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Re C

Case No. IL13P00071

Principal Registry of the Family Division

19 July 2013

[2013] EWHC 2408 (Fam)

2013 WL 3878895

Before: Mrs. Justice Theis

Date: Friday, 19th July 2013

(In Private)

Representation

Ruth Cabeza (instructed by Porter Dodson) for the Applicants.

Judgment

Mrs. Justice Theis:

1 This is an application for a parental order made by A and B in relation to a little boy, C, who was born on [a date in] 2012 and so is just over seven months old. The respondents to the application are D and E. C was carried by D following a surrogacy arrangement entered into by the parties through a surrogacy agency based in California.

2 As described in the two detailed statements from A and B this has been a long and very difficult journey for them to achieve their wish for a family. It has involved no less than eight IVF cycles, three of which were in this jurisdiction and five in the United States. They were undertaken by the applicants at times of enormous family loss and distress. Those procedures were unfortunately unsuccessful. When the applicants embarked on looking at what alternatives would be available they wished in addition to having a genetic link with any child to have a child who has a similar racial background to B, who is of Chinese origin. They entered into an agreement with Surrogate Alternatives, and through that agency were introduced to D and E, the surrogate mother and her husband.

3 To enable the court to make a parental order there are two matters which the court has to be satisfied: firstly, that each of the criteria set out in s.54 of the Human Fertilisation and Embryology Act 2008 are satisfied and, secondly, that C's lifelong welfare requires such an order to be made.

4 A and B have provided extremely full statements and those statements have been supported by comprehensive documentation detailing the various stages of the journey which they have gone through to be able to have C. In addition to a detailed skeleton argument I have also had a helpful bundle of the relevant legal authorities.

5 Turning to the s.54 criteria, I can take the criteria set out in s.54 (1) to (7) relatively quickly as there is little issue about them. Firstly, there needs to be a biological connection between C and one of the applicants and that C was carried by a woman who is not one the applicants as a result of the placing in her of an embryo using the gametes of at least one of the applicants. The letter from Dr. H confirms A's genetic connection to C and that C was carried by the first respondent, following the placing in her through the IVF procedure an embryo created using the gametes of A.

6 The second matter is the status of applicants' relationship. They have been in a relationship for ten years and were married on 29th August 2005.

7 The third matter is that the application must be issued within six months of C's birth. He was born on [a day in] December 2012 and the application was issued in early March 2013, so within six months.

8 The fourth matter is that C should have been in the care of the applicants at the time the application was made and at the time when the court is considering the order, and that at least one of the applicants is domiciled in this jurisdiction. The applicants assumed C's care almost immediately following his birth in the United States, and they returned to their home with him in this jurisdiction on 14th February 2013. He remains in their care in the family home.

9 A's domicile of origin is England. He was born in Yorkshire. There is no evidence his domicile of origin has changed and so he fulfils the domicile requirement. Even though it is not necessary for the purposes of this application, B was born in Hong Kong in 1963 but has been in this jurisdiction since 1971 and this is probably her domicile of choice, but, as I say, it is not necessary for me to determine that because the Act only requires one of the applicants to be domiciled.

10 The next requirement is the age of the applicants. They have to be over 18. B was born on [a date in] 1963 and so is 50 years of age, and A was born on [a date in] 1966 and so is 47 years of age.

11 The next matter is that the respondents should have given their unconditional consent to this application, and that consent should be given freely and with full understanding of what is involved. In relation to D, that should be more than six weeks after C's birth. There is a detailed document in the bundle, setting out the written consents which have been given, which have been notarised in accordance with r.13 of the Family Procedure Rules 2010 . The consent was given by both D and E on 6th February 2013. This is more than six weeks after C's birth. This is against a background where they have agreed to a pre-birth order which was made in the United States on 20th September 2012 and, obviously, agreed to the original surrogacy arrangement which they entered into. I am entirely satisfied the consent requirement of the s.54 criteria is met.

12 The final matter in relation to s.54 criteria is s.54(8) which requires that 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 arrangement with a view to the making of the order unless authorised by the court.

13 There have been a number of payments made by the applicants in this case which can be summarised in the following way. Firstly, in accordance with the surrogacy agreement they entered into, they have paid the respondents the total sum of $62,145, of which $38,000 was compensation. A further payment, of $24,145, was under various fixed headings in the agreement for certain specified amounts, of which about $13,200 is not attributable to expenses. So, in effect, the total payment to the respondents, which is not for expenses reasonably incurred, is $51,200 (about £31,500, depending on the exchange rate).

14 The second category of payment to be made has been made to the surrogacy agency, Surrogate Alternatives. That was a sum of $15,000, of which $12,000 was the agency fee, and $3,000 was for surrogate support services. Whilst it is right that a part of that sum would be for expenses which are incurred by the agency, obviously, as is permitted in the jurisdiction in the United States, an element of that will be profit, although obviously there is no way that the applicants can tell the extent of that profit.

15 The third category of payment was for medical treatment to the San Diego fertility centre medical group, a sum of $28,195 (about £17,536) and that was mainly for medical treatment and it is submitted that that is not caught by s.54(8) because if the procedure had taken place in this country, they would have been permitted expenses. I agree. However, within that figure is a sum of $6,000 paid to the egg donor, and the question has arisen as to whether that is or is not captured by s.54 (8) . In essence, the submission is that it is not, because it does not come within any of the purposes set out in s.54(8) (a) to (d) , namely the making of the order, any agreement required by subsection (6), the handing over of the child to the applicants or the making of arrangements with a view to the making of the order unless authorised by the court. I agree. It is quite clear the egg donor is not involved in any way with the matters listed in s 54 (8) . The egg

donor is not legally the mother in either jurisdiction and the pregnancy may not be successful so s.54 (8) would not come into play. I agree the $6,000 donor payment is not caught by s.54 (8) .

16 The payments which are caught by s.54(8) are the payments which were made to the respondents, other than for the identifiable expenses which are about $51,200, and some of the payment which is made to Surrogate Alternatives, of $15,000. But because there is no way of knowing what element of the agency fee is attributable to the agencies reasonable expenses incurred in facilitating the surrogacy arrangement, I shall adopt the cautious approach and consider the total figure.

17 As has been established in the cases to date, when the court is considering whether to authorise payments such as these, the court needs to look at a number of factors: Was the sum paid disproportionate to reasonable expenses? Were the applicants acting in good faith and without moral taint? Were the applicants' party to any attempt to defraud the authorities?

18 I am entirely satisfied in this case that the sums which were paid were not disproportionate to the reasonable expenses. They did not overbear the will of the surrogate and were not of such a level to be an affront to public policy. They were payments permitted in the jurisdiction in which they were made, and are not too dissimilar to payments made in similar cases. The profile information about the first respondent demonstrated she was altruistically motivated to become a surrogate mother and to assist the applicants have a much wanted child. She had been a surrogate before and had the benefit of detailed prior discussions and legal advice before entering into the agreement with the applicants and had a clear understanding of the process and issues involved. She formed a positive relationship with the applicants and she wholeheartedly supports the applicants' wish to be treated as C's parents.

19 In relation to the applicants acting in good faith and their involvement with the authorities, they have co-operated entirely with any requirements which have been made of them in either the United States or in this jurisdiction, both in relation to the steps which they have taken in the United States, for example, seeking the pre-birth order, the advice which they have taken in the United States and, also, promptly issuing their application here and furnishing this court with all the information which it requires to enable it to consider the application. There has been no ‘moral taint’ in the applicants' dealings with the respondents or with the authorities. The applicants have at all times sought to comply fully with the requirements of Californian and English Law It is also clear from the applicants' statements that the surrogacy arrangement was entered into with care and thought and in respect of a much-wanted child, and does not represent the simple buying of a child overseas.

20 I am satisfied, in the circumstances of this case, that the payments should be authorised by the court in accordance with s 54 (8) .

21 The second stage is the welfare stage. I can take that relatively briefly because I have the benefit of a thorough report from the Parental Order Reporter. She has investigated this matter on behalf of the court and, in particular, considered the welfare considerations set out in section 1 (4) Adoption and Children Act 2002 (ACA 2002) . The court is of course guided by s.1 of the Adoption and Children Act 2002 , where the court's paramount consideration is the lifelong welfare of C. In the parental order report at para.24, she sets out her professional judgment, following her inquiries, and she says:

> “C is living in a home environment where he is cherished and loved. There are no concerns that he is at risk of harm in the care of A and B and, in my view, it is in his best interests to remain in their care. It would be beneficial to C that his parents are willing to talk openly about his origins.”

22 I have, obviously, considered the welfare checklist in s.1 (4) and I am entirely satisfied, on what I have seen and read, that C's lifelong security and stability can only be met by the making of a parental order which will secure his relationship with the applicants long term and that is the order which I am going to make.


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