Neutral Citation Number: [2013] EWHC 2328 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Case No: IL13P00028

Royal Courts of Justice
Thursday, 6th June 2013

Before:

MRS. JUSTICE THEIS

B E T W E E N:

RE P-M

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MR. A. POWELL (of counsel instructed by Dawson Cornwell) appeared on behalf of the Applicants.

MISS M. CAREW (instructed by CAFCASS Legal) appeared as Advocate to the Court

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J U D G M E N T

(Approved)

MRS. JUSTICE THEIS:

1. This is the final hearing in respect of an application by MP and AH for a parental order under the Human Fertilisation and Embryology Act 2008 (HFEA 2008). The application concerns two children: A and L twins born on 20th July 2012. They are now just over ten months of age.

2. Both children were born in California, pursuant to a surrogacy arrangement between the applicants and the respondent, AM, the gestational surrogate. The applicants have filed a joint statement dated 16th April 2013 in support of their application and exhibited a number of documents, including a gestational carrier agreement and also the ledger in relation to payments.

3. Following the issue of their application, a parental order reporter was appointed, Ms Jaqui Roddy, and she has carried out her enquiries and provided an extremely helpful and thorough analysis in her report dated 1st May 2013.

4. The matter first came before me for directions on 27th March 2013, when I made directions for the filing of statements and for the parental order reporter's report. The matter was then listed before me for final hearing on 13th May 2013. When I considered the papers again at that hearing, I adjourned the matter to enable CAFCASS Legal to be appointed as advocate to the court to assist the court on issues that arose in the papers concerning payments that were made to the Center for Surrogate Parenting (hereafter referred to as "CSP"). They are the organisation in California who the applicants used to make the surrogacy arrangements. I am extremely grateful to CAFCASS Legal for taking up this invitation, submitting a written skeleton argument and for Ms Carew attending today to make oral submissions.

5. I can outline the background relatively shortly. Both the applicants are British Citizens and reside in this jurisdiction. MP was born on 18th April 1980, so is thirty-three years of age. AH was born on 21st June 1989, so is twenty-three years of age. They met in May 2009, and have lived together since October 2009. Since that time they have been in a committed relationship. They discussed having a family and, after exploring the options in this jurisdiction, chose to pursue a surrogacy arrangement in California where the applicable legal framework permits commercial surrogacy agreements to be entered into. The applicants considered this would be preferable as an option as it provided more certainty and there was likely to be less delay. After researching the various agencies who undertook these arrangements, the applicants entered into an arrangement with the CSP. They matched the applicants with the respondent who resides in California. She is a divorced lady who has her own child.

6. The gestational surrogacy agreement is exhibited to the applicants' statement, it includes provision for payments to be made to the respondent and the details are set out in the schedule to the agreement. The applicants entered into a separate arrangement with the Beverley Hills Egg Donation Agency in relation to identifying a suitable anonymous egg donor. Each of the applicant's sperm was used, so they are both a biological father of one of the children. DNA tests have confirmed that, although they have expressed the wish not to know the details in relation to that. As I indicated during the hearing that is something that they may want to reconsider whether that is in fact the right approach. It may be better for that information to be known by them sooner rather than later, so they will be able to deal with any questions that either

of the children will inevitably raise with them in the future. The embryos were placed in the respondent through the IVF procedure and A and L, as I have said, were born on 20th July 2012.

7. Prior to their birth, the applicants sought paternity orders in the relevant court in Sacramento and a judgment of paternity was made on 9th July 2012 securing their legal position in the jurisdiction where the children were born. Following their birth the applicants have cared for both children, firstly, in America whilst the immigration position was being resolved and then following their return to this jurisdiction on 21st August 2012, where they remain.

8. To enable the court to make a parental order, the court has to be satisfied that each of the criteria in section 54 HFEA 2008 is satisfied. If they are, the court then considers whether the order meets the lifelong welfare needs of the child concerned. The child's lifelong welfare is the court's paramount consideration, having regard to the matters set out in section 1 of the Adoption and Children Act 2002 (ACA 2002).

9. Turning to the section 54 criteria, I can take the first seven criteria relatively briefly, because there is no significant issue about them in this case. Firstly, the applicants are biologically connected to the children in the way that I have described earlier on. The DNA tests confirmed that and the evidence clearly establishes that the children were carried by the respondent.

10. The status of the applicants' relationship is the next matter. They are not in a civil partnership. However, it is submitted that they are "two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other." I agree. The evidence establishes that they are in an enduring relationship. As I have said, they have been living together since October 2009 and all the enquiries confirm that is the position.

11. Thirdly the application has to be made within six months of the children's birth. They were born on 20th July 2012 and the application was made on 9th January 2013.

12. Fourthly the court has to be satisfied that, at the time of the application and at the time of the making of the order, the children's home must be with the applicants and one of them is domiciled in this jurisdiction. The evidence clearly establishes that both of the children have been in the applicants' care almost immediately after their birth and remain so, so they were in their care at the time of the application and are physically in their care at the time of the making of the order. Both applicants were born in this jurisdiction; this is their domicile of origin. There is no evidence to suggest that that has changed, so they are both domiciled in this jurisdiction and meet that requirement.

13. Fifthly, both applicants should be over the age of eighteen and, as I have said, MP is aged thirty-three and AH is aged twenty-three.

14. Sixthly, the court must be satisfied that the respondent and any other relevant person (the latter is not applicable in this case) have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order. In relation to the respondent that has to be done at least six weeks after the birth of the children. The respondent has filed an acknowledgment of service to this application stating that she consents to the making of the parental order. She has also completed a form A101A agreement, which sets out very clearly that she agrees to the making of the order and that she understands what it means. It is dated 13th April 2013 and complies with the various notary requirements in r 13 Family Procedure Rules 2010. There is a

letter from the applicants' solicitors dated 8th January 2013 explaining the legal position to the respondent, so that was received by her before she signed that document. In addition, the parental order reporter spoke to the respondent and the parts of her report that deal with that discussion make it very clear the respondent is fully in agreement with this application; she fully understood what was involved and agreed unconditionally to the making of the order. So I am satisfied that, not only has she given her consent as required by s 54 but it has clearly been given more than six weeks after the birth of the children.

15. Turning to the last criteria under section 54(8), this is the area that has been in sharp focus at this hearing. Section 54(8) requires as follows:

> *"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 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."*

Hitherto the focus of section 54(8) has rightly been on the monies that have been paid to the surrogate mother, and whether the payments that were made to the surrogate were "other than for expenses reasonably incurred" and so required to be authorised by the court. However it seems to me and this is supported by CAFCASS Legal that in fact the position in relation to the court is that it is necessary to look at the wider payments as well. The section makes reference, not to payments paid to the surrogate, but payments made by the applicants. So the court's scrutiny should include, and can include, payments that are made to an organisation (for example, CSP, in this case) who are effectively doing this on a commercial basis and there is an element of profit.

16. Turning to the figures that need to be considered in this case. In headline terms, they are as follows: The payments that have been received by the respondent have consisted of a number of matters that total over $17,700. It is likely to be a little bit more than that because on further scrutiny of the ledger during this hearing there were a number of payments for travel expenses that I do not think have been properly bought into account, but that does not detract from the position that in essence the payments that were made to the respondent were for expenses that she incurred either through loss of wages, transportation costs, housekeeping or a general allowance for food and/or for childcare. So this is a case where the respondent has been altruistic, in relation to her participation in this arrangement in that she has only received expenses that she has incurred and there has been no, what has been termed in other cases, compensation element. Therefore, these payments do not require any authorisation by the court.

17. The second aspect in relation to the expenses that have been paid is the sum of about $48,000, which are payments made to the agency. Many of those expenses are for medical procedures, for insurance for the respondent and possibly some for legal expenses, but there does seem to be about $21,500 that appears to be the profit element for this clinic. There is $7,500 termed a "contract fee", $4,000 termed a "pregnancy fee" and two payments of $5,000 which have been euphemistically termed as "gift". There is no documentation in the papers setting out the basis upon which these payments were made; there is no contract or arrangement between CSP and the applicants, although the enquiries from Miss Roddy (she was able to speak to the director of CSP) in relation to these payments reveals these are payments that CSP advertises on its website to be paid by people such as the applicants who want to use their services and in particular applicants from overseas (as obviously these applicants are). The "gift" payment of $10,000

appears to have come about because the applicants in this case had been able to identify, sooner than they thought, an egg donor through the agency that they used and they did not want to lose that egg donor. Therefore CSP offer an arrangement whereby, if they pay an extra payment of $10,000, they can effectively be put to the top of the queue and that is what happened in this case. The CSP Director told Ms Roddy that the $10,000 was used to fund wider advertising to encourage more people to put themselves forward as surrogates to the agency, so that those who were behind the applicants in the queue the applicants jumped would not be prejudiced by the applicants going ahead of them. These payments need to be scrutinised by the court.

18. It has been observed before that, in addition to the provisions of section 54(8), the children's welfare throughout their lives is also the court's consideration when considering an application for a parental order. This recognises the balance that must be struck acknowledging the surrogate mother will inevitably incur expenses and require financial assistance as a result of a pregnancy, but the court needs to carefully scrutinise the circumstances of each case and be careful not to sanction commercial surrogacy arrangements which offend public policy.

19. When the provisions changed with the HFEA 2008 Hedley J, who has provided such wise guidance in these cases, considered the position in the case of *Re L (Commercial Surrogacy) [2010] EWHC 3146.* He set out the changes and at paragraph 9 said:

> *"The significant change in the new Act, other than the enlargement of the scope of the applicants, relates to the welfare test. The effect of the 2010 regulations SI2010/986 is to import into section 54 applications the provisions of section 1 of the Adoption and 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; it becomes its paramount condition."*

He continued in paragraph 10 to say as follows:

> *"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 consideration supports its making. It underlines the court's earlier observations 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)."*

This approach adopted by Hedley J was subsequently endorsed by the then President of the Family Division, Sir Nicholas Wall, in *Re X and Y*. So the position, in my judgment, is that the court when considering section 54(8), should not limit itself to looking at the payments that are made to the surrogate mother. Whilst of course those are important and are likely to receive the most scrutiny by the court, it does not mean that they should be limited to those. The court needs to look at the wider picture and the circumstances in which payments are made, for example, to agencies such as the CSP. However, it should be recorded that where the welfare considerations demand that an order should be made, the court will only in the clearest case of abuse of public policy consider not making an order; and the fact that an agency has made a profit where the surrogate has acted in an altruistic basis is a factor to take into account. But, in essence, provided it complies with the relevant legal framework in the jurisdiction in which it is entered into (which obviously on the evidence in this case CSP did) then it is a matter for the court to consider and

look at. But the level of profit is unlikely, in circumstances such as here where it is in compliance with the legal framework in the country that it is entered into be a reason for refusing to make an order, save in the most exceptional case. The reality is there is a legal commercial framework which is driven by supply and demand.

20. Turning now to the well-trodden path laid out by Hedley J as to the relevant considerations in considering whether the court can authorise any payments under section 54(8), the questions the court has to ask are as follows:

    i. Was the sum paid disproportionate to reasonable expenses?
    ii. Were the applicants acting in good faith and without moral taint in their dealings with the surrogate mother?
    iii. Were the applicants' party to any attempt to de-fraud the authorities?

    In relation to the first question whether the sum was disproportionate, as I have said the sums that were paid to the surrogate mother in this case were for expenses reasonably incurred by her. That is confirmed by the analysis of the ledger that has been provided in the papers and it is also confirmed by Miss Roddy in her discussions with the respondent when she said as follows:

    > *"[The respondent] confirmed her understanding that monies paid to her were entirely to reimburse her for costs incurred as a consequence of acting as a surrogate."*

    So this is not a case where one is looking at compensation payments made to the surrogate mother.

21. In relation to the payments that were made to the agency the majority of them were to cover expenses such as medical expenses, insurance expenses, etc. But there clearly was an element of profit probably in the region of about $21,500, although it may be slightly less. The CSP is a commercial organisation and the level of charges it makes is determined by what people are prepared to pay.

22. The only other matter that just needs to be considered under this aspect is that the evidence shows that the applicants, as in many other cases, have maintained their relationship with the respondent. They see that as an important aspect of A and L's future life. The applicants have recently arranged and agreed to pay for the respondent and her daughter to come over to this jurisdiction this summer to be able to visit both the applicants and the children. I obviously need to consider whether that is caught in any way by section 54(8). I am satisfied in the circumstances of this case that it is not. That view is endorsed by Ms Roddy in her enquiries. She says as follows at paragraph 35:

    > *"It is my view that [the applicants] wish to demonstrate their appreciation to [the respondent] and are in the fortunate financial position to meet the travel and other costs to enable their children to know their surrogate mother. [The applicants] are clearly intelligent men who have been legally advised. If there was some kind of sinister bribe to [the respondent] in relation to the making of this order I doubt they would have been so open in disclosing the upcoming trip."*

    Therefore I am satisfied, as was Ms Roddy, that that trip is not caught by section 54(8).

23. The next matter the court has to consider is whether the applicants have acted in good faith and without moral taint, and whether they were party to any attempt to defraud the authorities. All the evidence in this case confirms that they have acted entirely in good faith, there has been no suggestion that they have sought to defraud the authorities. They made an application for a pre-birth order in the court in Sacramento. They applied for appropriate immigration clearance and arrangements to return to this jurisdiction. They have sought legal advice to make this application and have been entirely transparent and open from the outset. As Miss Roddy observes, there was nothing in her enquiries that caused any concern in relation to the good faith of the applicants.

24. Having considered all the evidence in this case, I am entirely satisfied that the sum paid to CSP was not so disproportionate to expenses, the applicants have acted in good faith and the court should authorise that element of the payments that were made to the agency that are not referable to expenses reasonably incurred which is the sum of about $21,500.

25. So the section 54 criteria are met. As to the welfare considerations the court is guided by section 1 ACA 2002 and the considerations set out in s 1 (4). The court has the enormous benefit of an extremely thorough report from Ms Roddy, which provides an extremely helpful and thorough analysis of the considerations for the court. She has met with the applicants and A and L, not only at court on 27th March but on 17th April when she went to visit them at home. She has undertaken a detailed analysis of the welfare checklist in paragraph 36 of her report, which I agree with. She concludes with this observation:

> *"I have had the privilege of visiting this family and observing the tenderness with which [the applicants] care for their much loved children, having gone to some lengths to overcome many obstacles towards achieving their dream of becoming parents. The children have earned themselves a place within the wider family who I am told readily accepted their arrival. It is planned that they will continue to have some level of contact with [the respondent] which will assist their understanding of her role in their lives. [The respondent] is accepting of [the applicants'] right to make any decisions about continued contact."*

In my judgement each of these children's welfare needs will be met by a parental order being made. Only that order will secure the lifelong welfare needs of each of these children, by securing their relationship with each of the applicants in a way that will provide them with long term security and stability.

26. For those very brief reasons, the welfare of each of these children demands that the parental order is made and that is the order that I make.
