When is a 'Mother' not a 'Mother?

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The two judgments in *Re G (Declaration of Parentage: Removal of Person Identified as Mother from Birth Certificate) (No.1)* [2018] EWHC 3360 (Fam) and *(No.2)* [2018] EWHC 3361 (Fam) concern, amongst other things, an 'informal' surrogacy arrangement, the fraudulent attribution of motherhood on a birth certificate, multiple declarations of parentage and the wrongful removal of a child from the UK. While this case provides another cautionary tale of the potential complications involved in international commercial surrogacy arrangements, their most noteworthy feature is that, as George (2019, pg.16) has commented, '*Re G* is the first time that there has been a reported case of a person named as the child's mother being removed from a birth certificate on the basis of fraud'.

The underlying factual circumstances are complex and were the subject of disputed and contradictory evidence from the parties. As George (2019, pg.14) describes, '[t]he factual matrix…would be hard to make up, and is difficult enough even to summarise'. Indeed, with characteristic judicial understatement, Williams J observed that, '[t]he background to the application is most unusual' (para. 6). With that said, this case concerned a girl called 'Naomi' in the judgments, who was born in October 2011; the circumstances of her birth were one part of the dispute between the parties (para. 1). In resolving this, the judgment sets out that NG and AV, who were both Bulgarian nationals, had been in a long-term cohabiting relationship which ended in December 2016 (para. 6). During the course of this relationship, the couple had undertaken an 'informal surrogacy arrangement' (para. 6) in Bulgaria, with another Bulgarian national, RB, which had resulted in Naomi's birth in England. However, neither NG (the putative father) or RB (the gestational mother) were registered on the birth certificate; instead AV was registered as the mother (paras. 3 and 4). Moreover, RB had presented under the name AV during her medical appointments prior to Naomi's birth (para. 43). The judge noted that after the birth, 'NG and AV acted as mother and father to Naomi' (para. 46) and that regardless of her lack of genetic or gestational connection, 'AV has been in the role of her psychological mother since Naomi's birth' (para. 47). After the breakdown of NG and AV's cohabiting

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relationship there were some unsuccessful attempts at negotiating contact; subsequently NG raised applications for wardship, a declaration of parentage and a child arrangements order in the High Court in October 2017 (para. 6). Almost immediately after these applications, on October 12th, AV fled the jurisdiction with Naomi, travelling first to Bulgaria (para. 13) and then to Greece (para. 24). Neither AV nor RB had engaged substantively with the High Court proceedings (paras. 4 and 29) and AV had sought various orders in the Bulgarian courts in relation to Naomi (para. 31).

Given this background, the fundamental issue facing the court was that NG did not have parental status in relation to Naomi, while AV did, on the face of it, have such status as a result of being named on the birth certificate. This position was having a substantial effect on the approach of the Bulgarian courts and authorities towards the dispute. As such, NG was seeking both a declaration of parentage in his favour and a declaration of parentage in RB's favour, under section 55A of the Family Law Act 1986. This would have the consequent effect of altering Naomi's birth certificate under section 14A of the Births and Deaths Registration Act 1953, adding NG and RB and removing AV from the birth certificate. These declarations would further result in NG acquiring parental responsibility in relation to Naomi, in terms of section 4 of the Children Act 1989, and AV losing her parental responsibility (para. 30). Plainly, the potential consequences of the decision for Naomi and the parties were hugely significant.

In the first judgment, Williams J spends considerable time resolving the factual disputes between the parties (paras. 38-46) before making the declaration of parentage in NG's favour, with the consequence of NG acquiring parental responsibility (para. 48). However, in this judgment, Williams J declined to proceed to make a determination in relation to AV's motherhood (para. 51). This relied upon section 55A (5) of the 1986 Act; which states, 'the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child'. This decision was influenced by the fact that, '[a]t this point in time Naomi's whereabouts are unknown, although she is almost certainly with AV, the person who she has known as her mother since her birth' (para. 50) and the potentially traumatic consequences for Naomi of the summary removal from AV's care that could result from the granting of the declarations sought. This is combined with the judgment's 'forlorn hope' that AV may choose to engage with the proceedings because of the approach taken to this issue (para. 50). Williams J made clear that no decisions were being made at this stage about the future arrangements for Naomi's care; stating: '[t]he questions of Naomi's

future – who she should live with; who she should spend time with; what country she might live in – are yet to be determined' (para. 51). Crucially, the judgment also stated that 'it is absolutely not the case that the automatic consequence of the factual findings which I have made will lead to the stripping of AV away from Naomi'. (para. 51).

However, by the second judgment, which was given around three and half months after the first, the time for any such 'forlorn hope' appeared to have passed. AV had married in Bulgaria and was now seeking to adopt Naomi along with her new husband (para. 3); she had re-iterated her rejection of the opportunity to engage with the English court proceedings (para. 5). Due to these developments, Williams J granted the further declaration of parentage sought. Thus, the second judgment held that AV was not Naomi's mother and that RB was the 'birth mother', with the consequent alteration of the birth certificate (para. 9). It is apparent that the changes in the factual position, particularly the attempts by AV to adopt Naomi in Bulgaria, had resulted in a shift in the balance of the welfare considerations in section 55A (5) between the two judgments (paras. 4 and 6). Williams J commented that, '[i]t is in [Naomi's] interests because it appears to be one of the few routes, and perhaps the most effective route, left in order to prevent AV pursuing an application which will have the effect of eradicating the father from Naomi's life' (para. 9). This declaration was accompanied by an order requiring the return of Naomi to England, with or without AV (para. 9).

Beyond the complicated (and one might even say sad) facts of this dispute, *Re G* provides another example of the courts having to grapple with the complex issues that can result from the divergence between genetic, gestational, psychological and legal parenthood that occur in cases of assisted reproduction and surrogacy. In the first judgment, Williams J states that, 'RB is her mother in the sense of having given birth to her' (para. 47); this language is notable, because it clearly evokes the notion that 'motherhood' is not purely reflective of gestation. This occurs despite the clarity of section 33 (1) of the Human Fertilisation and Embryology Act 2008, which states that: '[t]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child'. The law generally considers the status of 'mother' to be a simple issue to determine, but this case illustrates how that simplicity can struggle to accommodate the myriad factual circumstances of assisted reproduction and surrogacy. The legal position is clear but harsh - AV is not Naomi's 'mother' and her placement on the birth certificate is the result of 'fraud'. While she is acknowledged in the judgments as the 'psychological mother' that does

not give rise to legal status (although she may have been able to acquire such status through a 'parental order' under section 54 of the 2008 Act). Thus, the divergence between parental status and social reality is stark.

Regardless of the gravity of her actions since 2017, AV remains, in Williams J's words, 'the person who [Naomi] has known as her mother since her birth' (para. 50). Nevertheless, the judgment holds that she is not the legal 'mother'. These cases provide another illustration of the difficulty of both language and law to properly reflect the complexity of relationships that can be created by assisted reproduction and surrogacy. There are no easy answers here, which is why the law often struggles.

References

George, R. (2019). The View from the Bar. *Family Law*, 49 (Jan), 14-16.