Case No: IL14P00020

Neutral Citation Number: [2015] EWFC 22 (Fam)

IN THE FAMILY COURT
Sitting at Canterbury Combined Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2015

Before:

MRS JUSTICE THEIS

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Between:

	R	**1st Applicant**
	- and -	
	S	**2nd Applicant**
	- and -	
	T	**Respondent**

- -
- -

Ms Ruth Cabeza (instructed by **Rollingsons Solicitors**) for the **Applicants**
Ms Penny Logan of **Cafcass Legal as Advocate to the Court**

Hearing dates: 5th March 2015

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Judgment **Mrs Justice Theis DBE:**

Introduction

1. This is an application for parental orders concerning twins now 18 months old. They were born following a surrogacy arrangement entered into by the applicants in Ukraine. The final hearing has been delayed for two main reasons:

(1) Difficulties in getting information to establish whether the respondent surrogate mother can be served with the application.

(2) Obtaining information from the clinic to establish the location of the surrogate mother and what payments were made to her.

2. This case provides another example of the difficulties that can be incurred if specialist legal advice is not taken before entering into a foreign surrogacy arrangement. It highlights, once again, the need for the commissioning parents to:

(1) Establish what the financial arrangements are with the surrogate mother.

(2) Meet the surrogate mother, establish clear lines of communication with her and ensure that she (and her husband, if she is married) is aware of the requirement for her to give consent to the making of a parental order more than six weeks after the birth of the child.

(3) Promptly make the application for a parental order (even if at the time of the application the applicants and the child have not yet returned to this jurisdiction) and ensure arrangements are in place for the surrogate mother to be served with the application and acknowledgement of service and, if required, arrangements are in place for translation and interpretation. The surrogate mother should also have access to independent legal advice, both in relation to the giving of consent and the application for a parental order.

3. A feature of this case is that the agreement between the applicants and the clinic in Ukraine involved an 'all inclusive package'. There was one payment made under an agreement which did not limit the number of embryo transfers and covered all aspects of the arrangement as provided for in the agreement. In this case the first embryo transfer was successful; it resulted in the birth of the children who are the subject of this application.

4. A consequence of this type of agreement is that it was not possible to establish whether the eggs used were donor or the surrogate mother's eggs. Further, there is a lack of clarity about the payments made to the surrogate mother. The part of the agreement

between the applicants and the surrogate mother that should set out the payments has no specific sums inserted, either in the section dealing with monthly payments or compensation. Due to the more recent position taken by the clinic in refusing to respond to further enquiries, it has not been possible to obtain any more information. This has meant, once again, the court is left in a position of having to consider the application without the full background.

5. The court is very grateful for the assistance provided by Ms Logan from Cafcass Legal who agreed to act as Advocate to the Court to address issues concerning service on the surrogate mother, the consent she had given and the uncertainty regarding payments made to her.

Relevant Background

6. The applicants, who are now in their early sixties, have been married for 38 years. They spent many years trying to conceive a child of their own. When the female applicant was in her early forties, over twenty years ago, they had IVF treatment as the procedures had become more widely available at that time. Following a number of IVF procedures, both here and abroad, they were advised to consider surrogacy.

7. After extensive research they decided in 2012 they would enter into an arrangement with a surrogacy clinic in Ukraine called Renaissance Inc. Commercial surrogacy is permitted in Ukraine. Renaissance provided an all inclusive package for a cost of EUR 26,000. In fact the applicants paid EUR 31,000 as an additional EUR 5000 was due in the event of a twin pregnancy. The joint agreement between the applicants and the surrogate mother prepared by BioTexCom is a subsidiary agreement governing the relationship between the parties. On the second page of that agreement there is no obligation on the applicants to make any payments to the surrogate mother; the sections that set out the payment are left blank. The contract between the applicants and Renaissance included all payments to the surrogate, medical costs and legal assistance with regard to obtaining birth certificates and passports for the children, as well as accommodation costs for the applicants whilst they were in Ukraine. In addition, the agreement provided that the clinic would carry any risks, at no additional cost to the applicants, of a failed surrogacy arrangement.

8. The children were born at around the time of a period of civil unrest in Ukraine started. The applicants were in Ukraine at the time of the birth, but their exit with the children was delayed for some 6 months before they were able to return here.

9. On 1 October 2013, more than six weeks after the birth of the children, the respondent surrogate mother signed a declaration which confirmed her understanding that she did not have parental rights for the children and that parental rights belonged to the applicants. She agreed to the children being brought to the UK by the applicants and for them to be naturalised as British Citizens. Before returning to the UK with the children, the applicants obtained the written consent of the respondent to the making of a parental order in a notarised consent dated 7 February 2014.

10. Since then, despite attempts to locate the respondent, there has been no contact with her.

11. The applicants have met the surrogate mother twice. The female applicant describes in her statement meeting her at the 15 week scan appointment. They met with an interpreter and she reports a discussion with her about her family; she has two children and seemed proud of them. She reported some sickness during the pregnancy which had passed. In her statement the female applicant continues *'[the surrogate] looked fresh and bright and did not appear tired at all. I then asked if everything was okay with Renaissance Inc. the Respondent replied by saying yes and that she was being looked after very well by them'.* The male applicant reports meeting the surrogate mother once when he went to collect the children from hospital, they shared the same transport and he and the children were dropped off first. He said there was no interpreter so was not able to communicate with her other than by hand gestures which he said *'informed me she was well'.* She helped take the children into the applicants flat.

12. The application for a parental order was issued on 10 February 2014. The applicants have taken the following steps to try and serve the respondent:

    (i) By sending sealed copies of the application, an acknowledgement of service form and a request for the surrogate to complete and return the document, with confirmation that the documents had been translated and explained. This was sent to the address the applicants had been given for the surrogate mother by the clinic. The letter with its enclosures was subsequently returned to the applicants' solicitor marked 'non reclame' on the envelope.

(ii) They have contacted their client manager at the clinic to ask whether they could assist in translating and explaining the documents to the surrogate mother. The clinic responded, by email, that the respondent was 'not available any more'. When the female applicant followed this up with a telephone call to the clinic she was informed the surrogate mother had returned to Russia and her whereabouts were not known.

(iii) The applicants' solicitor also contacted the clinic to ask for details of the circumstances under which the statements given by the surrogate mother on 7 February 2014 were made, in particular whether it was explained to her the meaning of a parental order and whether she had received independent legal advice. The clinic refused to give them any information on the grounds of Ukrainian data protection legislation. Subsequent legal advice has confirmed that the clinic is entitled to take that position in the absence of express consent from the surrogate mother to disclose personal data.

(iv) Following further directions from this court steps have been taken to visit the surrogate mother's last known address. The detailed report within the papers confirms she no longer lives there. The current occupant of the flat said she had not lived there for three years and the surrogate mother was only registered there on a temporary basis for the purposes of her social benefit payments. No further information as to her whereabouts could be obtained from her neighbours.

13. The applicants invite the court to dispense with the need for the respondent to be served, as they submit they have taken reasonable steps to try and locate her. The evidence demonstrates that the only other method left to seek to contact her would be by way of notification in the media to try and locate where she is.

Legal Framework

14. Part 13 of the Family Procedure Rules 2010 (FPR 2010) requires the respondent to be served with the application for a parental order; rule 13.6 provides '*the applicants must, within 14 days before the hearing…serve on the respondents (a) the application;(b) a form for acknowledgement of service; and (c) a notice of proceedings'*

15. There is no specific provision that gives the court power to dispense with service of the application on the respondent, however I am satisfied that the court has power to do so. There are general powers in rule 13.9 (1) (f) where the court can give directions about tracing the woman who carried the child and service of documents, together with rule 4.1

(3) (o) which provides the court may '*take any further step or make any other order for the purpose of managing the case and furthering the overriding objective'*. The overriding objective is set out in rule 1.1.

16. To make a parental order the court must first consider whether the relevant criteria under section 54 Human Fertilisation and Embryology Act 2008 (HFEA 2008) are satisfied, and, if they are, whether the child's lifelong welfare interests, pursuant to section 1 Adoption and Children Act 2002 (ACA 2002), are met by the court making a parental order.

17. In this case many of the section 54 criteria can be taken quite shortly. The evidence clearly establishes

(i) The children were carried by the surrogate mother following the embryo transfer and the male applicant is their biological father (s 54 (2)).

(ii) The applicants are married (s 54 (2)).

(iii) The application was made within six months of the children's birth (s 54 (3)).

(iv) The children have had their home with the applicants (initially in Ukraine and since early 2014 in this jurisdiction) since shortly after their birth (s54 (4)(a)) and both applicants were born in the UK which remains their domicile of origin (s 54 (4)(b)).

(v) The applicants are over 18 years (s 54 (5)).

18. The two areas under section 54 that require more detailed consideration concern the surrogate mother's consent to the making of a parental order (s54 (6) and (7)) and payments made other than for expenses reasonably incurred (s 54 (8)).

Consent

19. Section 54 provides that the surrogate mother should have *'freely, and with full understanding of what is involved, agreed unconditionally to the making of the order'* and that consent should be given more than six weeks after the birth of the child (s 54 (6) and

(7)).

20. There are two documents relied upon by the applicants to establish this requirement is met.

21. First the document signed by the surrogate mother on 1 October 2013, over six weeks after the children's birth. The document was signed in Ukrainian and subsequently translated. That document confirms that the applicants are the 'biological parents' of the children; that they were registered as the parents in accordance with the family code of Ukraine; that she has no parental rights regarding the children; that the parental rights should belong to the applicants; that she did not object to the children leaving Ukraine and residing abroad. Lastly, she authorised the children being 'naturalized in the Great Britain'. This document was witnessed by a notary public who verified the deponent's identity and her signature. There is no specific mention in this document of parental orders, or of unconditional consent to such orders with a full understanding of their meaning and significance.

22. The second set of documents comprises two statements in Ukrainian dated 7 February 2014 headed 'Agreement to the making of the parental order in respect of my child'; there is one statement for each child. These documents do refer explicitly to the surrogate's agreement to the making of a parental order being given 'unconditionally and with full understanding' of what is involved to the making of a parental order. The documents refer to the fact that the signatory could withdraw her agreement at any time prior to the making of the order. Both documents are signed and witnessed by a notary who confirms the respondent's identity and signature.

23. In their evidence the applicants' state that their understanding is these documents were completed at the clinic and their client manager was the facilitator and translator of the documents. The male applicant in his statement states *'[the client manager at the clinic] also explained to the respondent the effects of the court granting a parental order [in favour of the applicants]'*.

24. All these documents are witnessed in accordance with r 13.11 (4) (a) FPR 2010 for a form of agreement executed outside the UK.

25. The application for a parental order was issued after these documents were completed and, for the reasons set out above, has not been served on the surrogate mother.

26. Whilst these two sets of documents, particularly the latter ones, are, as Ms Logan acting as Advocate to the Court submits, 'strongly indicative' of the surrogate mother's consent, the court needs to consider whether they satisfy the requirement that consent was given with 'full understanding' as required by s 54 (6).

27. On behalf of the applicants, Ms Cabeza submits that bearing in mind the legal position regarding surrogacy in Ukraine and the surrogate mother's failure to try and find, or reclaim, the children there is no reason to believe that she did not and does not consent to the making of a parental order. However, this can only be on the basis of the court drawing that inference; the surrogate mother has not been served with the application for a parental order and there has been a considerable lapse of time since the consent documents were signed. In addition the information the court has about the circumstances when the February consents were signed is far from clear. For example, did the respondent have access to legal advice? How did the client manager at the clinic explain what the effects of granting a parental order were?

28. I agree with Baker J in *Re D and another (Children)(Parental Order: Foreign Surrogacy) [2012] EWHC 2631 (Fam)* paragraph 25 where he emphasised the importance of consent in surrogacy arrangements. In that case, although there was some evidence of consent by the surrogate mother prior to the expiry of the six weeks, there was no evidence of consent after that period and attempts to locate the surrogate mother had failed. Baker J dispensed with the need for the surrogate mother's consent as the applicants had taken all reasonable steps to locate her. By implication the need to serve the surrogate mother with the application for a parental order was also dispensed with.

29. The situation here is different. On the face of the documents signed by the surrogate mother, in particular the documents signed in February 2014, there is consent given more than six weeks after the children's birth. However, there is limited, if any, information as to the circumstances in which that consent was given; in particular whether she had a 'full understanding' of what was involved in giving that consent. Whilst the position taken by the clinic in not co-operating further with any enquiries made to gain a better understanding

may be justified as a matter of Ukrainian law, it means this court is deprived of having all the relevant information. On an issue as fundamental as consent, in the context of circumstances where what is being sought is to change the status of a child the court, in my judgment, should be very cautious about drawing inferences in circumstances such as this.

30. Although the documents are indicative of the requisite consent having been given, the lack of detail regarding the circumstances of the signing of the documents by the surrogate mother and her understanding, the subsequent unhelpful position taken by the clinic and the fact that it has not been possible to serve the surrogate mother with the application means, in my judgment, the court cannot be satisfied that the surrogate mother has 'freely, and with full understanding of what is involved, agreed unconditionally to the making of a parental order' as required by s 54(6).

31. In those circumstances the court needs to consider whether the surrogate mother 'cannot be found' (s54 (7)) and whether the applicants have taken all reasonable steps to find her. In my judgment they have. The only avenue not explored has been notification through the media. In circumstances such as this where the arrangement concerns a very sensitive subject, it is not known what country the surrogate mother is in and there is continued civil unrest in Ukraine this is not a step, in the circumstances of this case that is reasonable to take.

32. Therefore, I am satisfied that the applicants have taken all reasonable steps and as a result I dispense with the requirement for them to serve the application on the surrogate mother and do not require her agreement under s 54 (6) as she cannot be found (s54 (7)).

Payments

33. As referred to above, this was an all inclusive arrangement, and neither agreement sets out what was payable to the surrogate.

34. Under s 54 (8) the court is required to consider any payments made other than for expenses reasonably incurred *'..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'* (s 54(8).

35. Within the all inclusive payment made to the clinic whilst there were clearly expenses,

such as medical and accommodation costs, there would have been an element of profit; they are a commercial organisation.

36. The clinic has refused to provide any information concerning the payments made to the surrogate mother. The only information the court has is in a document purported to be signed by her on 23 December 2013 which provides that she *'hereby voluntarily state and declare that without any compulsion I have freely chosen to be the surrogate mother for [the applicants]. I also hereby declare that within the whole period of pregnancy...on the monthly basis I was receiving the costs in Ukrainian Hryvnia to cover necessary expenses on clothes and nutrition in the amount equivalent to EUR 200.00...'*. The terms of this document seem to suggest she was receiving payments direct from the applicants, in their statements they have stated this was not the case. Based on this document it appears the surrogate mother received payments totalling EUR 1,800 during the period of the pregnancy.

37. Neither the court nor the applicants have any information as to the circumstances of the surrogate mother, other than the limited contact they had with her as outlined above. The information regarding her address is that it was in a very run down area of Kiev, and she may not have even lived there. The applicants have produced some information giving details of Ukrainian average monthly wages for the period to September 2014. In Ukrainian Hryvnia (UAH) the highest was 3,619 and the lowest 115. At an exchange rate of 1 EUR to 25 UAH this means the surrogate mother received in the region of 5,000 UAH per month during her pregnancy, which on the limited information available is significantly higher than the average national monthly wage.

38. In considering whether the court should exercise its discretion to authorise the payments it is necessary to consider a number of matters: Was the sum paid disproportionate to reasonable expenses? Were the applicants acting in good faith without moral taint? Were the applicants party to any attempt to defraud the authorities?

39. The only other reported case where payments are specified concerning Ukraine is *X and Y [2008] EWHC 3030 (Fam)*; in that case the surrogate mother was paid EUR 230 monthly and a lump sum of EUR 25,000. Clearly that is well in excess of the payments in this case, and raises the spectre here that the payments are at a level to raise a concern as to whether the surrogate mother was a willing participant in this arrangement. Despite the disparity in these figures it appears, on the information the court has, the sums paid were

not disproportionate to reasonable expenses when considered in the context of the information about average wages, together with the evidence provided by the applicants about their dealings with the surrogate mother.

40. The applicants have acted in good faith and have not sought to get round the authorities. In their statement they have provided a detailed background about the circumstances that led up to the decision to engage this clinic, they did so in good faith. They have complied with all directions made by this court concerning the provision of additional information and the enquiries undertaken by the parental order reporter. They have been caught up in a situation that was beyond their control and, with the benefit of hindsight, could have been more straightforward if they had taken specialist legal advice beforehand.

41. Having carefully considered the position I am satisfied the court should authorise the payments made to the clinic and the surrogate mother which were other than for expenses reasonably incurred.

Welfare

42. Turning to welfare the court's paramount consideration is each of the children's lifelong welfare needs. The court has the benefit of the two reports prepared by Mr McGavin, an experienced member of the Cafcass High Court Team. He recommends parental orders are made in relation to both children. He discussed the applicants' health with them and was satisfied by the responses made. The applicants have reported in their written evidence that neither has any health concerns. One of the matters Mr McGavin rightly raises in his report is the need for the applicants to make satisfactory arrangements, in the event that they are unable to care for the children. At the hearing I was informed by Ms Cabeza that those arrangements are in hand, all relevant documents are drafted, the male applicant's niece has agreed to be a testamentary guardian and these arrangements will be implemented once the parental orders are made.

43. It is quite clear that each of these children require the position with their current carers to be secured in a way that provides lifelong security. That will reflect the position in their country of birth, where the applicants are their legal parents. If the parental order is not made the surrogate mother will remain, as a matter of English law, the legal mother of these children in circumstances where there is no realistic prospect of her having any future

role in the children's lives. Their de facto parents are the applicants, their lifelong welfare interests are best served if that reality is reflected in their legal relationship with the applicants. Mr McGavin reports *'When I visited them [the children] appeared content and well cared for babies whose physical and emotional needs are being well met by [the applicants] who are entirely delighted to have them. They are much loved and anticipated children.'*

44. The lifelong welfare needs of each of these children require the court to make parental orders which is the order I shall make.