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Title :	S (Parental Order), Re
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Status:  Positive or Neutral Judicial Treatment

S (Parental Order), Re

Family Division

09 November 2009

Case Analysis

Where Reported

[2009] EWHC 2977 (Fam); [2010] 1 F.L.R. 1156; [2010] Fam. Law 356

Case Digest

Subject: Family law

Keywords: Best interests; Children; Expenses; Illegality; Parental orders; Payment; Proportionality; Surrogacy

Summary: When considering whether to give retrospective approval for a surrogacy agreement that would not have been lawful in England and Wales, the court had to (1) ensure that the arrangements were not being used to circumvent the childcare laws in England and Wales; (2) be astute not to be involved in anything that looked like payment for effectively buying children overseas; and (3) be astute to ensure that the sums paid were not such as to overbear the will of the surrogate.

Abstract: The applicants (X) applied for a parental order under the [Human Fertilisation and Embryology Act 1990 s.30](#) in respect of twins born to a surrogate mother in the United States. The children were the biological children of Mr. X and the surrogate (M). Pursuant to a surrogacy agreement between the parties, which had been made in and was lawful under the law of California, X had paid the sum of \$23,000 to M. X were unable to account for how that sum was used by M. The children had been born in California but had returned to England with X shortly after their birth and had lived with them ever since. The issue for the court was whether s.30(7) of the 1990 Act, which required the court to be satisfied that no money or benefit had been given in consideration for the surrogacy, save to meet M's reasonable expenses, precluded the making of a parental order. It was common ground that X had entered into the surrogacy agreement in good faith and had been unaware that the agreement might be unlawful under English law.

Application granted. (1) Although part of the amount paid to M doubtless represented reimbursement of her reasonable expenses attributable to the pregnancy, it was also true that payment had been made in respect of expenses, such as rent, which would have been incurred by M in any event. X had wholly failed to prove that no part of the amount paid by them offended s.30(7). (2) The public policy issue raised by the instant case related to (a) ensuring that commercial surrogacy agreements were not used to circumvent childcare laws in the United Kingdom so as to result in the approval of arrangements in favour of people who would not have been approved as parents in the UK; (b) ensuring that the court was not involved in anything that appeared effectively to be payment for the buying of children overseas; (c) ensuring that sums of money which looked modest in themselves were not in fact of such substance as to overbear the will of the surrogate. (3) In the instant case, the payment made to M did not offend any broad issue of principle in relation to the buying of children and was not greatly

disproportionate to the expenses actually incurred; nor was the payment tainted by any issue of bad faith. It was clear that X would not have been prevented from parenting any children conceived by them; therefore, it was in the best interests of the children that a parental order should be made and the unlawful payment was not a bar to making that order, [X \(Children\) \(Parental Order: Foreign Surrogacy\), Re \[2008\] EWHC 3030 \(Fam\), \[2009\] Fam. 71](#) applied. (4) (Per curiam) Whenever a serious issue arose under s.30(7) of the 1990 Act, the child should ordinarily be separately represented by a guardian.

Judge: Hedley, J.

Counsel: For the first applicant: James Hayward. For the second applicant: Darren Howe.

Solicitor: For the first applicant: John Whittle Robinson. For the second applicant: Andrew Jackson.

Significant Cases Cited	<p>X (Children) (Parental Order: Foreign Surrogacy), Re</p> <p>[2008] EWHC 3030 (Fam); [2009] Fam. 71; [2009] 2 W.L.R. 1274; [2009] 1 F.L.R. 733; [2009] 2 F.C.R. 312; (2011) 118 B.M.L.R. 1; [2009] Fam. Law 115; Official Transcript; Fam Div; 2008-12-09</p>
All Cases Cited	<p>X (Children) (Parental Order: Foreign Surrogacy), Re</p> <p>[2008] EWHC 3030 (Fam); [2009] Fam. 71; [2009] 2 W.L.R. 1274; [2009] 1 F.L.R. 733; [2009] 2 F.C.R. 312; (2011) 118 B.M.L.R. 1; [2009] Fam. Law 115; Official Transcript; Fam Div; 2008-12-09</p>
Key Cases Citing	<p>Applied</p> <p>W, Re</p> <p>[2013] EWHC 3570 (Fam); Official Transcript; Fam Div; 2013-10-09</p> <p>J v G</p> <p>[2013] EWHC 1432 (Fam); Official Transcript; Fam Div; 2013-03-26</p> <p>D (Children) (Surrogacy: Parental Order), Re</p> <p>[2012] EWHC 2631 (Fam); [2013] 1 W.L.R. 3135; [2013] 1 All E.R. 962; [2013] 2 F.L.R. 275; [2013] 2 F.C.R. 510; [2013] Fam. Law 38; Official Transcript; Fam Div; 2012-09-28</p> <p>L (A Child) (Parental Order: Foreign Surrogacy), Re</p> <p>[2010] EWHC 3146 (Fam); [2011] Fam. 106; [2011] 2 W.L.R. 1006; [2011] 1 F.L.R. 1423; [2011] Fam. Law 241; Official Transcript; Fam Div; 2010-12-08</p>
All Cases Citing	<p>Applied</p> <p>W, Re</p> <p>[2013] EWHC 3570 (Fam); Official Transcript; Fam Div; 2013-10-09</p> <p>Applied</p> <p>J v G</p> <p>[2013] EWHC 1432 (Fam); Official Transcript; Fam Div; 2013-03-26</p> <p>Applied</p>

D (Children) (Surrogacy: Parental Order), Re

[\[2012\] EWHC 2631 \(Fam\); \[2013\] 1 W.L.R. 3135; \[2013\] 1 All E.R. 962; \[2013\] 2 F.L.R. 275; \[2013\] 2 F.C.R. 510; \[2013\] Fam. Law 38; Official Transcript](#); Fam Div; 2012-09-28

Mentioned by

X (Children) (Parental Order: Retrospective Authorisation of Payments), Re

[\[2011\] EWHC 3147 \(Fam\); \[2012\] 1 F.L.R. 1347; \[2012\] Fam. Law 286; Official Transcript](#); Fam Div; 2011-12-06

Mentioned by

IJ (A Child) (Foreign Surrogacy Agreement: Parental Order), Re

[\[2011\] EWHC 921 \(Fam\); \[2011\] 2 F.L.R. 646; \[2011\] Fam. Law 695; Official Transcript](#); Fam Div; 2011-04-19

Applied

L (A Child) (Parental Order: Foreign Surrogacy), Re

[\[2010\] EWHC 3146 \(Fam\); \[2011\] Fam. 106; \[2011\] 2 W.L.R. 1006; \[2011\] 1 F.L.R. 1423; \[2011\] Fam. Law 241; Official Transcript](#); Fam Div; 2010-12-08

Significant Legislation Cited

[Human Fertilisation and Embryology Act 1990 \(c.37\) s.30](#)

Legislation Cited

[Human Fertilisation and Embryology Act 1990 \(c.37\) s.30](#)

Books

Anton's Private International Law 3rd Ed.

Chapter: Chapter 17 - Children

Documents: [Sub-section 2. - Parenthood](#)

The Law Relating to Parent & Child in Scotland (SULI) 3rd Ed. Norrie

Chapter: Chapter 4 - Parenthood and Assisted Reproduction

Documents: [Surrogacy](#)