

## Articles

# International Surrogacy: Payments, Public Policy and Media Hype

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The international surrogacy case of *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [2011] 1 FLR (forthcoming) attracted front page national headlines in December 2010. It was heralded as a landmark judgment on surrogacy, fuelling debate about payments, public policy, welfare of children and family life. The facts of this case and the reasons why it hit the headlines are compelling, in what remains a complex and cutting-edge area of law and practice. Hedley J's reasons for publishing the *Re L* judgment were twofold. First, the Human Fertilisation and Embryology Act 2008 ('the 2008 Act') had replaced the Human Fertilisation and Embryology Act 1990 ('the 1990 Act') and this introduced policy changes in relation to international surrogacy applications; and secondly there were still practical issues that were causing difficulties which he felt merited wider publication.

The purpose of the judgment was therefore not to rehearse or examine the facts of the case in detail, but to tackle the intersection of public policy against commercial surrogacy in the UK and the welfare of surrogate born children following recent changes in surrogacy law. Media interest in the *Re L* judgment catapulted the issue of payments and the treatment of foreign surrogacy arrangements into the media spotlight and brought into focus the limitations of existing law and the motivations of those prepared to cross borders to set up surrogacy arrangements in ways that would not be lawful in the UK.

### Re L: The Facts

The intended parents entered into a commercial surrogacy arrangement with a

surrogate in Illinois, US, which led to the birth of a child known only as 'L'. While Hedley J acknowledged that the agreement was entered into perfectly lawfully in Illinois, it would have been unlawful for an arrangement of this type to have been set up on a professional basis in the UK due to restrictions on the commercial arrangement of surrogacy. Hedley J stressed that the parents in *Re L* were 'most careful and conscientious' and that they, like others, were still receiving incorrect information about the prospects of surrogacy in the UK. Hedley J explained that although in *Re L* the child gained entry into the UK by being granted temporary entry clearance which accompanied the US passport, 'it remains essential for each commissioning couple to acquaint themselves with their immigration position before committing themselves to a surrogacy agreement'.

### Payments

Having satisfied himself that the parents in *Re L* met the requirements of s 54 (1)-(7) of the 2008 Act, Hedley J authorised the payment they made to their surrogate mother under s 54(8). This followed previous decisions in the context of the 1990 Act in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733 and *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156. Hedley J had previously begun to grapple with the tension between payments and public policy in both *Re X and Y* and *Re S*, acknowledging that this was a difficult task which involved irreconcilable principles. *Re X and Y* was the first case to test the English court's approach to foreign commercial surrogacy arrangements and authorised a commercial sum of £23,000

paid to a Ukrainian surrogate mother. Hedley J refined his approach in *Re S*, directing that the court should be astute to ensure that:

- commercial surrogacy arrangements are not used to circumvent childcare laws in the UK and that people are not approved as parents who would not otherwise have been approved by other means;
- the court is not involved in situations which look like the 'simple payment for effectively buying children overseas'; and
- sums paid which might look modest are not in reality so significant that they 'overbear the will of a surrogate'.

In explaining the reason why the payment to the surrogate mother required authorisation in *Re L* Hedley J stated that:

'The reason is simple; no payments other than reasonable expenses are lawful here where no such restriction applies in Illinois. It is clear to me that payments in excess of reasonable expenses were made in this case.'

Hedley J went on to say that:

'"Reasonable expenses" remains a somewhat opaque concept. The approach that I have adopted is to treat any payment described as "compensation" (or some similar word) as prima facie being a payment that goes beyond reasonable expenses. It is necessary to emphasise (as comparisons between the USA and Western India graphically illustrate) that no guidance can be gained from "conventional" capital sums or conventional quantum of expenses. Each case must be scrutinised on its own facts.'

Hedley J concluded in *Re L* that in making the welfare of the child the court's 'paramount consideration' rather than its 'first' consideration Parliament had kept in mind the collective jurisprudence under the 1990 Act. It was significant that s 54 of the 2008 Act mirrored s 30 of the 1990 Act save that it widened the pool of people eligible to apply for a parental order (ie to include unmarried and same-sex couples where previously only married couples could apply).

Notwithstanding the elevation of the welfare of the child to the paramount consideration, the court should continue to carefully scrutinise any application for authorisation to police the commercial surrogacy prohibition and the specific matters highlighted in *Re S*. His message was unequivocal: the *Re L* judgment did not open floodgates giving intended parents the right to pay large commercial sums to foreign surrogate mothers. Such sums would continue to be vetted and require court authorisation.

#### The Welfare Test

*Re L* was the first case to apply the 2010 Parental Order Regulations (SI 2010/986) which effectively imported into s 54 of the 2008 Act the provisions of s 1 of the Adoption and Children Act 2002. Whereas previously, as applied in *Re X and Y* and *Re S*, the welfare of the child was the court's first consideration, the change brought in by the 2010 Regulations elevated the welfare of the child to the paramount consideration of the court. Hedley J concluded in *Re L* that this change effectively weighted the balance between public policy considerations (which banned commercial surrogacy) and welfare decisively in favour of the child's welfare. He added that: '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.'

This does of course bring into question what the 'clearest case of abuse of public policy' represents in practice and what legal arrangements the court should put into place if it were to withhold the grant of a parental order. In the absence of a parental order the surrogate mother (and if married her husband) remain legally and financially responsible for the child and the intended parents lack legal autonomy for their child (to whom they are biologically connected and have gone to great lengths to conceive). A parental order, the legal solution for surrogacy, is likely to be the best outcome for the child (in the absence of adoption which is problematic in a surrogacy context). If withheld it could prejudice the child as a result of the 'sins' of the parents.

This is inevitably likely to bring into greater focus existing public policy and

regulation of surrogacy. Existing law and public policy was put in place to prevent commercial surrogacy, to outlaw binding and enforceable surrogacy contracts, to ban advertising by prospective surrogates or intended parents and to limit as far as possible surrogacy to limited numbers of people involving friends or family. The advent of more arms length arrangements, not for profit surrogacy agencies and international surrogacy increasingly challenges this system and places it at odds with more liberal foreign systems of surrogacy law and practice.

### Re-Entry and Immigration

Hedley J also gave a clear message in *Re L* that intended parents need to familiarise themselves with the immigration and re-entry requirements into the UK before they enter into an international surrogacy arrangement. The immigration position is typically the first legal hurdle that intended parents are faced with from an English law perspective after the birth of a surrogate child. The acquisition of British citizenship

or temporary entry clearance for babies born to foreign surrogate mothers or temporary travel clearance can be a minefield for the unwitting as the intended parents found in *Re X and Y* when their twin babies were born stateless and parentless in the Ukraine.

Surrogacy law and immigration law and practice are not entirely joined up and it can involve a difficult and complex process to obtain the right passport or travel clearance. This can mean that intended parents and their surrogate born babies have to contend with a long wait in their foreign destination country and risk their baby being marooned abroad. These inherent risks can put immense strain on intended parents and leave surrogate born babies legally vulnerable before the rigours of a complex parental order application are even begun.

### Case Management

Court rules prescribe that any application for a parental order must be issued in the family proceedings court. Non-contentious

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domestic parental order applications are typically dealt with by magistrates and with intended parents acting in person. However, parental order applications with an international element or a question over payments require assessment by a higher court given the public policy considerations and the cross-border issues involved. Hedley J directed in *Re L* that legal advisers dealing with any international parental order application should consider lateral transfer to the Inner London Family Proceedings Court which has specialist expertise and has links with specialist expertise in Cafcass when appointing a parental order reporter.

Hedley J further addressed his mind in *Re L* as to whether international parental order applications continued to warrant assessment and determination by the High Court given the elevation of the child's welfare to the paramount consideration of the court. He concluded that as this remains an emerging area of law all such applications should be transferred to the High Court for at least the next 12 months.

### Media Spotlight

The unprecedented media interest in *Re L* was perhaps not surprising. Surrogacy has increasingly featured in the media following the birth of Sarah Jessica Parker's surrogate born twins in the US, growing interest in emerging foreign surrogacy destinations and the apparent globalisation of the surrogacy market. (The news about Elton John's surrogate son hit the media a few weeks after the publication of the *Re L* judgment). The greater visibility of surrogacy increasingly strains existing surrogacy laws which were put in place over 20 years ago to restrict and regulate

surrogacy and which were never geared up to tackle the demands of the modern world. *Re L* is a further catalyst, marking a legal watershed in that for the first time public policy banning commercial payments has effectively been downgraded in the face of the now paramount welfare test. This has raised concern in some quarters about the risk of 'baby buying' and exploitation of surrogate mothers and has called into question the motivations of those entering into surrogacy arrangements. In response to the intense media coverage of the *Re L* case, the intended parents issued a statement saying:

'We entered into this surrogacy arrangement after a great deal of thought and research, having exhausted all our other options for having a family, and following years of fertility treatment and several miscarriages. Our surrogate is a wonderful person who is now very firmly part of our family and will be part of our, and our child's, lives going forwards. She gave us the most incredible life-changing gift which we will be ever grateful for.'

### The Future

Surrogacy law and practice is complex. It involves people's own biological children and it cannot be likened to adoption. It remains inherently sensitive in that it raises questions about payments, public policy, right to family life and it creates new forms of family structures. However, whatever the challenges faced by the courts in applying public policy, what *Re L* has established is that the welfare of the child is now, quite rightly, the most important consideration of the court.