Neutral Citation Number: [2011] EWHC 921 (Fam)

Case No: FD10P02162

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2011

Before :

MR. JUSTICE HEDLEY

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Re: IJ (A Child)

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Ms. Ruth Cabeza (instructed by Gamble & Ghevaert Solicitors) for the Applicants
Mr. M. Sherwin (Solicitor of McMillan Williams) for the Child

Hearing dates: 8th March 2011

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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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MR JUSTICE HEDLEY

This judgment is being handed down in open court on 19th April 2011 It consists of three pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

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.

Mr. Justice Hedley :

1. On 8th March 2011 whilst sitting at Bow County Court, I made an order under Section 54 of the Human Fertilisation and Embryology Act 2008 granting the applicants a Parental Order in respect of a child IJ. I reserved my reasons, adjourning their delivery into open court. However, nothing may be reported which might reasonably lead to the identification of the child or the applicants.

2. IJ was born in the Ukraine in 2010. There was in place a surrogacy agreement between the applicants and the respondents which was wholly valid under Ukrainian law but, since it involved payment beyond reasonable expenses, would have been invalid under our domestic law. IJ was conceived as a result of the fertilisation of an egg from an anonymous donor by sperm from the male applicant and the pregnancy was 'hosted' by the first respondent, who of course has no genetic connection with the child.

3. For reasons explained by this court in RE X & Y (FOREIGN SURROGACY) [2009] 1 FLR 733, the consequences of this were complicated: under Ukrainian law the parents of IJ were the applicants whilst under domestic law the legal parents of IJ were the respondents who were a married couple. There were therefore real problems involved in obtaining immigration clearance for the entry of IJ into this country exacerbated by IJ in the meantime requiring some hospital treatment. In fact the applicants, who had done their conscientious best to act lawfully and to be prepared for all contingencies, had been misled by some unduly simplistic advice from the Ukrainian surrogacy agency.

4. One reason for adjourning these reasons into open court is to emphasise once again the legal difficulties that overseas surrogacy agreements can create. In the experience of the court to date, all overseas jurisdictions can confer parental status on the commissioning couple but that status is not recognised in our domestic law nor (at least where a commercial agreement has been in place) could it be. Those who travel abroad to make these arrangements really should take advice from those skilled in our domestic law to be sure as to the problems that will confront them (not the least of which is immigration) and how they can be addressed. Reliance on advice from overseas agencies is dangerous as the provisions of our domestic and immigration law are often not fully understood.

5. I was satisfied that the qualifying conditions set out in Section 54(1) - (7) were satisfied in this case. I take the liberty, however, of underlining the six week requirement for consent in Section 54(7), which parallels our adoption legislation: this will often require a second consent to be obtained as the overseas law may require consent at or before birth or handing over of the child.

6. Moreover, after investigation in evidence and by CAFCASS and Mr. Sherwin, the solicitor for IJ, I gave retrospective approval to the sums paid which would otherwise have contravened Section 54(8). The principles set out by this court in RE X & Y (supra) and RE S (PARENTAL ORDER) [2010] 1 FLR 1156 were applied and satisfied.

7. The conditions in Sections 54(1) - (8) having thus been satisfied, a discretion arose in the court to make a Parental Order. For the reasons explained in RE L [2010] EWHC 3146 (FAM) that discretion is now governed by the provisions of Section 1 of the

Adoption & Children Act 2002. Once again, after careful examination by CAFCASS and scrutiny in evidence, it was crystal clear that the best interests of IJ required the making of the Parental Order sought by the applicants. Hence the order made.

8. The second reason for adjourning into open court relates to the acquisition of citizenship on the making of a Parental Order. Mr. Sherwin helpfully drew my attention to paragraph 8.7 of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 made under the Act. Where such an order is made in the United Kingdom and one or both of the commissioning couple are British Citizens (as will usually be the case) the child (if not already so) will become a British Citizen. The policy purpose is to ensure parity with adoption legislation; that clearly is sound policy given the like effects of each order on a child and applicants.

9. That, of course, begs the question as to whether the Home Office should have notice of such an application. Ever since the case of Re W (A MINOR) (ADOPTION: NON PATRIAL) [1986] 1 FLR 179, it has been practice to give notice to the Home Office where the making of an adoption order will have the effect of conferring citizenship on a child otherwise an alien. No notice has been given in this case nor, to my knowledge, has it been given in any previous surrogacy case.

10. The position in adoption will depend on whether or not Section 83 of the Adoption and Children Act 2002 and the Adoptions with a Foreign Element Regulations 2005 apply. Where they do, the Border Agency will already have had notice of a child's entry into the country and the reasons for it. Notice may conventionally still be given but is hardly a practical necessity. The position is different where an alien child is lawfully here e.g. on a student visa or born in this country to non British Nationals, and an adoption application is made. Here the Home Office may have a real interest in the outcome and notice must of course be given.

11. I do not think that notice to the Home Office is necessary as a matter of course in cases involving overseas surrogacy. The Border Agency is intimately involved in the immigration procedures for such children. Almost inevitably leave is given either because the Border Agency is satisfied as to the child's entitlement to entry or for the purposes of applying for a Parental Order. Where the surrogate is unmarried, a commissioning parent will also be the genetic father and entitled to be considered in domestic law as the legal father. It is where the surrogate is married and therefore her husband is the legal father in our domestic law that real difficulties arise. In either case further notice to the Home Office is not in my judgment necessary.

12. It remains the view of those experienced in these cases that they should continue to be heard in the High Court. At least for the present that should continue to be so.