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RE G & M (2014)

[2014] EWHC 1561 (Fam)

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Barristers
Private: Hassan Khan

Court
Family Division

Practice Areas
Private Children Law

Summary
In an application for a parental order relating to children born through a commercial surrogacy arrangement in the United States, the court emphasised the critical importance of prospective parents obtaining expert advice in both jurisdictions from a very early stage to protect themselves from being in breach of the Adoption and Children Act 2002 s.83 when the children were returned to the domestic jurisdiction. The Department of Health would be well advised to consider whether surrogacy was intended to be caught by s.83.

Facts
The applicants (B and D) applied for a parental order concerning twins born as a result of a commercial surrogacy arrangement with an agency based in the United States.

B and D were a same sex male couple whose domicile of origin was France. They had entered into the surrogacy arrangement in 2012. Each had a biological connection with one twin. The babies had been conceived using two donor eggs, which had been transferred into a married surrogate mother (M). She gave birth in Iowa in March 2013. A few months before the birth, B and D decided to move to the United Kingdom on the ground that it provided a less discriminatory environment for a same sex partnership to bring up a family. They sold their French home and moved to the UK in January 2013. They retained a holiday property and an investment property in France. In April 2013, in accordance with Iowa law and the terms of the surrogacy contract, the following procedure took place over a period of three weeks: M signed a "release of custody" surrendering care of the twins to a named advocate, who agreed to act as custodian. DNA tests established that B and D were the biological fathers, one of each twin. Their names were entered on the birth certificate of the twin whom they had fathered. The parent-child relationship between M and the twins was terminated, and a decree of adoption was ordered so that B and D could have equal parental rights over each twin. The issues were (i) the effect of the Adoption and Children Act 2002 s.83, which regulated the entry into the UK of children adopted abroad; (ii) whether the criteria in the Human Fertilisation and Embryology Act 2008 s.54 were met; (iii) whether the children's welfare needs were met.

Held

(1) The policy considerations underpinning the 2002 Act were very important. It was open to debate whether those considerations applied in a surrogacy context. In reality, B and D had had little option but to follow the legal process in Iowa. It was clearly in the children's interests that B and D each secured his legal position regarding both children. Furthermore, the surrogacy arrangement required them to do so, and to extinguish M's legal relationship and responsibilities. The problem with having diligently undertaken the steps required in Iowa was that B and D had left themselves open to potentially being in breach of s.83, which prohibited a person habitually resident in Britain from bringing into the UK a child adopted under an external adoption. It was important to highlight that fact. Intended parents who were about to embark on surrogate arrangements in the US were advised to take advice in the early stages so as to avoid such a breach. The Department of Health needed to be alerted to the problem so that it could consider whether s.83 was intended to apply to surrogacy arrangements. In the instant case, while B and D were potentially in breach, they had, for the purposes of the instant application, acted in good faith, acted promptly and ensured that all information requested by the court had been made available (see paras 7, 19-22, 39 of judgment). (2) All of the s.54 criteria could be shortly and plainly established except for matters relating to payment and domicile. The agency's fixed fee was $20,750, in addition to payments for specific items of expenditure. M had also been paid almost $39,000. Those levels of payment were not significantly different to payments which had been approved in other cases and were to be authorised (paras 24-40). The issue of domicile was a question of fact, which turned on whether residence had been taken up and whether there was an intention to live in the UK permanently and indefinitely. It was relevant that the move was recent, but that had to be considered in the context of all the other factors; the court did not need to be satisfied that the move to the UK was irrevocable, Z v C (Parental Order: Domicile) [2011] EWHC 3181 (Fam), [2012] 2 F.L.R. 797 applied. B and D both had long term, permanent employment in the UK; they had UK bank accounts and paid tax and national insurance in the jurisdiction. They had registered the children at bilingual schools and had cogent societal reasons for abandoning their domiciles of origin. The s.54 criteria were met (paras 41-52). (3) Each child's lifelong welfare needs could only be met by their legal relationship with B and D being on the securest footing possible. That could only be achieved by the grant of a parental order (paras 53-55).

Application granted

Permission

Lawtel