surrogacy arrangements are legal but unenforceable under the Surrogacy Arrangements Act 1985 s. S.1A. If women like Mrs P renege on the agreement, the commissioning parents are in a difficult position. The surrogate mother, like all birth mothers, automatically acquires parental rights and obligations, along with her husband, or civil partner, if there is one, and who has agreed to the surrogacy arrangement. These rights and obligation include the right to have the child reside with her and her husband, or civil partner, and make all the decisions about the child's everyday care. The commissioning parent can only obtain parental rights and obligations by applying to the court for an order under the Children Act 1986, or by adoption of the child. This means that the majority of surrogate mothers who wish to keep their children will normally be allowed to do. By the time any dispute comes to court, most children will have reached an age where bonding has taken place and few judges will view it as in a child's best interest to destroy that bond. The court in *Re P* was exceptional in being prepared to take that risk. If the commissioning parents renege on the agreement, the surrogate mother and her husband, or civil partner, will find themselves responsible for the child.[7]

Second, under s.2 of the Surrogacy Arrangements Act 1985, no one may engage in the negotiation of surrogacy arrangements for a fee. The Human Fertilisation and Embryology Act 2008, s.59 has amended this section in a fairly convoluted manner and now allows organisations which provide surrogacy services on a not- for- profit basis to receive payment for providing some of those services. They may make a reasonable charge, for example, to enable surrogate mothers and commissioning parents/ parties to meet each other to discuss the possibility of a surrogacy arrangement between them. They may also charge for compiling information about surrogacy and establishing and keeping lists of people willing to be a surrogate mother, or commission such a person. They may not, however charge for offering to negotiate a surrogacy arrangement or for taking part in negotiations about a surrogacy arrangement. They may, however, undertake them legally if they do not charge for them. They may now also advertise those activities for which

[6] See also *Re X and Y (Foreign Surrogacy)* [2009] 1 FLR 733.

[7] *Re P (Surrogacy: Residence)* [2008] 1 FLR 177.

they are allowed to charge. So, they may advertise that they hold lists of surrogate mothers and commissioning parents and that it may bring them together for discussion. But it will remain illegal for anyone to advertise that they seek a surrogate mother or wish to be a surrogate mother. Unlike fertility clinics, which are regulated by the Human Fertilisation and Embryology Authority and governed by the provisions of the HFEA 1990, or adoption agencies which must be registered, there have been no further attempts to monitor these facilitating surrogacy organisations. They remain self-regulating and most make serious efforts to do this well. Coleridge J's final comments in *Re P* were reserved for these organisations which play a major role in surrogacy. He suggested, with a certain lack of force, that some surrogate mothers might have psychological difficulties relating to their own unacknowledged and unmet needs. Background checks on all potential surrogates and commissioning parents should be a priority for surrogacy organisations. Perhaps, he should have gone further and suggested that it is only by well thought out regulation that there will be an end to the risk of the type of chaos and emotional pain which occurred in *Re P*.[8]

Third, surrogate mothers may not receive any payments from the commissioning parents other than for costs associated with pregnancy and birth expenses yet the courts retrospectively authorise payments which are clearly unreasonable (see *Re X and Y (Foreign Surrogacy)*.[9]

Fourth, the HFEA 1990 (as amended) whilst not actually regulating surrogacy makes provision for parental orders under s.30. These orders transfer all the parental rights and obligations to the commissioning parent or couple provided the application is made to the court within six months of the child's birth. At least one of the commissioning couple must have provided gametes used to create the child. The surrogate mother, and her husband, or civil partner, if they have agreed to the surrogacy must consent to the making of any parental order. The surrogate mother may not give her consent until six weeks after the birth of the child. Where there is agreement but the other conditions are not met, the commissioning parent/s will have no recourse other than to apply for an order under the Children Act 1989 or apply to adopt the child.

Since 1985, when surrogacy first came within the ambit of the law, it has developed as an alternative to adoption or as an alternative form of infertility treatment. More recently, it has taken on an international dimension as commissioning parents seek surrogate mothers abroad. The law has failed to address these developments and rather, concentrated all its attention on other forms of infertility treatment.

[8] *Re P (Surrogacy: Residence)* [2008] 1 FLR 177.
[9] *Re X and Y (Foreign Surrogacy)* [2009] 1 FLR 733.

Natalie Gamble and Louisa Ghevaert who are lawyers specialising in fertility law have stated that:

> "We need a better and more planned approach to surrogacy. Of course, there are difficult and sensitive issues to be handled in creating new law. Surrogacy arrangements are among the most ethically and humanly complex in assisted reproduction, with three or even four adults involved throughout the process of conception, pregnancy and birth, and possibly third party gamete donors as well. The respective interests, protection and independence from exploitation of all these adults and, most importantly, the resulting child, need to be adequately balanced and protected by the law."[10]

I can only concur.

[10] http://www.bionews.org.uk/BioNews