IN THE FAMILY COURT
Case No: FD14P00293
[2014] EWFC 1280

2 May 2014

Before :
THE HONOURABLE MR JUSTICE PETER JACKSON
Sitting at the Royal Courts of Justice
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Between :

Ms L Applicant
-and-
Ms C Respondent
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Hannah Markham (instructed by **Goodman Ray**) for **Ms L**
Anita Guha (instructed by **Family Law Group**) for **Ms C**

Hearing date: 2 April 2014
Judgment date: 2 May 2014
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JUDGMENT: L v C (Applications by non-biological mother)
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IMPORTANT NOTICE
This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the persons concerned must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Peter Jackson:
Introduction
1. These proceedings concern G, a baby girl now six months old. They are one more example of the painful legal confusion that can arise when children are born as a result of unregulated artificial conception. Other recent instances are *M v F and H (Legal Paternity)* **[2013] EWHC 1901 (Fam)**, a decision of my own arising from informal sperm donation, and *JP v LP and Others* **[2014] EWHC 595 (Fam)**, a surrogacy case, in which Mrs Justice Eleanor King said this:

[The] facts of this case stand as a valuable cautionary tale of the serious legal and practical difficulties which can arise where men or women, desperate for a child of their own, enter into informal… arrangements, often in the absence of any counselling or any specialist legal advice.

2. The present applications arise from a same-sex relationship between Ms L and Ms C, which began in July 2012 and ended in January 2014. Ms L is English and Ms C Irish. They decided to have a baby together and in January 2013 Ms C found an internet sperm donor who has played no part subsequently. Ms C conceived and G was born in England in October 2013. Between August and December 2013, Ms L and Ms C lived together in England and after G's birth they shared her care.

3. On 3 January 2014, Ms C took G, then 2½ months old, to Ireland. They remain there and Ms L has not seen G since.

4. On 25 February, Ms L issued two applications in this court:

• For permission to apply for a residence order and a contact order under the Children Act 1989.

• For declarations that at the point of G's departure from England, Ms L was acting as her 'psychological parent' and that they shared family life within the meaning of Article 8 of the European Convention on Human Rights.

5. Ms L brings the case in the English court because she believes, perhaps correctly, that she would have few if any legal rights under current Irish law. That cannot, however, affect this court's approach.

6. The applications were heard on 2 April, when I reserved judgment. During the hearing, Ms Markham stated that Ms L might also seek a declaration of parentage under s.55A Family Law Act 1986, but that has wisely not been pursued as that provision is plainly only concerned with declarations of biological parentage or parentage by operation of law.

7. The applications are defended by Ms C. On her behalf, Ms Guha argues that this court has no jurisdiction to hear them and that, if it does, it should dismiss them.

The history

8. I next set out the history in more detail. The facts are essentially agreed, although each narrator views events in her own very different way.

9. Ms L is a British citizen in her mid-40s, habitually resident in England.

10. Ms C is in her mid-30s. She is a citizen of the Republic of Ireland and has her own home there. She has an older daughter (D) who is now aged 10 and has always lived in Ireland, where her father also lives.

11. In 2010, Ms C entered into a short-lived civil partnership in England with another woman. That relationship has ended although the partnership has not been dissolved. Ms C's civil partner has not been served with these proceedings.

12. In July 2012, Ms L and Ms C met in Ireland and their 18-month-long relationship began. They wanted a child and G was conceived in the way described below. At that stage, Ms C was living in Ireland. In March 2013, her daughter D went to live with her father and Ms C began to spend a lot of time with Ms L in England to the point where she moved in with her in August. After that, she travelled back to Ireland to see D once before the birth of

G in October and twice afterwards, on each occasion for a few days.

13. The relationship between Ms L and Ms C was fraught with a number of difficulties. After D went to live with her father, Ms C was anxious about being separated from her. There were also problems in the relationships between both women and Ms C's mother and between Ms L and D's father. Difficulties also grew in the relationship between Ms L and Ms C themselves, with Ms L regarding Ms C as vulnerable and needing protection, and Ms C considering Ms L to be domineering and emotionally abusive.

14. There is, however, no doubt that Ms L was as involved as she could have been in the couple's plans to have a child. The conception was a joint effort, with Ms L inseminating Ms C by syringe with the donor sperm. Plans for the child's arrival were jointly made. Ms L was present when G was born in England on 16 October and played a full and equal part in looking after her while she remained here. Ms C unfortunately suffered from some ill health after the birth, and Ms L was on hand throughout. She even took steps to enable herself to suckle and breastfeed G. On the two occasions that Ms C returned to Ireland (for four days in November and six days at New Year) G remained in the sole care of Ms L.

15. To her credit, Ms C acknowledges that the decision to have a child was a joint one and that the couple agreed that they would be '*equal parents*'; she adds that there was no talk of legal rights at the time of conception, but that the subject arose later. Her position, as she now describes it, was that both women would be equal parents but that she would be the only one with legal rights.

16. Nonetheless, Ms C and Ms L twice went together to register G's birth. They attempted to register both their names as parents, but this was not permitted. The birth certificate therefore shows Ms C as the sole parent. However, G's surname includes the surnames of both adults.

17. Following this, the couple visited a solicitor to seek legal advice about Ms L's position. They were advised that she had no legal rights and that a joint residence order would be necessary to give her parental responsibility. Following this first appointment, Ms C booked a second appointment for 6 January 2014 in order to set matters in train. As things turned out, the appointment was not kept: Ms C now says she had no intention of going.

18. The whole picture, consistent with many details in the evidence and with the communications passing between Ms C and Ms L at various times (in which the former assured the latter that she would be a full parent in every way), is that this was a family with G having two parents.

19. However, things changed radically on 3 January 2014, when Ms C returned from her New Year absence. She went to the home, removed G from the arms of a protesting Ms L, and immediately took her to Ireland. Ms L was extremely distressed and it was not until 25 February that she had gathered the strength to take these proceedings. By that time, G had been in Ireland for 7½ weeks.

20. The relationship between Ms L and Ms C has entirely broken down and Ms C refuses to allow Ms L to have any contact with G. Ms C's household now consists of herself, her mother, and the two children, D having returned from living with her father.

Analysis

21. The first question is whether the court has jurisdiction to entertain Ms L's applications. If jurisdiction exists, the second question is whether and how it should be exercised. These questions must be separately analysed in relation to each application.

The Children Act application

22. Jurisdiction in respect of the Children Act application falls under the Family Law Act 1986 and the Council Regulation (EC) No. 2201/2003 ('Brussels II Revised' or 'BIIR') which, as its title states, concerns among other things *'matters of parental responsibility'*.

23. The effect of this regime is that this court will only have jurisdiction to entertain the application if G was habitually resident here on 25 February: Family Law Act 1986 ss. 2 and 3 and Arts. 8 and 16 BIIR.

24. If the court concludes that it does not have jurisdiction, and that the Irish court does, it must declare that it has no jurisdiction: Art. 17 BIIR.

25. If G's place of habitual residence cannot be established, the Irish court will have jurisdiction on the basis that she is present there: Art. 13 BIIR.

26. The meaning of habitual residence has been considered by the European Court of Justice, by the Supreme Court and by the Court of Appeal.

27. In *Re A (Jurisdiction: Return of Child)* **[2013] UKSC 60**, the Supreme Court reviewed the European decisions in the cases of *Re A (Area of Freedom, Security and Justice) (Case C-523/07)* CJEU and *Mercredi v Chaffe (Case C-497/10)* CJEU. Baroness Hale, summarising at [54], emphasised that habitual residence is a question of fact and not a legal concept. The test is 'the place which reflects some degree of integration by the child in a social and family environment' in the country concerned. This depends on numerous factors. The environment of an infant or young child is shared with those upon whom she is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.

28. In *Mercredi v Chaffe* the European Court referred to the factors that must be taken into consideration as including, first, the duration, regularity, conditions and reasons for the child's stay in the State in question and for the mother's move there and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections that the mother and child have with that State.

29. The facts of the Supreme Court case of *Re A* are not at all similar to the present case. However, the facts of *Mercredi v Chaffe* are. A French mother and a British father cohabited until five days after the birth of the child. The father did not have parental responsibility. When the child was two months old, the mother unilaterally took him overseas. The father began proceedings in England and the mother began proceedings in France. Following the reference to the European Court, the Court of Appeal (at [2011] EWCA 272) held that the removal of the child had been lawful, that the English court's jurisdiction was at best doubtful and in any event should not have been exercised in competition with that of the French court.

30. Applying the guidance to be found in these decisions, I find that when Ms L's proceedings were issued G was not habitually resident in England and Wales:

• G had by then been living in Ireland for over seven weeks, a significant period for a baby then aged four months.

• She was dependent on her mother, who was then habitually resident in Ireland, to which she had returned with the intention of remaining permanently and where she has deep, longstanding family and social connections.

• G's removal to Ireland by Ms C was lawful, a fact conceded by Ms L.

31. I reach this conclusion despite accepting that:

• Ms C was quite possibly habitually resident in England between August 2013 and G's removal. (For what it is worth, the facts do not appear to sustain her argument that this four-month period of residence in England was the result of duress. Duress requires a complete overbearing of the will: see *Re T* **[2010] EWHC 3177 (Fam)** at [31]. That is not alleged here.)

• G had not been outside England for the first 11 weeks of her life and was very likely habitually resident here during that period.

• Ms L has been habitually resident in England throughout.

• Ms L had had full parental involvement in G's life up to the point of her removal.

32. In accordance with Art. 17 BIIR, I must therefore declare that this court has no jurisdiction in relation to matters of parental responsibility concerning G.

<u>The application for declarations</u>
33. Ms L seeks a declaration that she is G's 'psychological parent' and that at the date of removal she and G shared family life within the meaning of Art. 8.

34. BIIR does not apply to '*the establishment or contesting of a parent-child relationship*': Art. 1(3)(a) – and so does not circumscribe the court's jurisdiction in relation to this application. Likewise, the jurisdictional provisions of the Family Law Act 1986 are not engaged by an application for a declaration. Nor does the Brussels 1 Regulation ((EC) No 44/2001) apply where the principal matter of a dispute is one of family law.

35. Ms Guha argues that the court does not have *carte blanche* to consider Ms L application. She raises two objections. The first (which I shall call the 'territorial' objection) is a submission that the court cannot interfere in matters that are properly within the province of the Irish courts. The second (the 'procedural' objection) is that the court cannot make a free-standing declaration of human rights in the absence of substantive proceedings concerning the child. Ms Guha further argues that even if jurisdiction exists it should not be exercised in the circumstances of the case, and that if the court was considering doing so it would need to hear oral evidence.

36. I consider at the outset the application for a declaration that Ms L was acting as G's 'psychological parent'. As shown by *Re G (Children)* **[2006] UKHL 43**, a court making a welfare determination has to evaluate parental contributions that can be genetic, gestational or social/psychological. However, the present application for a declaration is not a welfare

determination. While declarations can encompass the existence of facts, I do not regard the existence or non-existence of psychological parenthood as an apt subject for a declaration. Moreover, it adds nothing in reality to the application for a declaration concerning the existence of family life. I propose to say nothing on the matter either way. Ms L's application for a declaration of psychological parenthood is accordingly refused.

37. I return to Ms Guha's 'territorial' objection. Article 1 of the Convention stipulates that:

"The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Article 1 of this Convention."

She argues that where a person seeks to institute an application concerning their Convention rights, jurisdiction lies with the state that has territorial jurisdiction. This submission is supported by the decision of the European Court of Human Rights in *Bankovic v Belgium* (App no. 52207/99) where the court interpreted the words 'within their jurisdiction' as reflecting an essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case. Thus, argues Ms Guha, any litigation regarding the child must take place in Ireland. The English court should not seek to adjudicate over any application regarding a child (including the existence or non-existence of Article 8 rights) if it does not have jurisdiction to make substantive orders concerning the child. It would, she says, be perverse for the court to dismiss Ms L's applications for Children Act orders for want of jurisdiction, but then to seek to determine issues relating to Article 8 rights. The English court would in effect be trespassing upon the territorial competence of the Irish court. The fact that Ms L is a British national is irrelevant, given that the issue of Art. 8 rights cannot, she says, be divorced from consideration of the child's present position. Even though BIIR and the Family Law Act 1986 do not apply, their philosophy, which bases jurisdiction on habitual residence or presence, should be respected.

38. This is a question that is not directly governed by convention, statute or authority and I am not aware of any precedent for Ms L's application. First principles therefore apply. What is necessary in my view for this court to have jurisdiction is that (borrowing from the language in cases of *forum non conveniens*) it should be a natural and appropriate forum for the resolution of the issue in question, and that there is not some other forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice. As to whether the English jurisdiction is natural and appropriate, regard must be had to whether there is a sufficient connection between this jurisdiction on the one hand and the parties and the subject-matter on the other. As to whether there is some other more suitable forum, regard must be had to the connection between the forum and the subject-matter and the parties, and the likelihood of the matter being effectively litigated there.

39. For a practical instance of a case in which jurisdiction was not governed by statute (BIIR not then being in existence), I would instance the decision of the Court of Appeal in *Re S (a minor) (parental responsibility: jurisdiction)* [1998] 2 FLR 921. It was held that the English court had jurisdiction to entertain a father's application for parental responsibility (an application falling outside the jurisdictional remit of the Family Law Act 1986) in relation to a child who had never been in England on the basis that the father had *'sufficient connection'* with England.

40. It is likewise worth noting that it would not be particularly anomalous for this court to find that it had jurisdiction to entertain an application of the present kind when the jurisdictional regime for declarations of parentage is recalled. Section 55A Family Law Act 1986 allows for an application to come before the English court if either the putative parent or the child is domiciled in England and Wales on the date of the application or has been habitually resident in England and Wales throughout the period of one year ending with that date. There is no requirement that both persons should be resident or present.

41. What is at issue here is the competence of this court to rule upon a specific situation that existed in England in respect of a child who had never lived anywhere else, involving the nationals of two contracting states, one of them English and all of them resident in England at the material time. As to the existence of an alternative forum, I entirely accept that this court should not trespass upon matters that would fall within the territorial jurisdiction of the Irish court. For example it would, as I have already held, be improper for this court to make orders about future arrangements for the child. But I do not accept that the declaration that is being sought would encroach upon the Irish court's territorial jurisdiction. In fact there is as yet no indication that there will be proceedings in Ireland, that jurisdiction not having been invoked by either party at this point. And even if proceedings were taken in Ireland, their central focus would be on the child's actual situation and not upon declarations as to past events. Nor do I accept that the issue of Art. 8 rights can only be determined by a court considering substantive remedies relating to the child. As discussed below, I would hold the question of whether such rights existed to be independently justiciable.

42. In the circumstances, while I understand the logic of Ms Guha's objection, I would hold that there is no territorial obstacle to Ms L's application for a declaration being considered by this court.

43. I turn then to Ms Guha's 'procedural' argument. This is that the court cannot make a free-standing declaration of human rights in the absence of substantive proceedings. The argument is based upon s.7(1) of the Human Rights Act, which provides that a person who claims that a public authority has acted (or proposes to act) unlawfully may bring proceedings against the authority under the Act in the appropriate court or tribunal, or rely on the Convention right in any legal proceedings, but only if he is (or would be) a victim of the unlawful act. It is argued that Ms L's application falls outside the ambit of s.7 because she is not claiming unlawfulness by a public authority, nor relying on her Convention rights in any substantive proceedings.

44. The relief Ms L actually seeks is a free-standing declaration as to her Art. 8 rights. This is not a claim falling within s.7 of the Act, even though her claim has on a number of occasions been described as being brought 'under the Human Rights Act'. Likewise, Ms Markham has suggested that the court could invoke its inherent jurisdiction to enable it to hear the application. In my view, recourse to the inherent jurisdiction would not add anything of substance. Lastly, the suggestion that the application for a declaration might gain a sound jurisdictional foundation as a result of being made alongside the ill-founded Children Act application cannot be right.

45. I therefore have some sympathy for Ms Guha in having had to respond to these distractions from the main point: that is whether a free-standing declaration as to human rights is possible or whether s.7 prevents this.

46. It is true that the Human Rights Act is normally deployed to challenge allegedly unlawful acts by public authorities (s.6) by making the claim within judicial proceedings (s.7) for a specific remedy (s.8). This provides a route for the enforcement of Convention rights, but it does not provide a statutory route by which their existence can simply be asserted in an appropriate case.

47. The whole tenor of the Human Rights Act is the protection of Convention rights domestically. There being nothing explicit within the Act to state that declarations cannot be granted in the absence of proceedings brought under s.7, there is no good reason to infer such a restriction. (I would add that I do not find that s.11, entitled *'Safeguard for existing human rights'*, assists on this issue. Its purpose is not procedural in relation to Convention rights but protective of rights arising outside the Convention.)

48. My overall conclusion is that the terms of the Act do not exclude the court's power to make free-standing declarations as to Convention rights in appropriate cases and that such an application can be approached in the same manner as any other application for a declaration.

49. Rule 40 of the Civil Procedure Rules 1998 provides that the court may make a binding declaration whether or not any other remedy is claimed, or can be claimed. As stated in *Financial Services Authority v Rourke* [2002] C.P. Rep. 14 (Neuberger J), the power to make declarations is discretionary. The court can grant a declaration as to their rights, or as to the existence of facts or as to a principle of law. When considering whether to grant a declaration, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why the court should or should not grant the declaration.

50. Standing back, a conclusion that this court is impotent to make human rights declarations arising from past events occurring within its territorial jurisdiction would to my mind be capable of leading to a denial of justice. This casts doubt upon the correctness of such a conclusion.

51. For the above reasons, I would therefore hold that this court has procedural jurisdiction to entertain Ms L's application for a free-standing declaration.

52. It does not of course follow from the existence of jurisdiction that a declaration should be granted, and it is to this issue that I now turn. I do so by considering the matters identified in *Rourke* (above).

53. The first matter of relevance to the question of justice to the parties and to G is the degree of cogency of Ms L's argument in favour of her family rights. As to that, it is to be noted that there is no precise definition of 'family life' in Convention case law. It is a question of fact and one of substance, not form. There need to be close personal ties but these need not yet be fully developed provided there is potential for them to develop. There is no pre-determined model and family life must be interpreted in the light of modern trends. (See Clayton and Tomlinson 'The Law of Human Rights' 2nd ed. 13.04 -13.06). With less conventional family structures, the courts have taken a broad purposive approach. So it was held that a family relationship did exist in *X, Y and Z v UK* 1997 24 EHRR 143 between a woman, her female-to-male transsexual partner and the child she had conceived by artificial insemination. The court emphasised that the notion of family life is not confined to families based on marriage and can depend on a number of factors including whether the couple lived

together and whether they demonstrated their commitment to each other by having children or by any other means (see Clayton and Tomlinson at 13.134 and 13.145 and Lester, Pannick and Herberg 'Human Rights Law and Practice', 3rd Ed. at 4.8.49).

54. Applying these principles to the present case, Ms L's claim that family life existed is a compelling one. A balancing of these rights against the Art. 8 rights of Ms C and G is not a precondition to determining the rights of Ms L. The fact that all such rights are qualified and would have to be balanced against each other in any welfare determination should not be confused with the question of whether they exist in the first place.

55. I next consider the question of fairness to Ms C and to G. Ms C undoubtedly dislikes any recognition of Ms L's role, saying hyperbolically that *'she destroyed my and my baby's family life'*, but this does not translate into any unfairness towards her arising from the court evaluating the circumstances objectively. G's own position is of great importance and in my view fairness to her calls for the circumstances of her conception and neonatal period to be reflected as accurately as possible amidst the adult discord.

56. This is also relevant to the question of whether a declaration would serve a useful purpose. There are two ways in which it might: first, as an objective contribution to G's future wellbeing, and secondly as a record that may be useful to any other court considering her situation. Ms Guha argues that such a declaration would be meaningless in isolation from substantive proceedings in respect of the child. I accept that this might be the case, but it equally might not and I cannot see any detriment arising from the existence of an accurate declaration, any more than it would arise from an accurate judgment.

57. In the course of her argument, Ms Markham submitted that one reason why a declaration should be granted is that there would otherwise be a lacuna in English law in failing to protect Ms L's rights, and that there is positive obligation on the State to remedy this. I am not influenced by this argument. There is in my view no such gap in the law. Had the matter come before the court at a time when G remained in England, there are a number of legal remedies that might have been available to Ms L, whether or not she had the support of Ms C. Nor can it persuasively be said that the law is failing in its treatment of the non-biological partner (male or female) of a biological parent who conceives as a result of informal arrangements. There would be many difficulties in seeking to equalise the legal consequences of licensed and unlicensed arrangements, fuller consideration of this issue being far beyond the scope of this judgment.

58. The international element is undoubtedly a special feature of the case, but I do not find that it provides a reason for declining to make a declaration. As stated above, the matter arises from events in England. It has been capably argued before this court, and there are no existing proceedings in Ireland. The limited nature of the declaration in question would not trespass on any potential Irish proceedings, and might even assist if there were any. It is said on Ms C's behalf that an alternative legal remedy is available to Ms L in the Irish courts, but this rests on the doubtful assumption that she has the emotional and financial resources to pursue that course in practice.

59. I do not consider that oral evidence is required to enable a decision to be reached in this matter. There is a mass of written material from which the picture is clear in all material respects. Both women speak of unhappy features of their relationship and ascribe responsibility for them to the other. But given the extent of the agreed facts, this difference

in perception cannot colour the question of whether family life existed. What is in issue is the existence of family life, not the existence of happy family life, nor the reasons for unhappiness.

60. Drawing all these matters together, I shall refuse Ms L's applications except to the extent that I declare that at the date of G's removal from England on 3 January 2014 family life within the meaning of Article 8 of the European Convention on Human Rights existed between G and Ms L.