X (Children), Re

2011 WL 5903077

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Case Nos: EU11P00024

EU11P00023

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

RHYL DISTRICT REGISTRY

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 06/12/2011

Before:

SIR NICHOLAS WALL, THE PRESIDENT OF THE FAMILY DIVISION

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In the matter of X and Y (Children)

And in the matter of Section 54 of the Human Fertilisation and Embryology Act 2008

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Alexandra Hewitt (instructed by J W Hughes & Co) for the Applicants

Gwynneth Knowles QC (instructed by Humphrys and Co Solicitors) for the Children

Hearing dates: 27 October 2011

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Judgment Approved by the court

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.

SIR NICHOLAS WALL, THE PRESIDENT OF THE FAMILY DIVISION

This judgment is being handed down in private on 6 December 2011. 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

Sir Nicholas Wall P:

1. On 27 October 2011, I made parental orders under section 54(1) of the Human Fertilisation and Embryology Act 2008 (the Act) in relation to two children, whom I propose to identify only as X and Y. X is a boy, and Y is a girl. Each was born within a few days of the other. Each is now a little over one year old. The orders provide that the two children are to be treated in law as the children of the applicants for the orders, whom I propose to identify only as Mr and Mrs A. I reserved the reasons for my decision, which I now give.

2. I am making this judgment public for three reasons. Firstly, I regard the subject matter (international surrogacy) as one of considerable public importance. Secondly, I wish to endorse the position taken by (amongst others) Hedley J. who has given several judgments in the field; and, thirdly, I would like publicly to acknowledge the considerable assistance which I received from counsel both for the applicants and for the children themselves. Their diligent, sensible and cooperative approach enabled the case, including the oral evidence of Mr and Mrs A. to be concluded comfortably within two hours. It was a model of presentation, and they will recognise much of what follows as being their work.

3. I have taken the opportunity to anonymise the case because it is, in my judgment imperative in the interests of the children that nothing should be published which in any way identifies either of the children or Mr. and Mrs A. For the same reason I have anonymised the other participants in the history, to which I will now turn.

The facts

4. Mrs A is 47 years old. Her husband, Mr. A is 41. The couple's relationship began in about 2002 and they married in October 2008. Both have children from previous relationships: Mr A has three children who live with their mother and Mrs A has two daughters from a previous marriage.

5. X was born in a hospital in New Delhi in India. His surrogate mother is C, an Indian woman married to D. X has lived with and been cared for by Mr and Mrs A since he was three days old. His biological father is Mr A and his biological mother is an anonymous egg donor. His legal parents at his birth were C and D.

6. Y was born at the same hospital. Her surrogate mother is E, an Indian woman married to, although separated from, F. Y has lived with and been cared for by Mr and Mrs A since the day after she was born. Her biological father is Mr A and her biological mother is the same anonymous egg donor. Her legal parent at birth was E. X and Y are, however, full biological siblings.

7. Prior to 2010, Mr and Mrs A spent five years unsuccessfully trying to have their own child, a process which has involved surgery for Mrs A and fertility treatment at a number of clinics. In 2007 Mrs A had an operation on her uterus and her fallopian tubes and in 2008 the couple underwent two cycles of IVF treatment at an English Fertility Centre. In 2009 they had six cycles of IVF treatment using donor eggs at an Institute in Barcelona. Following the failure of donor egg IVF treatment, the couple were advised by the Institute in Spain to explore surrogacy in India as this appeared to be their only remaining option to have a child.

8. Mr and Mrs A explored surrogacy via a British agency but in 2009 both COTS and Surrogacy UK stated on their websites that they could not consider couples for the next three years as there was a shortage of surrogates in the United Kingdom (the UK). Mr and Mrs A considered surrogacy in the United States, Georgia and the Ukraine but eventually decided to use a fertility clinic in India. The specialist there, Dr S, had worked at reputable fertility clinics in the UK and was a member of the British Fertility Association. Mrs A states that they also chose India for cost reasons and because they were assured by the Indian clinic that the surrogate mothers would have excellent ante-natal care.

9. Mr and Mrs A first contacted Dr S in September 2009. Her company (the company) is based at the main maternity hospital in New Delhi. The company operated from a clinic in the hospital. The company was responsible for finding the surrogate mothers who had to be women who had already given birth to a living child and who had been screened for a variety of conditions such as hepatitis and HIV.

10. Mr and Mrs A were advised to use two surrogate mothers to increase the chances of a successful birth, and in January 2010 they travelled to India. On that trip they met both surrogate mothers, and D, the husband of C. I was told that Mr and Mrs A did not consult solicitors in the UK about the legal implications of an international surrogacy arrangement before flying to India though they were aware of some of the legal difficulties they might encounter.

11. E worked as a maid earning 9,000 rupees a month. She had two children. She was married to F in 1993 but he deserted her in 2000 and she had had no contact with him since that date. Her affidavit in the proceedings states that she considered herself to be legally single as she had waited for him for seven years and because their marriage had never been registered. C worked as a housekeeper and her husband D as a waiter, earning 11,000 rupees a month. They had a son.

12. Following completion of the surrogacy agreements, Mr and Mrs A returned to the UK. In February

2010 they learned that both surrogate mothers were pregnant. Both surrogates were provided with accommodation by the company during pregnancy: E lived in a maternity home with her two children and C and D lived in a flat. Both C and E required hospital care during their pregnancies.

The Surrogacy Documents

13. The company's lawyer drew up the contract for the surrogacy arrangements. The contract had two parts: the main part concerned the surrogacy arrangement and a subsidiary document detailed the financial terms. Both surrogate mothers and D also signed documents renouncing all legal rights with respect to any child born via this arrangement.

14. The main surrogacy contract contained, inter alia, provisions that the Mr and Mrs A were to have the care of the children from birth onwards; that each surrogate mother would surrender any claim over the child born to her; that the surrogate mothers would keep the contents of the agreement secret; and that they would submit themselves to the medical direction of the Clinic. Mr and Mrs A were to meet all the medical costs associated with the surrogacy arrangement as advised by the Clinic.

15. The financial agreement between Mr and Mrs A and each surrogate provides for a payment of 200,000 rupees in compensation payable in instalments: 15,000 on embryo transfer; 10,000 on confirmation of pregnancy and for every month of the pregnancy; the balance remaining to be handed over on birth and handing over the child. The monthly maintenance was said to cover all genuine expenses associated with the pregnancy and Mr and Mrs A were to pay all medical expenses and medication costs. The agreement states that the clinic was not a party to or responsible for the financial agreement between the surrogates and Mr and Mrs A.

16. The main surrogacy agreement was signed by Mr and Mrs A and E in January 2010. Both parties had the implications of their agreement explained to them by Dr S. The financial agreement between Mr and Mrs A and E is in my bundle. In addition E signed a declaration of intent in 2010 promising to renounce custody and any parental rights over a surrogate child in favour of Mr and Mrs A.

17. The main surrogacy agreement was also signed by Mr and Mrs A and C and D in January 2010. Once again, all parties had the implications of their agreement explained to them by Dr S. The financial agreement between Mr and Mrs A and C and D is also in my bundle. C also signed a declaration of intent in similar terms to that signed by E. D also swore an affidavit confirming his agreement to the surrogacy arrangement, renouncing any legal rights in respect of any surrogate child, and promising confidentiality.

18. Following the births of the two children, Mr and Mrs A took over their care as had been agreed. Both births were registered. Mrs A stayed with both children in India when Mr A returned to the UK.

19. In October 2010 E signed a declaration confirming Y's birth and relinquishing all legal rights in respect of her in favour of Mr and Mrs A. On the same day she also signed an affidavit explaining the status of her marriage. She also signed a document headed "Consent Form/No Objection" which stated that she had delivered a female child who had been handed over to Mr and Mrs A; that she had received the full financial consideration; consented to the child being removed from India; and had no complaints about the surrogacy process. C also signed a "Consent Form/No Objection" in the same terms as that signed by E, confirming X's birth

20. Following consultation with English specialist solicitors, Mr and Mrs A made citizenship applications for X and Y to the British High Commission in New Delhi, in accordance with Guidance issued by the UK Border Agency. That Guidance is in my papers.

21. The process of obtaining British citizenship for the children and exit visas from India was complex. The authorities in India interviewed the couple with the children and also interviewed the surrogate mothers and D. However, the Home Office issued certificates of registration as British citizens to X and Y and the children were issued with British passports. They then travelled to the United Kingdom with Mr and Mrs A. The UK Border Agency has provided information to the Court via the EX660 process. It confirms that, had the surrogate mothers both been single, the children would have had an automatic claim to British citizenship.

The parental order applications

22. These were issued on 18 January 2011 and on 16 February 2011 the local Family Proceedings Court (FPC) appointed a Parental Order Reporter and transferred the proceedings to the County

Court. On 16 March 2011 the late His Honour Judge Farmer QC sitting as a Deputy High Court Judge gave directions for the parties to file and serve full narrative statements and gave permission for an expert in Indian law to be instructed to advise on the validity of the surrogacy arrangements under Indian law, the status of E's husband, and validity of the Indian birth certificates. On 7 June 2011 His Honour Judge Gareth Jones approved an amendment to Form A101A (the form for registering the consent of a surrogate to the making of a parental order) and gave further directions, listing the matter before Mr Justice Wood on 21 June 2011.

23. The order of Wood J. gave detailed directions to prepare the matter for final hearing on 27 October 2011, in particular for Mr and Mrs A to obtain, if possible, the formal consent of C, D and E to the making of parental orders. This, I am satisfied has been done.

Payments made to C, D and E

24. Mrs A's statement provides a breakdown of the monies paid to the Indian clinic: a total of 2,090,196 rupees of which 1,423,196 was for medical care and 667,000 was for non-medical expenses such as legal fees and "compensation for surrogate, coordinator and donor if applicable". The total sum was, I was told, at today's exchange rates, £27,405.22.

25. Mrs A's statement makes it clear that all the monies due to the surrogate mothers were paid direct to the clinic by Mr and Mrs A. The clinic is said to have taken responsibility for making the payments to the surrogates. Mr and Mrs A were not supplied with details about how their money was spent by the clinic and have had to attempt to clarify this with the clinic during the course of these proceedings

26. Dr S provided via email on 1 July 2011 a breakdown of the costs relating to the care of the surrogate mothers. Routine costs were said to be 110,000 rupees [£1,442.24] which included not only routine medication in pregnancy but also money for the surrogate to pay for rent, utilities, food and childcare. Extra expenses were incurred for unforeseen medical events such as infections necessitating hospital admissions.

27. Dr S was also asked to provide a breakdown as to how the non-medical expenses of 667,000 rupees were spent. By email dated 5 July 2011 Dr S indicated that 460,000 rupees represented compensation for the surrogates with the remainder being spent on co-ordinator charges, donor charges, travelling and rent. The precise amount received by each surrogate remains unclear but it is assumed that C and D received 230,000 rupees and E received 230,000 rupees, equating to £3,015.60. In a telephone call to Mr and Mrs A's solicitor on 5 July 2011, Dr S described this sum as compensation to each of the surrogates for loss of earnings over 13 months. This sum is also referred to as compensation for loss of wages in Dr S's email of 1 July 2011.

28. The sum of 230,000 rupees described as compensation purportedly given to each surrogate differed from the sum of 30,000 rupees provided by the A's lawyer. He had told Mr and Mrs A that each surrogate had been given 200,000 rupees which comprised the compensation of 30,000 plus sums also spent on medicine, clothing, accommodation and hygiene products. The Indian Company told Mr and Mrs A that 200,000 rupees was the standard sum paid to surrogates. It thus remains unclear precisely what sums the surrogate mothers actually received and what the monies paid to them actually covered.

The law

29. Section 54 of the Act defines the matters about which the court must be satisfied in order to grant a parental order. They are :

(a) that the relevant child has been commissioned as a result of either partial or total surrogacy and using the gametes of at least one of the commissioning parents [s.54 (1)];

(b) the applicants should be over the age of 18 and either husband and wife, civil partners, or persons living as partners in an enduring family relationship and not within prohibited degrees of relationship to each other [s.54(5) and s.54(2)];

(c) the application for a parental order must be made within six months beginning with the day on which the child is born [s.54(3)];

(d) at the time of the application and the making of the order the child's home must be with the applicants and either or both applicants must be domiciled in the United Kingdom or in the Channel Islands or in he Isle of Man [s.54(4)];

(e) the woman who carried the child and any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43) have freely and with full understanding of what is involved agreed unconditionally to the making of the order [s.54 (6)];

(f) and, unless authorized by the Court, that no money or other benefit (other than for reasonably incurred expenses) has been given or received by either of the applicants for or in consideration of (i) the making of the order, (ii) any agreement required by s.54 (6), (iii) the handing over of the child to the applicants, and (iv) the making of arrangements with a view to the making of the order.

30. The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 apply various parts of the Adoption and Children Act 2002 to applications for parental orders, the most significant of which is that section 1 of the Adoption and Children Act 2002 now applies to all such applications. This means that the child's welfare throughout its life is the Court's paramount consideration when considering whether or not to make a parental order.

31. Part 13 of the Family Procedure Rules applies to parental order proceedings under the Act. The manner in which the duties of the parental order reporter are to be exercised are also set out in Part 7 of Practice Direction 16A (The Representation of Children) which I need not reproduce.

The argument

32. I heard oral evidence from both Mr. and Mrs. A. Each struck me as entirely genuine and straightforward people. The critical issues arising in the case thus seem to me to be; (1) whether the payments made by Mr and Mrs A fall foul of the provisions of s.54 (8) of the Act; (2) whether retrospective authorisation of any payments is required; and (3) whether the paramountcy of the child's welfare is engaged in decisions concerning the retrospective authorisation of payments. I am entirely satisfied on the evidence that the remaining sub-sections of section 54 are satisfied, and need not spend time on them.

33. The position of Mr and Mrs A, in summary, was that it was likely that the surrogate mothers and D did receive payment for their services; that the payments received went beyond 'reasonable expenses' and so did not comply with the provisions of s.54 (8) of the Act. It was however argued that nonetheless both Mr and Mrs A were acting in good faith, with no attempt to defraud the authorities; and that the payments were not so disproportionate that the granting of parental orders would be an affront to public policy.

34. It was further submitted on behalf of Mr and Mrs A that the effect of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI/2010/985) was to apply section 1 of the Adoption and Children Act 2002 to all applications for parental orders. Thus, pursuant to section 1(2) of the Adoption and Children Act 2002, the paramount consideration of the court when considering whether or not to make a parental order must be the child's welfare throughout his life.

35. It was pointed out that at paragraph [20] of his judgment in Re X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam), [2009] 1 FLR 733 (Re X and Y), (a case decided under the previous legislation) Hedley J did consider welfare from the perspective of the 2002 Act but held that welfare considerations were important but not paramount:

"Given the permanent nature of the order under s.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 s.30 (7), welfare considerations cannot be paramount but, of course, are important".

36. It was also pointed out that in Re L (A Minor) [2010] EWHC 3146, Hedley J referred to the significant change in the new Act relating to the welfare test, in that welfare is no longer the court's first consideration but becomes its paramount consideration. Hedley J emphasised in Re L, 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 (Parental Order) [2009] EWHC 2977(Fam), [2010] 1 FLR 1156. that is, the simple payment for effectively buying children overseas.

37. It was submitted on behalf of the Applicants that X and Y's welfare was paramount and that the lifelong welfare of the children required the making of parental orders. It was, however, also accepted

that such an order could only be made if the court authorised payments pursuant to section 54(8) of the Act.

The argument for the children

38. For the children, it was accepted that the payments made to the surrogate mothers contained an element of profit and/or financial reward and were thus not reasonable expenses. Nevertheless, it was submitted that these payments should be retrospectively authorized by the Court and that the children's welfare throughout their lives required the making of parental orders in favour of the Applicants.

39. For the children it was thus accepted that the Regulations applied section 1 of the Adoption and Children Act 2002 with the consequence that X's and Y's welfare throughout their lives was the paramount consideration when making parental orders. Thus whilst it was not easy to establish precisely what sums the surrogates and D actually received and what those sums were for, it was submitted that the important public policy consideration was to examine the sums of money involved together with the element of financial gain in the context of both the surrogate mothers' own personal circumstances and the economic circumstances in the country where the agreement was forged. This comparative exercise, it was argued, was a vital part of the court's assessment and went to the heart of Hedley J's second public policy consideration, namely whether the surrogacy arrangement was the mere purchase of a child from overseas. The payments, it was argued, were not of such magnitude to overbear the wills of the surrogates, and the court was thus invited to exercise its discretion to make parental orders in favour of Mr and Mrs A.

Discussion

40. As will be apparent, I accepted the arguments advanced on behalf of Mr and Mrs. A and the children, and made parental orders as asked. 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. I was, have to say, particularly struck by a passage in paragraph 24 of his judgment in X and Y which seems to me to remain relevant, notwithstanding the change in the law. I propose to set it out in full: -

"I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (ie the child concerned) that rigour must be mitigated by an application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order. Bracewell J's decision in Re AW (Adoption Application) [1993] 1 FLR 909 is but a vivid illustration of the problem. If public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing of a section 30 application. In relation to adoption this has been substantially addressed by rules surrounding the bringing of the child into this country and by the provision of the Adoption with a Foreign Element Regulations 2005. The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement. It is, of course, not for the court to suggest how (or even whether) action should be taken. I merely feel constrained to point out the problem."

41. Happily, in the instant case, no such difficulty arises. Mr and Ms A are entirely genuine, the terms of the section are met, the payments are not in my judgment disproportionate, and it is plainly in the interests of these two children that they should be brought up by Mr and Mrs A as their parents. These, accordingly were the reasons why, on 27 October 2011 I make the orders sought.

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