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Re F & M (Children) (Thai Surrogacy) (Enduring family relationship)

[2016] EWHC 1594 (Fam)

12/01/2016

Barristers
Dorothea Gartland KC

Court
Family Division

Practice Areas
Private Children Law
Application for parental orders in respect of twins born conceived by way of IVF subsequent to a commercial surrogacy agreement entered into between the applicants (a British couple) and the respondent birth mother (a Thai national).

The matter concerned the application for parental orders in respect of twins born on 13 January 2015 conceived by way of IVF subsequent to a commercial surrogacy agreement entered into between the applicants (a British couple) and the respondent birth mother (a Thai national).

On 29 May 2015 the applicants filed their application for parental orders. On 23 June 2015 the court appointed a Parental Order Reporter (POR) and the matter came before the court for a final hearing on 12 January 2016.

In determining whether to grant the parental orders to the applicants the court, three particular issues required some consideration:

(1) Whether the applicants were in an 'enduring relationship';

(2) The status and legality of the agreement entered into in Thailand; and

(3) The financial payments made in Thailand to the surrogate and clinic.

Whether the applicants were in an 'enduring relationship' (s.54(2) HFEA 2008)
The court reviewed existing authorities (Re Z [2015] EWFC 73, Re X [2015] 1 FLR 349), guidance arising from the ACA 2002 (which also includes, as a definition of a 'couple', those who are 'in an enduring relationship' s.144(4)) and the Hansard Debates accompanying the drafting and enactment of the HFEA 2008. The court concluded that "it is clear, therefore, that parliament intended that this court is to decide whether a relationship is, or is not, an enduring family relationship" (para 29). It is accordingly a

question to be determined at the court's discretion, on the facts specific to the case.

Relevant to this case was the following:

the applicants had both previously been in relationships that ended as a result (in part) of their respective partners not wanting children;
prior to meeting B, P had already entered into a surrogacy agreement with the respondent;
B and P met in April 2014, cohabited from June 2014, continued to cohabit since and plan to marry in August 2017;
the applicants had together supported each other through the surrogacy process, traveled together to Thailand, and supported each other through the court proceedings;
they were bringing the children up together.
Moreover the Court noted the observations of the POR who wrote that "it would certainly appear that P and B are in a loving relationship; for example they related to each other in an emotionally attuned, affectionate way." (Para 31).

The court concluded, being mindful that Parliament "pointedly and specifically decided not to define an enduring relationship in terms of its longevity", concluded that on the facts, P and B were a couple for the purposes of s.54(2) (para 32).

The status and legality of the commercial surrogacy agreement
At the time of the surrogacy agreement and the birth of the twins, there was no governing legislation in force in Thailand in respect of commercial surrogacy agreements. In July 2015 the Protection of the children born by Assisted Reproductive Technology Act (ART Act) came into force in Thailand, under which commercial surrogacy in Thailand was forbidden and punishable by up to ten years' imprisonment. The court obtained the legal opinion from a Thai lawyer who reported that in the two cases decided under s.56 of the ART Act (providing for children born by surrogacy prior to the Act coming into force), parental rights had been granted, and on one occasion to a single man. In her opinion, the Thai courts would interpret s.56 broadly and not limit it to heterosexual married couples.

Mrs Justice Russell held that "there was no reason for this court to conclude that the applicants entered into the agreement with the surrogate and the Thai agencies or clinic in anything other than good faith as the agreement was lawful in Thai law at the relevant time." (Para 12).

The financial payments to the surrogate and clinic in Thailand
Under s.54(8) 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 (a) the making of the order; (b) any agreement required by subsection (6); (c) the handing over of the child to the applicants; or (d) the making of arrangements with a view to the making of the order, unless authorised by the court.

The court noted that a number of payments were made by the applicants in this case but accepted that they had used their best endeavours to try and provide as much information as possible concerning those payments made to the Clinic and to the respondent. The court noted that the courts have previously authorised payments where far less evidence had been available (A&B and X&Y and C&D [2015] EWHC 2080).

Whilst the court has a duty to 'scrutinise applications for authorisation under section 54(8) with a view to policing the public policy matters…' (Re L (a child) [2010] EWHC 1738 (Fam) at 12), it should only refuse a parental order in the 'clearest case of the abuse of public policy'. The court considered the various

payments made, to include compensation for the respondent's loss of earnings, money for vitamins and medicines and a small gift, and concluded that the sums were not so great so as to have 'suborned the respondent's will' (para 44). The various sums were accordingly authorised by the court.

Having satisfied herself that the remaining criteria of s.54 were met, Russell J held that it was it in the children's best interests now and for the rest of their lives for the parental orders to be made, and necessary that the orders be made to give legal effect and recognition to the children's identities.

To read the judgment, click here.

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