RE: L (a minor)

Case No: FD10P01027

High Court of Justice Family Division

8 December 2010

[2010] EWHC 3146 (Fam)

2010 WL 5059188

Before: Mr. Justice Hedley

Date: 08/12/2010

Hearing dates: 15th October 2010

Representation

Ms. Lucy Theis Q.C. (instructed by Gamble & Ghevaert LLP).

Approved Judgment

This judgment is being handed down in private on 8th December 2010. 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 15th October 2010 I made a Parental Order pursuant to Section 54 of the Human Fertilisation and Embryology Act 2008 in favour of the applicants in respect of a child known as L. I decided to reserve my reasons, put them into writing and hand them down in due course. This I now do.

2 These reasons are given in open court and this judgment is accordingly anonymised. However, nothing may be reported which might reasonably lead to the identification of the child or her family. They are given in open court for two reasons: first, the 2008 Act has now replaced the 1990 Act; and secondly, there are still some issues that give rise to difficulty and may merit wider publication.

3 This case relates to a commercial surrogacy agreement made in Illinois, USA. There is no doubt that the agreement was wholly lawful under the law of Illinois just as there is no doubt that it would continue to be unlawful under the 2008 Act in this country. The reason is simple: no payments other than reasonable expenses are lawful here where no such restriction applies in Illinois. It is clear to me that payments in excess of reasonable expenses were made in this case.

4 Accordingly no parental order can be made unless those expenses are authorised retrospectively by the court pursuant to Section 54(8) of the 2008 Act. Those matters have been fully considered by this Court in the context of the 1990 Act — see RE X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam) and RE S (Parental Order) [2009] EWHC 2977 (Fam).

5 It has to be accepted that in implementing the new Act, Parliament must be taken to have had in mind the accumulated jurisprudence under the 1990 Act. It is therefore significant that, with one material exception, Section 54 of the 2008 Act reproduces Section 30 of the 1990 Act. The exception is the widening of the categories of those who may apply and the making of ransitional provisions for those who have only become entitled to apply on the coming into force of the 2008 Act. It necessarily follows, with one significant change (relating to welfare), that the law in respect of Parental Orders is not affected by the new Act save as is noted above.

6 It is therefore unnecessary for me to set out in these reasons details of the factual matters which allowed me to conclude that the requirements of Section 54(1)-(7) are fully met in this case. It may, however, be worth noting, now that the transitional provisions have expired, that the mandatory period for application of 6 months from birth now applies to all applicants and remains incapable of extension by the court.

7 Further, I authorised the payments made pursuant to Section 54(8) of the 2008 Act. In my judgment the policy principles set out in RE S (supra) continue to hold good and were satisfied in this case. I observe only that 'reasonable expenses' remains a somewhat opaque concept. The approach that I have adopted is to treat any payment described as 'compensation' (or some similar word) as prima facie being a payment that goes beyond reasonable expenses. It is necessary to emphasise (as comparisons between the USA and Western India graphically illustrate) that no guidance can be gained from 'conventional' capital sums or conventional quantum of expenses. Each case must be scrutinised on its own facts.

8 It is also necessary to observe that it is still the case that the most careful and conscientious parents (as these are) are still receiving incorrect information; in this case it related to the prospects of surrogacy in the UK on the basis of age. Moreover, there still remain real issues about re-entry to the UK although in this case it was effected through temporary leave granted to the child who had a USA passport. It remains essential for each commissioning couple to acquaint themselves with their immigration position before committing themselves to a surrogacy agreement.

9 The significant change in the new Act other than the enlargement of the scope of applicants relates to the welfare test. The effect of the 2010 Regulations (S1 2010/986) is to import into Section 54 applications the provisions of Section 1 of the Adoption & Children Act 2002 . In fact in RE X and Y (supra) the court had adopted in its welfare consideration the perspective of the 2002 Act. What has changed, however, is that welfare is no longer merely the court's first consideration but becomes its paramount consideration.

10 The effect of that must be to weight the balance between public policy considerations and welfare (as considered in RE X and Y (supra)) decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations supports its making. It underlines the court's earlier observation that, if it is desired to control commercial surrogacy arrangements, those controls need to operate before the court process is initiated i.e. at the border or even before.

11 There are two other observations to make. First, these applications are made in the first instance to the Family Proceedings Court. Where any such application has an international element, legal advisors may wish to consider lateral transfer to the Inner London Family Proceedings Court which has specialist expertise in this area and is able to utilise specialist expertise in CAFCASS when appointing a Parental Order Reporter, which remains a mandatory obligation. Secondly, I had wondered whether, in the light of the change in respect of welfare, it was time to relax the requirement that all these cases should be transferred to the High Court. I was urged not to do so for at least the next 12 months as there were still fresh issues emerging. Given that there are now new categories of applicant as well, I agree that matters for the time being should still come to the High Court.

12 I think it important to emphasise that, notwithstanding the paramountcy of welfare, the court should continue carefully to scrutinise applications for authorisation under Section 54(8) with a view to policing the public policy matters identified in RE S (supra) and that it should be known that that will be so. As I have said all such matters were satisfied in this case and the court accordingly made the orders sought.