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Family

Can surrogate have parenting time with child?

By **Chantal Cattermole and Abigail Choi**

Chantal Cattermole

Abigail Choi

(September 15, 2021, 1:56 PM EDT) -- Is your surrogate entitled to parenting time with the child they helped bear? The B.C. Supreme Court faced this question in the recent case of *K.B. v. M.S.B.* 2021 BCSC 1283.

Three's company or three's a crowd? The parties' relationship history: MSB, NBB & KB

The relationship between the parties involved is messy and unconventional. MSB and NBB are a married couple who had been having difficulties conceiving a child. KB met the couple in 2014 and shortly after this encounter, KB and MSB became lovers. Despite the affair, KB also became friends with the wife, NBB. In 2016, KB offered to become a surrogate for MSB and NBB.

Initially, the parties tried implanting one of NBB's frozen embryos into KB, however, the pregnancy attempt was unsuccessful. After the failed attempt, KB proposed to use her own eggs. The parties consented via a written surrogacy agreement that MSB and NBB are the intended parents. KB became pregnant with her own egg and MSB's sperm.

What happened after child was born

A few weeks after the child was born, KB signed official documents confirming that she had surrendered the child along with all parental rights to MSB and NBB, the intended parents. The agreement allowed KB to see the child at any time and stated that MSB and NBB would not refuse KB access to the child.

For the first two years of the child's life, the parties had a working relationship and KB was able to see the child regularly. Things took a turn for the worse when KB started to make greater demands of the parents. MSB and NBB subsequently refused access to the child and so KB has not seen the child since February 2020.

KB applied for a contact order to see the child in the interim while fighting to be declared the child's parent at trial.

Evaluating best interests of the child

Section 37(1) of the *Family Law Act* states that the court must exclusively consider the best interests of the child when making a contact order. Section 37(2) of the *Family Law Act* sets out considerations the court must account for in determining what is in the best interest of a child.

The court must analyze all of the child's needs and circumstances, including but not limited to: the child's health and emotional well-being; the history of the child's care; the nature and strength of the relationship between the child and the significant person in the child's life; the child's need for stability; as well as the appropriateness of an arrangement that would require the child's guardians to co-operate on issues affecting said child.

The onus is upon the contact order applicant to prove that the proposed access is indeed in the child's best interests.

Key considerations for best interest of the child

Although there was a written agreement that KB will have contact with the child, the parents had the right to vary the agreement and could not be penalized for doing so when they believed it was in the child's best interest to stop the contact. The courts are often reluctant to interfere with a parent's decision.

The courts will give weight to a parent's view and their reasons for opposing contact. With this said, a poor relationship between the parents and the surrogate does not automatically mean that it is against the child's best interest to have contact.

The B.C. Supreme Court acknowledged that there are situations in which a child would want to have a relationship with their biological parent(s). If the child was at a place where they are ready to learn about their biological parent(s), then a contact order would be appropriate, despite a challenging relationship between the parents and the other party.

This was not the case here: the child was 4 years old and was not at a place where she would be ready anytime soon to learn of her connection to KB.

On these facts, the court held that forcing the parties to co-operate so that KB could see the child would be difficult and potentially harmful to the child, given the parties' history and present litigation positions and acrimony. The court went on to consider the child's age and her need for stability.

Weighing the benefits of having KB see the child as opposed to not see the child, the court held that there was a high likelihood of a confusing co-parenting regime for the child if a contact order was allowed. Ultimately, the B.C. Supreme Court held that it was not in the best interests of the child to impose a contact order.

Final thoughts

In closing, what is in the child's best interest is always the foremost consideration. Although the facts in this case are unique, the principles and reasoning still apply to other analogous relationships. The decision on whether a court will order a contact order is fact sensitive and will be evaluated on a case-by-case basis.

As such, it is advisable that parents maintain a civil relationship with the surrogate, get official written documentation confirming that the child has been surrendered to the intended parents and continue to champion the best interests of the child.

Chantal Cattermole is a partner with Clark Wilson LLP*, where she is co-chair of the family law group. She is a certified family mediator, arbitrator, parenting co-ordinator and collaborative professional. Cattermole has helped families navigate complex family issues such as cohabitation and marriage agreements, separation agreements and divorce. As a bilingual practitioner, Chantal is able to assist clients in English and French. This article was written with assistance from Abigail Choi, who was an articled student with Clark Wilson LLP.*

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