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Re C (A Child) [2013]

[2013] EWHC 2413 (Fam)

05/05/2013

Barristers
Sam King KC

Court
High Court (Family Division)

Practice Areas
Private Children Law

Summary
High Court application for parental order – Russian surrogacy arrangement – consideration of s.54 HFEA 2008 criteria including s.54(8) concerning payments.

Facts
Application for a parental order in relation to C, a child conceived through IVF in Russia with the sperm of the 1st applicant, eggs from an anonymous Russian donor and carried by a married Russian surrogate.

Following a history of unsuccessful IVF treatments and three failed attempts at surrogacy, the applicants entered into a successful surrogacy arrangement in Russia, through the auspices of an organisation which was both law firm and matching agency. The surrogate was a married woman, thus making both she and her husband respondents.

The applicants cared for C from birth in Russia and applied for a British passport for her without disclosing the surrogacy (believing that the surrogate's marital status would be a bar to success). They subsequently received legal advice and made full disclosure, following which C was given British citizenship and the family returned to the UK.

The matter came before Mrs Justice Theis who had the benefit of expert Russian legal advice which confirmed that, under Russian law, the applicants, not the respondents were treated as C's legal parents, they having been registered on his birth certificate with the consent of the 1st Respondent.

In considering the application, Theis J first went through the criteria set out in S54 (1-5) HFEA 2008′ namely that:

– the gametes of one of the applicants (the 1st) were used to create the embryo,

– the application had been made within 6 months of birth,

– C had been in the care of and had his home with the applicants at the time of the application and both applicants were domiciled in England and Wales,

– the applicants were both over 18

She then considered the issues of consent required by s.54(6) and s.54(7) HFEA 2008, forming the view that, although the form upon which the consent of both the surrogate and her husband was given was not that stipulated, it was, in fact, more detailed and did fulfil the procedural requirements of Rule 13 of the Family Proceedings Rules 2010. The document had been appropriately translated and notarised and, following further evidence that the respondents had fully understood the document, the court was satisfied both that the consents were valid and that (in the case of the 1st Respondent) had been given in the proper time frame of more than 6 weeks after the birth.

Theis J then considered the question of whether or not the payments made in this case fell foul of the requirements of s.54(8) HFEA 2008 and the manner in which the court should exercise its discretion in respect thereof. She noted that the court was unaware of any previous case involving Russia and that there were therefore no comparators.

In respect of the sum paid to the agency (a total of €50,000 of which about half went to the agency itself) having had expert advice that under Russian law, payments to surrogates were not regulated and that the amount paid to the surrogate did not appear to be unusually high – and was indeed less – than payments made in similar contexts and, having formed the view that there was no evidence that the will of the respondents had been" "overborne" by the offer of payment, she was satisfied that the payments made were not "so disproportionate as to …affront public policy".

As to the issue of whether the applicants had acted in "good faith and without moral taint", she bore in mind Hedley J's observations in *Re X and Y* for the court to "be astute" not to be involved in " buying children overseas". In this case, all the evidence pointed towards proper steps having been taken by the applicants and of there being no suggestion of bad faith or moral taint.

In relation to whether or not there had been any attempt to defraud the authorities, Theis J considered the applicants' failure to provide information on their first attempt to obtain British citizenship for C within the context of their having been, at that time, the recipients of out dated advice (to the effect that the surrogate had to be unmarried). Having then obtained updated advice that, since 2009, discretion had been available and had been used relatively routinely in foreign surrogacy cases involving a married surrogate, they had immediately made the proper application, which had been successful.

Held

Taking into account the enquiries made by the Court Reporter, all the evidence pointed towards the applicants being committed parents who had endured a "long and difficult journey" and, whilst their initial actions were clearly wrong, her Ladyship was satisfied that this was a case where the court should exercise its discretion and authorise the payments made.

Finally,in relation to the issue of welfare, without a parental order, C's life would remain in a "legal vacuum". His welfare required that he have the lifelong security that could only be achieved by the making of the parental order.

Permission

Family Law Week