Neutral Citation Number: [2022] EWFC 120

Case No: ZC22P00119

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2022

Before:

MRS JUSTICE THEIS

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Between:

Y and Z	**Applicants**
- and -	
V	**1st Respondent**
- and -	
W and X	
(By their children's guardian)	**2nd and 3rd Respondent**

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Mr Andrew Powell (instructed by **Laytons**) for the **Applicants**
1st Respondent did not attend
Ms Maria Stanley (**Cafcass Legal**) for the **2nd and 3rd Respondent**

Hearing date: 29th September 2022
Judgment: 13th October 2022

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Approved Judgment

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MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. The court is concerned with an application for a parental order in relation to two children, W and X, age 2 years. The applicants, Y and Z, are a same sex couple who currently live with the children in Thailand. Y is a British Citizen currently working there and Z is an Indonesian national. The respondents to the application are the gestational surrogate, V, and the children, W and X, who were joined as parties to the application.

2. The issues in the case are whether some of the criteria in section 54 Human Fertilisation and Embryology Act 2008 (HFEA 2008), which enable the court to make a parental order, are met. In particular:

    (i) Has Y has retained his domicile of origin (s54(4)(b))?

    (ii) Has V given consent to the court making a parental order in accordance with s54 (6) and (7)?

    (iii) Whether further steps should be taken to locate V's husband (s54 (6) and (7)) or conclude he did not consent to the embryo transfer with the result his consent is not required.

    (iv) Whether the court should authorise any payments made other than for expenses reasonably incurred (s54(8)).

    (v) Whether there are there any public policy reasons why the order should not be made.

3. The court is very grateful to both Mr Powell and his instructing solicitor, Mr Spearman, who have acted pro bono for the applicants in this case. Their excellent written documents have provided clear analysis of the issues the court is being asked to determine. The court has also benefitted from the expertise of Ms Stanley, Cafcass Legal, who represents W and X. At an early stage in the proceedings she provided a comprehensive document setting out the issues in the case, both legal and factual.

4. Before turning to the details of this case it is important to highlight, once again, that before embarking on a surrogacy arrangement (particularly one that involves arrangements in other jurisdictions) intended parents should have a clear understanding about what is required to secure their legal position in relation to any child born as a result of such an arrangement. To do otherwise leaves the future of the much longed for child at risk, in particular of not being able to secure the lifelong legal parental relationship between the intended parents and the child in the jurisdiction where they wish to live. By failing to take these steps prior to a surrogacy arrangement takes considerable risks in relation to any child born as a result of such an arrangement, and could be said to be an abdication of responsibility intended parents have towards that child.

Relevant background

5. Y met Z when he went to work in Thailand. They entered into a civil partnership on 15 July 2013 and converted this to a marriage on 30 December 2019. They wished to have a family of their own through surrogacy and began making enquiries about this in 2017, initially in the UK but due to the delays they were informed would occur here they decided to look abroad. In their initial statement they state *'There exists an incredible number of agencies online who all claim to undertake surrogacy in various countries regardless of the intended parents sexual orientation and despite the laws that may exist within a country. We naively thought some of these were acceptable options'.*

6. They initially entered into an arrangement organised by an agent in Thailand, with an egg donor based in Cambodia and the embryo transfer with a Thai surrogate taking place in Cambodia. The resulting pregnancy was lost at six weeks. The agent suggested moving the embryos to Kenya which the applicants did not support and they no longer continued working with that agent.

7. The applicants were put in contact with another agent who had set up Global Star Consultancy, based in India but works with agencies around the world. This agent suggested Georgia. The applicants describe in their statements that they did not appreciate any problems there, they were aware other same sex couples had been there, had not encountered any issues and understood it was being approached from the perspective of what they describe as *'hidden acceptance'.* Following their own researches they were aware surrogacy was permitted in Georgia, however it was not an option as a same sex couple although there was no requirement to prove that you were married. They understood a number of same sex couples had undertaken surrogacy arrangements there, they describe in their first statement they were aware of the difficulties but were driven by an *'overwhelming desire to be parents'.* Later in their statement stating *'We had researched the US but the cost was out of our reach and Canada had a long waiting list and was also expensive. We knew our only option of ever being parents was to undertake surrogacy in a country where we were possibly not following all of the regulations. Georgia seemed like the safest option…'.*

8. The initial agreement they signed with the agency was for $30,000 and involved transporting their embryos from Cambodia to Georgia. Following two unsuccessful embryo transfers to a surrogate in Georgia the agency informed them that further IVF was required to create better quality embryos. Due to the increasing costs the agency also suggested they changed to the Guaranteed Pregnancy Programme which cost $40,000, which they did in July 2019. Through the agency the applicants selected a new surrogate, V, and two embryos were transferred to her in November 2019 and a twin pregnancy confirmed. Due to Covid restrictions the applicants did not travel to Georgia to meet V and attend scans, as they had planned.

9. The applicants state they had been informed by the agency prior to the embryo transfer that V was single, had one child and had undertaken a previous surrogacy. The applicants subsequently found out, after the children were born that V married on 6 June 2019 and was divorced on 17 February 2020.

10. W and X were born premature and required neonatal intensive care. The applicants report that specialist care cost them an additional £20,000, which they had to borrow. W and X were discharged from hospital in July 2020.

11. Due to the Covid restrictions there were difficulties in Y travelling to Georgia. They report they were advised by the agency to say that Y's girlfriend had given birth to the children to assist gaining entry, which they did. Having given a contradictory account to the British embassy and providing a correct account they were refused entry to Georgia.

12. The applicants sought some specialist legal advice in this jurisdiction. As a result, Y was able to travel to Georgia and following Y having a two-week quarantine period collected the children from hospital, then age eight weeks. Y remained in Georgia with the children until October 2020, the children were issued with Georgian passports in September 2020. Z joined Y and the children in Germany in October 2020 and in November 2020 they all flew to Thailand.

13. Whilst British passports were initially refused, following DNA test results British passports were issued for the children in December 2020.

14. Y had contact with V when he was in Georgia. On 21 July 2020 V signed the document, which was notarised, consenting to this court making a parental order. On the same day the sum of $5,000 was paid to V by the applicants, Y recalls giving the money to their agent who paid V. This was for the signing of the birth certificate which the agreement detailed was not included in the initial financial package agreed to.

15. In addition, V asked the applicants to pay $1,000 for her to complete relevant documentation to obtain Georgian passports in September 2020, which was paid by the applicants with an additional sum for $10 for travel expenses.

16. During the discussions with the agency after the children's birth the applicants set out they were informed for the first time that the agency had not registered V as a surrogate with the relevant authorities in Georgia.

17. Since leaving Georgia the applicants have had no direct contact with V, either directly or via the agency. When they have sought to engage with the agency about serving these proceedings they had no response. Following Mr Spearman being instructed in June 2022 steps were taken to locate V on social media, as well as her husband. Contact was made with V via this route.

18. A detailed translated letter dated 29 July 2022 was sent to V on 5 August 2022 from Mr Spearman informing V of these proceedings, the hearing date and setting out the legal implications if a parental order was made. V was asked to sign the C52. V received the letter and in her response raised concerns about endangerment to her and her family if she provided any further details regarding her husband. V states her husband was unaware of the surrogacy arrangement and they had separated at the time of the embryo transfer.

19. At the direction of the court, further enquiries were made with the surrogacy agency regarding the circumstances of the sum of $5,000 being paid on the same day as the consent was signed. The response from Ms B from the agency is that payment accorded with the surrogacy arrangement as being a payment for birth registration. On the same day, following the instructions from the agency, V and Y registered the children's births and they signed a power of attorney document which enabled the children to leave Georgia.

20. Due to delays in the application for the children's British passports the applicants decided to obtain Georgian passports for the children to enable them to travel. That was done in September 2020 with the assistance of V and the agency.

21. The parental order applications were made in December 2021, directions were made on paper and hearings took place on 29 March 2022, 4 May 2022 and 29 September 2022.

22. V has been notified of these proceedings, although she has not signed and returned the C52 Acknowledgement of Service. In email exchanges between V and the applicants' solicitor V has refused to do so without a further payment to her. V has clearly had notice of the proceedings and is aware of the hearing. In those circumstances, I do not consider there should be any further delay to await completion and return of the C52.

Section 54 criteria

23. There is no issue on the evidence that there is a biological connection between one of the applicants, Y, and the children (s54 (1)) and the applicants are married (s54(2)).

24. Mr Powell raises an issue in his skeleton argument relating to the applicants' status. The applicants originally entered into a civil partnership in July 2013, which was converted into a marriage in December 2019. S 54(2) refers to 'husband and wife' and the HFEA 2008 was not amended by the Marriage (Same Sex Couple) Act 2013 under Schedule 3, Part 1 which considers the interpretation of existing legislation in England and Wales. It states:

(1) In existing England and Wales legislation—

(a) a reference to marriage is to be read as including a reference to marriage of a same sex couple;

(b) a reference to a married couple is to be read as including a reference to a married same sex couple; and

(c) a reference to a person who is married is to be read as including a reference to a person who is married to a person of the same sex.

25. Mr Powell submits the court should 'read down' s 54(2) to ensure that it is compatible with the applicants EHCR Article 8 and 14 rights. It could not have been the intention of Parliament, when enacting the 2013 Act to exclude a same sex couple where the term 'husband and wife' is used, which must infer a marriage. Section 3 Human Rights Act 1998 requires, so far as it is possible, for primary legislation to be read and be given effect to in a way which is compatible with Convention rights. Lord Nicholls in *Ghaidan v Godin-Mendoza [2004] 2 AC 557* stated at paragraph 32

'Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation."

26. Having considered the terms of s54 (2), the relevant provisions in the Marriage (Same Sex Couple) Act 2013 and the need to protect the applicants Article 8 and 14 rights, and the Article 8 rights of the children s 54(2) should be read down to include a same sex marriage.

27. The requirement for the application to be issued within six months of the children's birth (s54(3)) was considered in *Re X (A Child)(Surrogacy: Time Limit) [2014] EWHC 3135*. That case made clear the court could, depending on the circumstances of each case, permit an application after the six month period had expired. It is clear from the background to this case that included the applicants managing the health difficulties caused by the premature birth of the children, the difficulties encountered in managing the travel restrictions in 2020, the pandemic restrictions that continued in 2021 and the demands on the applicants in caring for W and X all contributed to the delays in the application for a parental order being made. If the application is not able to proceed that is likely to impact the children's welfare, as any other orders do not give the lifelong security a parental order provides. It is unlikely Parliament would have intended that outcome. Proceeding with the application does not have an adverse impact on any third party, yet if it doesn't proceed it will have a significant impact on the children's best interests, denying them the opportunity to benefit from an order that provides lifelong legal security to the legal relationship with those who care for them. In the circumstances of this case, I am satisfied the application should be permitted to proceed.

28. There is no issue W and X had their home with the applicants at the time the application was issued and when the court is considering whether to make a parental order (s54(4)(a)).

29. It is submitted the requirement for at least one of the applicants to have their domicile in this jurisdiction (s54(4)(b)) is met, as Y has retained his domicile of origin in this jurisdiction, despite having worked abroad for a number of years. That is based on the fact that the periods Y has spent abroad have been solely related to work, his current contract ends in July 2023 when the plan is for the family to live in this jurisdiction, where Y retains very close family connections. Y has retained his British citizenship and has not acquired any other nationality or other right to remain in Thailand. He retains an interest in a property in this jurisdiction and continues to pay national insurance contributions here. The strength of his family connections here is demonstrated by the description in the Parental Order Reporters report of the visit to see the applicants and the children, who were staying with Y's sister. The report underpins what Y states about those strong connections he retains here and how he regards this jurisdiction as his permanent home. Having considered the factors set out in *Z v C (Parental Order: Domicile) [2011] EWHC 3181 (Fam)* at [13], I am satisfied Y's domicile of origin is retained.

30. Both applicants are over the age of 18 years (s54(5)).

31. Turning to the issue of consent (s54 (6) and (7)), there are two aspects to this in this case.

32. First, the position of V's husband. Section 54(6) requires his consent to be given unless it can be shown he did not consent to the placing in V of the embryo, pursuant to section 35(1) HFEA 2008. Mr Powell submits the court can make that inference from the information the court has. He submits it appears V was not truthful in her account to

the surrogacy agency about her marital status, in those circumstances it is likely V's husband did not consent as he was unaware of the surrogacy arrangement. This is what V has stated in an email to the applicants' solicitor in August 2022, and is supported by the email from the Ms B, the agency co-ordinator in Georgia to Y in June 2022 when she stated *'I'm so sorry to inform you that [V] has caused so many problems not only [for] you but to agency too. First of all she lied to us that she was single, only after she got pregnant we found out she was officially married, agency representatives have never met her husband'.* Alternatively, it is submitted that in the circumstances of this case, no further steps can be taken to locate V's husband. V has refused to provide any further information, other than the limited information regarding his name. V refers in her responses to both she and her family being in danger if any other steps are taken. In their most recent statement, the applicants set out the steps they have taken to try and contact people via social media with the name of V's husband, only two have responded stating that they did not know V.

33. I have been referred to the cases in similar circumstances in adoption, where the birth mother refuses to provide details of the child's father. This issue has most recently been considered in *Re A, B and C (Adoption: notification of fathers and relatives) [2020] EWCA Civ 41.* Jackson LJ emphasised that each case needed to be considered on its own facts, requiring the court to strike a fair balance between the competing interests of each the birth parents and most importantly, the child.

34. Having considered the evidence including the steps that have been taken to date, V's position about refusing to provide any further information for the reasons she gives, I am satisfied that no further steps can be taken to locate or contact V's husband and the children's welfare requires the order to be made, if it can. As a consequence, V's husband *'cannot be found'* in accordance with s 54(7) and as a result his consent is not required.

35. Second, V's consent. V's written signed notarised consent was given on 21 July 2020 that accords with form A101A, the provisions in s54 (6) and rule 13.11 (4)(a) Family Procedure Rules 2010 which requires any written consent executed abroad to be notarised. The evidence demonstrates that on the same day as the consent was given Y provided $5,000 to V. In their statement the applicants set out that this sum was provided at the time of the signing of the birth certificates, which was on the same day as V signed the consent. Y states he gave this sum to Ms B, to give to V. Although there is no separate statement from Ms B, her email dated 29 July 2022 states *'[Y] gave me 5000 cash when we collected him at airport and this was given to [V] outside the BC office after signing the BC as per the contract. Then she signed the parental order at the notary, she knew that additional amount was only for the birth certificate, and she hasn't take any money for the signing parental order'.* It is correct that the agreement entered into between the applicants and the agency sets out matters not included in the fees that were agreed, listing them as *'services not included in the package'* and listed below that heading is *'payment to surrogate for signing on birth certificate $5,000 USD'.*

36. Having considered the evidence I am satisfied that the payment of $5,000 to V did not relate to the issue of consent. It was provided in accordance with the agreement for a separate matter not related to consent. That is supported by what Y's sets out in his statement, the account given by Ms B and the terms of the agreement between Y and the agency dated 10 July 2019.

37. The final criteria under s54 relates to the question of payments (s54(8)). The court is required to be satisfied that no payments have been received or made by the applicants (other than for expenses reasonably incurred) 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 the arrangements with a view to the making of the order

    unless authorised by the court.

38. The payments made in accordance with the agreement can be summarised as follows:

    (i) Payments to the agency totalling $35,500: $8,500 paid to the clinic for the egg donor/IVF procedure and $27,000 to the hospital for the ICU care.

    (ii) Payments to the agency totalling $35,500: $21,500 was paid to V via the agency and the balance related to agency fees/hospital costs.

    (iii) Payments to V totalling $6,010: $5,000 on 21 July 2020 for signing the birth certificate, $1,000 in September 2020 relating to signing passport applicant and $10 travel expenses related to that.

39. Section 54 (8) enables the court to authorise any expenses that do not relate to expenses reasonably incurred. The approach the courts take in considering this issue was set out by Hedley J in *Re X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)* namely:

    (i) Was the sum paid disproportionate to reasonable expenses?

    (ii) Were the applicants acting in good faith and without 'moral taint' in their dealings with the surrogate mother?

    (iii) Were the applicants' party to any attempt to defraud the authorities?

40. In *Re WT* [2014] EWHC 1303 (Fam) at [35] I summarised the position as follows:

"When considering whether to authorise the payments made in this case the relevant principles are firmly established by the cases, starting with Re X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam) *[2009] 2WLR 1274 (paragraph 19 and 20) and the cases that have followed (in particular Re S (Parental Order) [2009] EWHC 2977 (Fam), Re L (Commercial surrogacy)* [2010] EWHC 3146 (Fam), *[2011] 2WLR 1006 Re IJ (Foreign Surrogacy Agreement Parental Order)* [2011] EWHC 921 (Fam) *[2011] 2FLR 646 and Re X and Y (Parental Order: retrospective authorisation of payments)* [2011] EWHC 3147 (Fam)

(1) the question whether a sum paid is disproportionate to "reasonable expenses" is a question of fact in each case. What the court will be considering is whether the sum is so low that it may unfairly exploit the surrogate mother, or so high that it may place undue pressure on her with the risk, in either scenario, that it may overbear her free

will;

(2) the principles underpinning section 54 (8), which must be respected by the court, is that it is contrary to public policy to sanction excessive payments that effectively amount to buying children from overseas.

(3) however, as a result of the changes brought about by the Human Fertilisation and Embryology (Parental Orders) Regulations 2010, the decision whether to authorise payments retrospectively is a decision relating to a parental order and in making that decision, the court must regard the child's welfare as the paramount consideration.

(4) as a consequence it is difficult to imagine a set of circumstances in which, by the time an application for a parental order comes to court, the welfare of any child, particularly a foreign child, would not be gravely compromised by a refusal to make the order: As a result: "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 support its making", per Hedley J in Re L (Commercial Surrogacy) [2010] EWHC 3146 (Fam), [2011] 2WLR 1006, at paragraph 10.

(5) where the applicants for a parental order are acting in good faith and without 'moral taint' in their dealings with the surrogate mother, with no attempt to defraud the authorities, and the payments are not so disproportionate that the granting of parental orders would be an affront to public policy, it will ordinarily be appropriate for the court to exercise its discretion to give retrospective authorisation, having regard to the paramountcy of the child's lifelong welfare.

41. In *A, B and C (UK Surrogacy expenses)* [2016] EWFC 33, Russell J observed at [28] and [29]

"28. It remains necessary for the court to consider matters of public policy set out above in considering whether to exercise the power of authorisation under s54(8) HFEA 2008, but the court should only refuse a parental order in the "clearest case of the abuse of public policy". The approach developed by Hedley J has subsequently been endorsed by Theis J in A v P [2011] EWHC 1738 (Fam) *and by Sir Nicholas Wall, the President of the Family Division, in Re X (children)* [2011] EWHC 3147 (Fam).

29. The need for the court to consider issues of public policy extends to welfare and to ensure that commercial surrogacy agreements are not used to circumvent childcare laws in this country, resulting in the approval of arrangements in favour of people who would not have been approved as parents on welfare grounds under any set of existing law such as adoption. To paraphrase Hedley J, the court must be careful not to be involved in anything that looks like a payment for buying. Such arrangements have been ruled out by Parliament and the court cannot be party to any arrangements which effectively allow them."

42. Dealing with the issue of payments other than for expenses reasonably incurred it is clear the arrangement in this case involved such payments, which require authorisation. Save for the payment of $1,010 for the passport application the payments were made in

accordance with the agreement between Y and the agency, or were listed in that agreement as not being included in the package price. The payment relating to the passport application was not referred to in the agreement, was paid in September at the time the passport application was signed and did not relate to any of the matters set out in s54(8). The children were already in Y's care, the Georgian passport application was made due to the delays in the application for a British passport and were to enable Y and the children to travel to join Z and return to Thailand. Whilst it may be said the applicants' good faith may be open to question as they were aware when they entered into the arrangement that Georgia did not permit same sex surrogacy arrangements they have candidly set out that they relied in good faith on what they were told by the agency and from the experience of other same sex couples who have undergone surrogacy arrangements there. In addition, the applicants accept their judgment was clouded by their desire to become parents and the difficulties they had encountered to do that. It is also right that the account the applicants gave in support of their initial application was incorrect, however they took steps to correct the position and British passports for the children were granted.

43. Ms Stanley raises the issue about public policy, having regard to the applicants entering into a surrogacy arrangement in a jurisdiction that did not permit same sex surrogacy arrangements. The authorities make it clear that a parental order should only be refused in the *'clearest case of the abuse of public policy' (*see *Re L (a minor) [2010] EWHC 3146* per Hedley J [10]).

44. The court does have a number of concerns in this case about the way the applicants acted. Whilst fully understanding the situation they were in wanting to fulfil their wish to become parents and the difficulties they had experienced in being able to achieve that, it does not mean that understandable wish can be pursued irrespective of the consequences for any children born as a result of such an arrangement. The applicants have admitted that their judgment was clouded, that they were aware of the restrictions about parties to a surrogacy arrangement in Georgia but say they relied upon what they were informed by the agency they used. Whilst that may be an explanation of why they did what they did it does not absolve them of responsibility. It needs to be understood that situations such as in this case can result in the court refusing to make a parental order.

45. In this case having considered the wider evidence, the steps the applicants have taken both in relation to correcting the information in support of the children's British passport application, making this application, seeking to contact V and complying with the directions made in this case I am satisfied that the actions of the applicants do not amount to a '*clearest case of the abuse of public policy'.* The element of the payments made that do not relate to expenses reasonably incurred should be authorised (s54(8)).

Welfare

46. The s 54 criteria having been met the court needs to consider whether the children's lifelong welfare needs will be met by making a parental order.

47. The detailed report by the experienced Parental Order Reporter, Ms Julian, provides a comprehensive and perceptive analysis of the children's welfare needs. As part of her enquiries she met the applicants and children whilst they were staying with Y's sister. That gave Ms Julian a valuable insight to the wider family support and she concludes

her report with making a clear recommendation for a parental order to be made, if the court is satisfied the s54 criteria are met. Ms Julian observed she is *'left in no doubt now how, loved, wanted and well cared for [W and X] are by the applicants and believe this should continue'.*

48. The s 54 criteria are met and I am satisfied that each child's lifelong welfare needs can only be met with parental orders being made. Only those orders will ensure the legal parental relationship is secure between the children and Y and Z which will give each child the lifelong security and stability their welfare requires.