Neutral Citation Number: [2013] EWHC1432

Case No: IL12P00185

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2013

Before:

MRS JUSTICE THEIS DBE

- -

Between:

J	**Applicants**
- and -	
G	**Respondents**

- -
- -

Mr Julian Date (instructed by **Natalie Gamble Associates**) for the **Applicants**

Hearing date: 26 March 2013

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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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MRS JUSTICE THEIS DBE

It consists of 9 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.

Mrs Justice Theis DBE:

1. This matter concerns an application for a parental order under section 54 Human Fertilisation and Embryology Act 2008 (HFEA 2008) in respect of twins born in 2012 following a surrogacy arrangement in California, USA. The children were conceived through IVF treatment in the USA with the second applicant's sperm and eggs from a third party donor. They were carried by a married surrogate mother, the first respondent, following a surrogacy arrangement entered into between the parties under Californian law. The second respondent is her husband. The respondents have taken no active part in these proceedings other than confirming their consent to the orders applied for.

Background

2. The applicants, both British citizens are domiciled and resident in the United Kingdom. They met in 2003 and became civil partners in 2010. They first began talking about starting a family in 2003 and from about 2007 seriously researched the options. They considered adoption, but were discouraged by the waiting time and lack of certainty. They also considered surrogacy within the United Kingdom, but at that time parental orders were not available to same sex couples. Those changes did not come into effect until April 2010, with the implementation of the HFEA 2008. The applicants looked at surrogacy overseas and following further research decided to engage a clinic in California. Between 2008 and 2010 the applicants were matched with four different surrogates and two egg donors. Following nine IVF procedures, eight of which were unsuccessful and the other resulting in a pregnancy which went on to fail, the applicants had to re-assess their plans.

3. In early 2011 the applicants contacted the British Surrogacy Centre of California ('BSC') which operates in this jurisdiction from an address in Essex. Their website refers, in general terms, to the provisions of the Surrogacy Arrangements Act 1985. Section 2 (1) provides

> *(1)No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—*
>
> *(a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement,*
>
> *(b) offer or agree to negotiate the making of a surrogacy arrangement, or*
>
> *(c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;*
>
> *and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.*
>
> Contravention of this provision is a criminal offence.

4. According to the documentation I have seen the applicants paid £3,500 to BSC for their services. They signed a consulting contract which stated the applicants were in

'*need of assistance in the area of project Management with regards to their planned surrogacy which will take place in the State of California USA. The British Surrogacy Centre has agreed to perform consulting work for the [applicants] in providing support and consulting services and other related activities as directed by the [applicants]; To include but not limited to, Home assessments, liaison between clinics, surrogate, egg donors, Home office etc. We will also help with assistance back to the UK and with Passport applications in the UK and the USA. Our consultants in the USA will also work with the [applicants] to establish parental responsibility along with social workers from the BSC."* The contract goes on to state "*By signing this agreement, you are signing to also confirm that you are in no way paying for baby(ies) in any way whatsoever. You are also agreeing to acknowledge that you are also not paying for brokering services for surrogacy, which is considered illegal in the United Kingdom, but that you are contracting the British Surrogacy Centre Inc in the USA to project manage the agreement on your behalf, which will be administered by its employees based in the state of California and also in the UK."*

The agreement was signed in February 2011. BSC put the applicants in touch with a US clinician at California Fertility Partners. The first respondent surrogate mother was identified by BSC as one of a number of experienced surrogate mothers. She is a US citizen who lives in California, was married and had her own children. The applicants liked her profile. The BSC facilitated the negotiations between the applicants and the first respondent, in particular the proposed payment. This was negotiated from between $55 – 60,000 to $45,000 (with an additional payment of $5,000 for twins). The first respondent had her own legal adviser. In fact the applicants decided to instruct their own US lawyer who considered the terms of the proposed surrogacy agreement, which had been provided to them by BSC. BSC matched the applicants with an anonymous egg donor.

5. The first embryo transfer resulted in a pregnancy, unfortunately this failed as it was an ectopic pregnancy. A further transfer was made in December 2011, which was successful. The applicants and the first respondent remained in close contact during the pregnancy. The applicants went out to the US to see the first respondent and her family and attend some of the scan appointments.

6. During this period the applicants decided to cease using the BSC. It has not been necessary, in the circumstances of this case, to consider the role played by BSC. However, I have directed the applicant's solicitors to send a copy of this judgment to the Department of Health, which has regulatory responsibility in this area.

7. At 25 weeks the applicants instructed a US lawyer in California to start the relevant procedure there. The applicants were awarded paternity orders by the Californian court prior to the birth, enabling them to be named together on the children's US birth certificates.

8. The applicants made the decision to go and stay near the first respondent for the last few weeks of the pregnancy. This enabled them to get to know the first respondent and her family better, assist with practical matters and attend the various medical appointments. Both applicants' parents joined them in the US prior to the birth.

9. Following their birth the children have been in the full time care of the applicants. The applicants obtained US passports for the children and returned to the UK on 12 September with the children and their wider family. The children were given a visitor's visa for 6 months. Following their return the applicants consulted immigration lawyers and applied for British citizenship for the children.

10. The applicants have remained in contact with the first respondent and her family.

Section 54 HFEA 2008

11. Before the court can consider making a parental order the requirements set out in section 54 have to be met.

12. The evidence clearly establishes that the children were carried by the first respondent, who is not one of the applicants, as the result of the placing in her of an embryo; the gametes of the second applicant were used to bring about the creation of the embryo (s54 (1)). The applicants are civil partners (s54 (2)). The application for a parental order is dated 12 September 2012 and was made within six months of the children's birth (s54 (3)). At the time of the application and the making of the order the children's home is with the applicants (s 54(4) (a)). Both applicants were born in the United Kingdom and their domicile of origin is here (s54 (4) (b)). The applicants are both over 18 years (s 54 (5)).

13. Section 54 (6) and (7) require the first and second respondent to have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order. In addition, the first respondent's consent must be more than six weeks after the birth. Both respondents have signed a notarised statement setting out their agreement to the parental order. This is dated 9 November 2012, which is more than the required six weeks after the birth. It is in a form to like effect of Form 101A (Part 13.11(1) Family Proceedings Rules 2010 'FPR 2010') and executed in accordance with Part 13.11(4) FPR 2010. Although not strictly necessary, there is also additional evidence to confirm the respondent's consent. She has acted as a surrogate twice before and has the full support of her husband and three children. Prior to the birth the respondents cooperated with the proceedings in California which formally terminated their parental status in California. They have fully engaged in these proceedings, consistently demonstrating their support for the parental order application. In the first respondent's conversation with the parental order reporter, she confirmed her consent again and the reporter observed *'It was apparent on speaking to the first respondent that she is an educated woman who entered into surrogacy as a result of a desire to help others'.*

14. Section 54(8) provides that the court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given by either of the applicants for or in consideration of the making of the order, any agreement, the handing over of the child to the applicants or the making of any arrangements with a view to the making of an order unless authorised by the court. Under the terms of the gestational surrogacy agreement entered into by the parties, which was governed by Californian law, the applicants made payments to the first respondent totalling USD$56,750, which the applicants invite the court to authorise retrospectively pursuant to its powers under s 54 (8). This sum can be broken down as follows:

(i) USD $2,750 as an allowance for unspecified 'incidental expenses'
(ii) USD $1,000 inconvenience fee for the IVF transfer
(iii) USD $53,000 pregnancy compensation fee. This is made up of the base fee of USD $45,000, an additional payment of USD $5,000 for a twin pregnancy and a further sum of USD$3,000 as compensation for giving birth by caesarean section.

Other payments were made in accordance with the terms of the agreement, but these are clearly referable to identified expenses.

15. The skeleton argument submitted by the applicants set out the relevant principles in exercising this statutory discretion. These have evolved from the cases that have considered this provision, as there is no statutory guidance. In *Re X and Y [2008] EWHC 3030 (Fam)* Hedley J was considering a Ukrainian surrogacy arrangement under the Human Fertilisation and Embryology Act 1990 (HFEA 1990). Section 30(7) HFEA 1990 was in similar terms to s 54 (8) HFEA 2008. In that case Hedley J said at paragraphs 20 and 21:

> *"20. The statute affords no guidance as to the basis, however, of any such approval. It is clearly a policy decision that commercial surrogacy agreements should not be regarded as lawful; equally there is clearly recognition that sometimes there may be reasons to do so. It is difficult to see what reason Parliament might have in mind other than the welfare of the child under consideration. Given the permanent nature of the order under Section 30, it seems reasonable that the court should adopt the 'lifelong' perspective of welfare in the Adoption and Children Act 2002 rather than the 'minority' perspective of the Children Act 1989. On the other hand, given that there is a wholly valid public policy justification lying behind Section 30(7), welfare considerations cannot be paramount but, of course, are important. That approach accords with that adopted in the previous cases and also accords with the approach adopted towards the authorising of breaches of the adoption legislation. A particularly vivid example of this can be found in the judgment of Bracewell J in Re AW (Adoption Application) [1993] 1FLR 62. There the court was concerned in particular with serious (and indeed dishonest) breaches of Section 29 of the Adoption Act 1976 yet in the final striking of the balance between public policy considerations and the welfare of the child concerned the judge nevertheless made an interim adoption order.*
>
> *21. In relation to the public policy issues, the cases in effect suggest (and I agree) that the court poses itself three questions:*
>
> *was the sum paid disproportionate to reasonable expenses?*
> *were the applicants acting in good faith and without 'moral taint' in their dealings with the surrogate mother?*
> *were the applicants' party to any attempt to defraud the authorities?"*

16. *Re S [2009] EWHC 2977 (Fam) was* a case which involved a Californian surrogacy arrangement in which USD $23,000 was paid. Hedley J again considered the issue of authorisation in respect of a payment for a commercial surrogacy arrangement and set out further the approach the court should take. At paragraph 7 he stated

"....there is a problem for the courts of this country in that it raises the question of what the proper approach is where those who cannot do something lawfully in this country that they wish to do, go overseas to do it perfectly lawfully according to the country in which the surrogacy is carried into effect and then seek the retrospective approval of this country for something which, as I say, could not have been done here. This clearly raises matters of public policy and those matters really relate to, as it seems to me, three things:

(1) To ensuring 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.

(2) The court should be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas. That has been ruled out in this country and the court should not be party to any arrangements which effectively allow that.

(3) The court should be astute to ensure that sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate.

The last consideration, of course, is not one which is applicable to a case involving the United Kingdom and the state of California. It may, and does, arise in other contexts. The first two considerations, however, do."

17. Following these decisions the legislative framework applicable to parental orders was changed under the HFEA 2008, which came into force on 6 April 2010. The accompanying Regulations provide that the child's welfare must now be the court's paramount consideration throughout the child's lifetime.

18. The impact of this change was highlighted by Hedley J in *Re L (a minor) [2010] EWHC 3146 (Fam)* at paragraphs 9 and 10 when he said:

"9 ....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 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) 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."

He continued at paragraph 12:

"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."

20 This approach developed by Hedley J has subsequently been endorsed by Sir Nicholas Wall, when President of the Family Division, in *Re X (children) [2011] EWHC 3147 (Fam)* who stated at paragraph 40 *"Having set out the facts, I would also like to take the opportunity afforded by this case to endorse the approach taken by Hedley J in the cases."*

21 It is therefore necessary for the court to consider the public policy matters as identified by Hedley J in *Re X and Y* and *Re S (supra)* but with the understanding that the court is only likely to refuse parental orders in the clearest case of the abuse of public policy where otherwise the child's welfare requires the order to be made.

22 On the facts of this case I am entirely satisfied about the following matters:

(1) The payments in this case were not so disproportionate to expenses reasonably incurred that the granting of an order would be an affront to public policy. There is no evidence to suggest that they were of such a level to overbear the will of the surrogate. The surrogate was an experienced surrogate; she had been one twice before. She is a mature woman with financial means. She had legal advice before entering into the agreement and was able to command a higher compensation fee because of her proven track record. The parental order reporter records the following in her report about the surrogate mother:

"She explained that to be a surrogate in California a woman needs to be financially independent and emotionally secure…I did not sense that the respondent surrogate was vulnerable to financial or other exploitation. Indeed it was she who set the sum she required and was paid…"

(2) I am entirely satisfied the applicants have acted in good faith at all stages. Their journey to have a family has clearly been a long and arduous one, both emotionally and financially. There is no suggestion they have used surrogacy as a means of circumventing child protection laws. They are a loving and committed same sex couple with a stable home environment. They have detailed in their written evidence their decisions at each stage and the support they have from their wider family and friends. This view is shared by the experienced Parental Order Reporter. Her detailed and perceptive report extensively considers the issues raised in this case and concludes *"On the basis of my enquiries I am satisfied that the intended parents acted in good faith...".* The evidence demonstrates the applicants formed a close relationship with the first respondent and her family. Following her telephone discussion with the first respondent the parental order reporter observes that the first respondent described her relationship with the applicants "*as close and spoke of their support to her during the pregnancy".*

(3) This assessment of the applicants is supported by the fact that they have taken all proper steps to comply with the legal parentage requirements in both the US and in the UK. The relevant court in California made a judgment prior to the birth that the applicants were the legal parents. Following that procedure the position under Californian law is that the children's legal parents are the applicants. The respondents' legal status in that jurisdiction is extinguished. The applicants applied for parental orders in this jurisdiction to secure their position as parents for the purpose of UK law.

(4) In relation to their immigration position, having considered the options and their wish to return here soon after the children's birth, the applicants (having already been in the US for over a month prior to the birth) decided to travel home to the UK using the children's US passports. The applicants explained the position at border control and were issued with six month visas for the children. They subsequently lodged applications for the children to be registered as British Citizens under the British Nationality Act 1981.

(5) It is quite clear, in the circumstances of this case, there is no evidence of any attempt to circumvent the relevant authorities at any stage.

23 In the circumstances of this case the court should exercise its discretion pursuant to section 54 (8) and authorise the payments made other than for expenses reasonably incurred.

Welfare

24 The court's paramount consideration is the children's lifelong welfare. Schedule 1 paragraph (ii) of The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (HFEA Regulations) applies section 1 of the Adoption and Children Act 2002 to these applications.

25 The parental order reporter's comprehensive enquiries and investigation into the welfare of the children are set out in her report. She observes in that report the clear positive relationship each of the children have with the applicants and recommends that the welfare needs of each of the children would be best served by the making of a parental order.

26 For the purposes of English law the respondents remain the children's legal parents by virtue of s 33 (1) and (3) and s 35 HFEA 2008. They also have parental responsibility by virtue of s 2 (1) Children Act 1989. As set out above, as a matter of Californian law the respondents are not the legal parents of the children. The respondents have no biological connection with the children and are not able or willing to assume parental responsibility to safeguard the children' welfare.

27 A parental order will safeguard the children's welfare on a lifelong basis as it will

(1) Confer joint and equal legal parenthood and parental responsibility upon both the applicants. This will ensure each child's security and identity as lifelong members of the applicants' family.

(2) Fully extinguish the parental status of the respondents under English law.

(3) Make each of the children British citizens which will entitle them to live in the UK with their family on a permanent basis. This is by the operation of Schedule 4 paragraph 7 of the HFEA Regulations which provides that the children will become British citizens upon the grant of parental orders in favour of either of the applicants, both of whom are British citizens.

28 As the parental order reporter observes in her report

> "*A parental order allows the reality for [the children] to be formalised now and bestows a sense of finality and completeness. It closes the door on official challenges to the intended parents' authority and paves the way for the future without delay and the further anxiety that will inevitably be experienced if another route to permanency and security has to be sought."*

29 I am entirely satisfied the only order that will secure the lifelong welfare needs of each of these children is a parental order. Only that order will provide the lifelong security and stability that their welfare clearly demands.

30 I would like to add a few general observations. Those who embark on this type of surrogacy arrangement are to be encouraged to apply for parental orders. There has been a noticeable increase in such applications being made, which is to be welcomed. As has been set out above, the legal relationship in this jurisdiction between children born as a result of surrogacy arrangements and their intended parents is not on a secure legal footing without such an order being made. That can have long term legal consequences for the children and those who care for them. It should be remembered parental order applications must be made within six months of the child's birth, there is no power vested in the court to extend that period. The message needs to go out loud and clear to encourage parental order applications to be made in respect of children born as a result of international surrogacy agreements, and for them to be made promptly.