Neutral Citation Number: [2013] EWHC 2413 (Fam)

Case No: IL12P00153

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2013

Before:

MRS JUSTICE THEIS DBE

Between:

AB	**1st & 2nd Applicants**
- and -	
DE	**1st & 2nd Respondents**

Ms Samantha King (instructed by **Natalie Gamble Associates**) for the **Applicants**

Hearing dates: 4th March & 15 May 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE THEIS DBE

This judgment was handed down in private on 15th May 2013. It consists of 8 pages and has been signed and dated by the judge.
The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Theis DBE:

1. This matter concerns an application for a parental order in relation to a child C born in 2012 pursuant to section 54 Human Fertilisation and Embryology Act 2008 ('HFEA 2008'). I heard this matter on the 15 May 2013 when I made a parental order. I gave a short ex tempore judgment then and stated I would provide a full judgment in due course.

2. C was conceived through IVF treatment in Moscow, with the First Applicant's sperm and eggs from an anonymous Russian donor. He was carried by a married Russian surrogate mother. She and her husband are the Respondents to this application.

3. The Applicants met in 1991 and married in 2001. The Second Applicant has been married before and has three grown-up children. The Applicants started trying for a family in 1992, soon after they met. For the ten years between 1996 and 2006 they attempted 10 cycles of IVF treatment in the UK using donated eggs. All of these were unsuccessful. They considered adoption and fostering, but decided not to proceed with these options. They contacted and sought the assistance of a clinic in Italy for further IVF treatment with an egg donation programme through a clinic in Russia. This too was unsuccessful.

4. In August 2008 they approached the clinic in Russia to discuss their surrogacy programme. In January 2009 they were matched by the clinic with a surrogate and sought legal advice in the UK. This was just after the decision in *Re X and Y [2008] EWHC 3030 (Fam),* and they were advised they needed to be matched with an unmarried surrogate. Two attempts at conception in 2009 were unsuccessful. They were put in touch with another agency that operated as a law firm and matching agency. They were put in touch with another unmarried surrogate mother, who briefly became pregnant in early 2011 although subsequently miscarried. The Applicants were subsequently put in touch with the First Respondent, a married surrogate mother. Following IVF treatment she became pregnant and gave birth to C in Moscow in 2012. Both the Applicants were present at the birth and have cared for C since.

5. The Applicants initially made an application for a British passport for C without disclosing the surrogacy context. They subsequently sought legal advice and made proper applications, fully disclosing the details of their previous application. C was registered as a British citizen by the Home Office and the family returned to the UK after receiving his passport. The Applicants had been in Russia for six months.

6. Surrogacy agreements are legal in Russia. The court has the benefit of expert evidence from a Russian Lawyer which confirms that the Applicants are treated as C's legal parents under Russian law, having been legitimately registered as such on his Russian birth certificate with the consent of the First Respondent. Neither of the Respondents is treated as a legal parent of C in Russia.

7. In considering a parental order application the court must be satisfied that the criteria under s 54 HFEA 2008 are fulfilled and that such an order meets the lifelong welfare needs of the child concerned.

Section 54 HFEA 2008 criteria

8. The evidence clearly demonstrates that the First Applicant's gametes were used to bring about the creation of the embryo and C was carried by the First Respondent (s54 (1)).

9. The Applicants are married (s54 (2)).

10. Their application was made within six months of C's birth (s54 (3)).

11. C has been in the continuous care of the Applicants and had his home with the Applicants at the time of the application and of the making of the order (s54 (4) (a)). Both Applicants are domiciled in the United Kingdom, they were both born here and their domicile of origin remains in place (s54 (4)(b)).

12. The Applicants are over 18 years (s54 (5)).

13. As the surrogate mother was married the court has to be satisfied that both Respondents consent to a parental order. The First Respondent is the woman who carried the child and her consent is ineffective if it is given less than six weeks after C's birth (s54 (6) (a) and (7)). As the Respondents were married at the time of C's conception the Second Respondent is C's legal father by virtue of s 35. He is therefore the *'other person who is a parent of the child'* and his consent to a parental order is required (s54 (6) (b)). There is a written consent signed by each of the Respondents. It sets out clearly what they are consenting to. Whilst is not a Form 101A it is in fact more detailed. Rule 13.11 (1) Family Proceedings Rules 2010 (FPR) states the consent can either be in Form 101A or a form to *'the like effect'*. This form clearly sets out all the requirements to satisfy the court that the Respondents fully understood what is involved and the effect of their consent. The evidence clearly establishes that the consent was translated into Russian and sent by the Applicants' solicitors to the agency in Russia. They made the arrangements for the Respondents to sign it in the presence of a notary who witnessed the Respondents' signature and notarised the document (FPR 13.11(4)). Following further directions from the court, evidence was filed which demonstrates the Respondents were literate and able to understand the document they were signing. I am therefore satisfied the Respondents have both consented to the parental order as required by s54, and in the case of the First Respondent this was more than six weeks after C's birth (s54 (6) and (7)).

14. The final requirement under s 54 concerns payments. Section 54 (8) provides

> *(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of-*
>
> *(a) the making of the order,*
>
> *(b) any agreement required by subsection (6) above,*
>
> *(c) the handing over of the child to the applicants, or*
>
> *(d) the making of any arrangements with a view to the making of the order, unless authorised by the court*

15. Under the terms of the surrogacy arrangement entered into between the Applicants and the agency they agreed to pay the agency €50,000 for the cost of the surrogacy arrangement. This sum included all costs, including a payment to the First Respondent, the precise amount the Applicants were unaware of at the time of the agreement. The initial letter from the agency stated that the First Respondent received 750,000 RR for her *'medical expenses, transportation costs, baby sitter, loss of wages, inconvenience and other financial losses caused by the pregnancy and consequent rehabilitation'*. Following further directions from this court additional information was filed as to precisely what payments were made to the First Respondent. That revealed she was in fact paid 196,269 RR (c£4,324) for actual expenses incurred by her (travel, medication, medication, clothes, child care costs etc). There is a small amount (966 RR (c£22)) itemised as commission which does not appear referable to any expense. She also received compensation of 400,000 RR (c£8,812). Other items listed by the agency are expenses to third parties (323,500 RR (c£7,127) for hospital and accommodation costs for the First Respondent) and 9,612 RR (c£211) for IVF medication. The Applicants were able to file evidence from the translator who liaised between the parties when they were in Russia. She was able to speak to the First Respondent and obtain confirmation from her that the sums itemised by the agency as having been paid to her had in fact been received by the First Respondent.

16. In considering whether to exercise its discretion to authorise the payments the court considers a number of factors:

    (i) was the sum disproportionate to reasonable expenses;
    (ii) were the applicants acting in good faith and without 'moral taint' in their dealings with the surrogate mother, and
    (iii) were the Applicants' party to any attempt to defraud the authorities.

17. The total sum paid to the agency was €50,000, out of which the various expenses were paid, including the compensation fee to the surrogate mother. No doubt there was an element of the fee that was profit for the agency; on the figures that are available about half of the global fee went to the agency. This is the first Russian surrogacy case that the court has been aware of so there are therefore no comparators. According to the Russian expert report:

> *"Payments in surrogacy specifically are not regulated in Russian law, and there is no prohibition of commercial surrogate motherhood in law either. That means that it may be commercial and altruistic. There is neither regulation nor precise information concerning reimbursement to surrogate mother and/or amount of payment. In practice, medical expenses of surrogates are supposed to be reimbursed; loss of earnings and/or monthly allowance is known to be compensated as well. However, as to the payment for the services rendered, the parties may try to make it hidden or interpret it as compensation for the moral and physical sufferings caused by pregnancy and delivery of a child. According to the mass media, the services of surrogate mothers in Russia were estimated approximately to cost 15,000 to 20,000 USD [see: 'Theme Issue: Surrogate Mothers' (2010) 4(4113) Ogoneyk 1 February 2010, p.32-33 (in Russian)]. In Saint Petersburg, surrogate mothers are paid on average 16,000 – 19,000 USD (500,000 to 600,000 RUB) [see: 'Russian Surrogate Moms Attract Foreigners' (2012) 1726 (37) The St Petersburg Times 12 September 2012]."*

18. The amount paid to the First Respondent in this case is less than the amount reported to be paid to surrogate mothers in St Petersburg, and does not appear unusually high in the context of what is paid in other areas in Russia.

19. From the information directed to be filed by the court the average wage is Russia is in the region of 300,000 RR (c£6,427) and the cost of living in the area the Respondents live is lower than in Moscow. So the amount paid to the First Respondent equates to about 1 – 2 years average wage.

20. There is no evidence to suggest the will of the First Respondent has been overborne by the offer of payment. The Respondents were provided with support and advice by the agency. The Applicants' describe in their statements the good relationship they established with the First Respondent and the First Respondent cooperated with all enquires made of her within these proceedings.

21. In the circumstances of this case, bearing in mind the evidence I have about the Respondents' circumstances, the First Respondent's co-operation with the provision of extra information during the enquiries made relating to this application, the fact that all negotiations were conducted through a third party and the legal framework relating to these arrangements in Russia I am satisfied that the payments made were not so disproportionate as to amount to an affront to public policy, or to have overborne the will of the First Respondent. All the evidence points to the sum being within the range of similar arrangements made in Russia and all the information regarding the First Respondent's actions support the conclusion that she entered into this arrangement of her own free will.

22. Turning to consider whether the Applicants acted in good faith and without moral taint the court needs to consider the actions of the Applicants in relation to the surrogacy arrangements, their prior history and bona fides. As Hedley J observed in *Re X and Y (ibid)* '*The court needs to be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas*' and ensure that '*commercial surrogacy agreements are not used to circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country*'.

23. In considering the Applicants' dealings with the agency and the First Respondent the detailed statements filed by the Applicants set out the steps they took in selecting the agency in Russia, which they understood to be a reputable agency. In selecting the First Respondent to be a surrogate mother they liked the reasons she gave for wanting to become a surrogate mother and she had the full support of her husband and her family. They were not involved in the negotiations of the payments made to her; they paid a global fee to the agency. During the First Respondent's pregnancy the Applicants formed a good relationship with the First Respondent. They communicated via a translator or an electronic translation service and met her on a number of occasions prior to C's birth. They plan to stay in touch. All the evidence points to a warm and caring relationship with no suggestion of bad faith or moral taint on behalf of the Applicants.

24. Turning to the Applicants' dealings with the authorities. Over the last 16 years they have had a long and arduous journey to become parents, involving 15 IVF cycles both here, in Italy and

then Russia. When they considered surrogacy they sought legal advice here, which at the time advised they should be matched with an unmarried surrogate mother to enable them to secure British nationality for their child, as the First Applicant would be considered the legal father. They did not seek updated legal advice, so were unaware that since 2009 it had become relatively routine for the Home Office to award British nationality, on a discretionary basis, in international surrogacy cases where the foreign surrogate mother is married. Following C's birth the Applicants' believed they had no way of obtaining a British passport for him if they declared he had been born through a surrogacy arrangement. As a result they applied for a British passport without disclosing the surrogacy context, that application was unsuccessful. The Applicants then sought specialist legal and immigration advice here and realised their error. They immediately made the correct applications to the Home Office and the British Embassy, declaring all the details of their previous application and why it had been made in the way that it had. The Home Office were satisfied by their application and explanation. They agreed to expedite the application to enable the Applicants and C to be re-united with the wider family here, as they had been in Russia for a number of months awaiting immigration clearance to return home. C is now a British citizen.

25. The Applicants applied for a parental order here in order to fully regularise C's status and their legal parentage. This was done whilst they were still in Russia making the necessary applications for C to return to this jurisdiction with them.

26. The evidence clearly demonstrates the Applicants have tried for many years to become parents. The Second Applicant is a full time mother and appreciates the challenges of being an older mother, she is in her mid sixties. She has the experience of having raised three grown up children, has more time now and has the support from a strong network of family and friends nearby. The First Applicant is a father for the first time, he is 20 years younger than his wife. He takes a very active role in C's care and is able to work partly from home to enable him to do that.

27. In her investigations the very experienced parental order reporter stated as follows:

> *"Any concerns I may have had about the couple's circumstances were mitigated on meeting with the applicants. I found that they were open about the difference in their ages, thoughtful and insightful, and very much at ease with caring for C who responded to each of them in a spontaneous and happy way. I was more than reassured that they had thought through the emotional and practical issues that taking care of a child of their own would entail.*
>
> *The failure to disclose that C was a surrogate child which created such difficulty when trying to obtain a British passport for him in Russia is difficult to understand given the way they present now. It would seem, perhaps, that they had not updated their research on the whole process sufficiently well, were reacting to hearing about the difficulties other intended parents were having and had relied too much on the original legal advice they had gained some years earlier."*

28. Whilst the Applicants' actions in not being candid with the immigration authorities when they made their first application regarding C were clearly wrong, and as the parental order reporter observes difficult to comprehend, it should be considered in the context of the outdated advice they were relying on and their subsequent conduct. All their actions since receiving updated

day, and although she lived some way away she had plans to move closer. She was clear that she would do everything she could to support C in the event that he lost his mother during his childhood.

34. Although the Applicants now have parental responsibility by virtue of the residence order made by the court at the first hearing they are not C's legal parents and C lacks a lifelong connection with the Applicants for matters as significant as inheritance, financial support and his wider identity. Without an order he would be left in something of a legal vacuum, without full legal membership of any family anywhere in the world.

35. Following her extensive and comprehensive enquires the parental order reporter concluded

> *"53. C's permanent home will be with [the Applicants]. A parental order will benefit all members of the family as it will secure C in law as the applicants' child and the extended family members will be reassured about his future. This will afford all of them the greatest possible security.*

36. I agree. His welfare needs would clearly not be met by the Respondents remaining his legal parents in this jurisdiction, when they are not so recognised in their own jurisdiction and have no intention of having any future parental role in C's life. C's future is in the long term care of the Applicants, they are his de facto legal parents and his welfare demands their relationship is given lifelong security which can only be achieved by making a parental order.

specialist advice demonstrates they have been open about their previous conduct. Their explanation regarding the first application was accepted by the immigration authorities, who then processed their fresh application for C. All the evidence points to the Applicants being committed parents who have endured a very long, difficult and emotional journey to try and have a child together. The enquiries undertaken by the experienced parental order reporter found no evidence that the Applicants had sought to circumvent child protection laws, buy a baby abroad or take any steps or action that may be regarded as an abuse of public policy. I entirely agree with her assessment in the circumstances of this case.

29. I am satisfied that the court should exercise its discretion in this case and authorise the payments made by the Applicants to the agency which involved payments other than for expenses reasonably incurred. This, in effect, relates to the compensation payment made to the surrogate mother by the agency in the region of 400,000 RR (£8,812) and the element retained by the agency part of which will be profit (that is not related to any identifiable expenses), although it is difficult to give a precise figure for this.

Welfare

30. The court's paramount consideration in relation to this application is C's lifelong welfare (s 1 Adoption and Children Act 2002 'ACA 2002'). In considering this the court must have regard to the matters set out in s 1 (4) ACA 2002.

31. Like many children in his situation C is in something of a legal vacuum, with different jurisdictions recognising different legal parents for him. As a matter of English law C's legal parents remain the Respondents (by operation of s 33(1), (3) and s 35 HFEA 2008) and they share parental responsibility for him (s 2(1) Children Act 1989). Section 33 (1) provides the woman who carries the child (and no other) is treated as the child's mother, thereby excluding the Second Applicant from being a parent. Section 38(1) provides *'Where a person is to be treated as the father of the child by virtue of section 35 or 36, no other person is to be treated as the father of the child'* , thereby excluding the First Applicant from being treated as C's father, even though he is C's biological father. However, under Russian law the Respondents are not C's legal parents and have no biological connection with him. The legal position in Russia is confirmed by the Russian expert report which states *"Under Russian law, [the Applicants] are considered as C's legal parents, and [the Respondents] have no parental rights in respect of C".*

32. On the ground C has resided with the Applicants since birth. He now resides with them on a permanent basis in this jurisdiction and he is a British citizen. Despite this reality in C's day to day life the Applicants currently have no legal connection with C as parents, other than through the residence order made by this court which gave them parental responsibility.

33. The parental order reporter conducted a full assessment into the welfare aspects of this case. The Second Applicant has three grown up children from her first marriage, who in turn have twelve children between them. The parental order reporter raised with the Applicants the mature age of the Second Applicant and what plans they had made to ensure C's continued care if she became ill or died. The First Applicant made it clear he was prepared and available to continue to parent C. The parental order reporter also discussed this with the Second Applicant's daughter, who has her own children. She confirmed she spoke to her mother each