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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice

Thursday, 12 April 2018

Before:

MR JUSTICE NEWTON

(**In Private**)

IN THE MATTER OF **THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008 (SECTION 54)**

Re ST (A child) (Surrogacy:Iran) [2018] EWHC 3439 (Fam)

REPORTING RESTRICTIONS

MR T. WILSON appeared on behalf of the Applicants.

J U D G M E N T

MR JUSTICE NEWTON:

1 The commissioning applicants apply for a parental order in respect of ST, who was born in Spring 2017 in Iran. This is the final hearing in relation to their application pursuant to s.54.

2 The first applicant, the commissioning father, although born in Canada, moved to the United Kingdom when he was a small child. The second applicant, the commissioning mother, is Iranian. She moved to the United Kingdom in 1985. Both have dual citizenship. The second applicant became a UK citizen in 1998. They both live and work in the United Kingdom .

3 The gestational mother of ST is Iranian and lives in Iran. ST was conceived through a fertility clinic in Tehran by way of embryo transplant using donated sperm from the commissioning father and an anonymous Iranian egg donor. Nothing is known about the egg donor.

4 The gestational mother is a single woman. She, and the commissioning parents are named as ST's parents.

The background facts

5 The applicants met in 2005, and married in 2008. They had a strong wish to start a family, which, following unsuccessful IVF treatment, did not occur. They began the adoption process in the United Kingdom, and were approved as adopters, but they also investigated adopting a child from Iran. For cultural reasons they discovered that was not a possibility.

6 Subsequently they investigated surrogacy in 2015. Iran is one of the very few, if not the only, I think, Islamic country that permits and promotes surrogacy. It is legal to administer fertility treatment, and for a single or married woman to act as a surrogate. Written surrogacy agreements are legal, and enforceable in Iran.

7 Through their enquiries they were introduced to a Fertility Clinic, who in turn introduced them to the potential surrogate. All parties had legal advice and the applicants entered into a "private contract instrument" with the surrogate. That document is, in Iran, an official deed and was notarised at the time of signing. It constitutes a binding surrogacy agreement between the parties providing for the surrogate to carry the child conceived by way of embryo transplant. In turn, the applicants agreed to pay various sums of money to meet her reasonable expenses and medical costs.

8 A successful transfer occurred in Summer 2016, and ST was the happy result, born in Spring 2017. ST moved into the care of the applicants following birth, and has remained with them ever since.

9 Following the birth, a "certificate of birth" was issued. That is not to be confused with a birth certificate, which is a different document. The certificate of birth recorded the name of the hospital in which ST was born and the surrogate's details. The applicants presented this certificate to the Registry of Births in Tehran, together with the notarised surrogacy agreement and other medical documents. Those documents were then forwarded to the Registry at the Ministry of Justice for Iran, who, confirming the validity of the agreement, granted approval for the issue of a birth certificate.

10 That birth certificate was issued shortly after the birth, naming the applicants. Subsequent relevant consents were sought from the Iranian Ministry of Foreign Affairs enabling the commissioning parents to leave Iran with ST. Leave for ST to enter the UK was subsequently granted, and they flew home in the summer of 2017.

11 The surrogate mother has been involved in this application. She was a party to the notarised agreements. She has given the necessary notarised consent and indeed has also spoken most recently to the Reporting Officer.

The legal position in Iran

12 In 2002, the Iranian Parliament passed a law that permitted surrogacy for infertile married couples, that was subsequently approved by Guardian Council and has been fully operative for some 13 years.

13 Iran is one of the few Islamic countries that permits surrogacy, it takes a relatively enlightened attitude towards the donation, for example, of third party eggs. Most Sunni scholars, as opposed to Shiite, being the majority in Iran, take a different view about surrogacy, introducing, as it were, the sperm of a man into the uterus of a woman to whom he is not married. Those difficulties do not arise in this case. Sperm donation in fertility treatment is not permitted.

14 There are debates in the literature which I have seen about the remuneration in Iran to the surrogate. There is no set limit on the money paid to the surrogate, but there is a strong school of thought, as with the law here, that expenses should be limited to the reimbursement of expenses actually incurred.

15 There is no ban on providing infertility services, including surrogacy, which can include foreign commissioning couples. The intended mother is recognised as the child's legal mother and the birth certificate is issued under the names of the intended mother and her husband. The egg donation must not incur a cost. The intended parents must be the same religion as the egg donor. I am told that currently about 2,000 children a year are born via surrogacy in Tehran alone, and that there are over 70 registered fertility clinics.

16 The Clinic engaged by the applicants in this case - is one of two especially prominent fertility centres in Iran. I note that their services involve the medical and psychological screening of surrogates and intended parents, and the clinic helps the parties agree to and prepare a free surrogacy contract, similar to the one which appears in this case.

The legal framework

17 The statutory framework is contained in s.54 of the Human Fertilisation and Embryology Act 2008, originally enacted at s.30 of the Human Fertilisation and Embryology Act 1990. Section 54 provides:

> **"Parental orders**
>
> (1) On an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if—

(a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,

(b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and

(c) the conditions in subsections (2) to (8) are satisfied.

(2) The applicants must be—

(a) husband and wife,

(b) civil partners of each other, or

(c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

(3) Except in a case falling within subsection (11), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born.

(4) At the time of the application and the making of the order—

(a) the child's home must be with the applicants, and

(b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.

(5) At the time of the making of the order both the applicants must have attained the age of 18.

(6) The court must be satisfied that both—

(a) the woman who carried the child, and

(b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43),

have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

(7) Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

(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.

(9) For the purposes of an application under this section—

(a) in relation to England and Wales —

(i) 'the court' means the High Court or the family court, and

(ii) proceedings on the application are to be 'family proceedings' for the purposes of the Children Act 1989,]

(b) in relation to Scotland, 'the court' means the Court of Session or the sheriff court of the sheriffdom within which the child is, and

(c) in relation to Northern Ireland, 'the court' means the High Court or any county court .

(10) Subsection (1)(a) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.

(11) An application which—

(a) relates to a child born before the coming into force of this section, and

(b) is made by two persons who, throughout the period applicable under subsection (2) of section 30 of the 1990 Act, were not eligible to apply for an order under that section in relation to the child as husband and wife,

may be made within the period of six months beginning with the day on which this section comes into force."

18 The significance of a parental order to ST, the commissioning parents, as well as the surrogate mother, is obviously immense. As is evident, it has a life changing and transformative effect, in particular in the legal relationship between the child and the applicants. The effect of the order is that ST is treated as though he were born to the applicants, the surrogate mother no longer retaining any parental connection or responsibility.

19 Turning to the 54(1) to (5) criteria of the HFEA 2008:

1. ST was carried by the first respondent as gestational surrogate mother following invitro fertilisation which involved the placing in her of an embryo created with the commissioning father's sperm, thereby satisfying s 54(1).

2. The applicants are married, have made their applications within 6 months of ST's birth whose home is with the applicants, and who are both clearly domiciled in the United Kingdom. Both are obviously over 18.

20 Sections 54(6) and (7) of the HFEA 2008 – consent:

1. The first respondent consents to the making of Parental Orders in favour of the applicants, and not only gave her notarised consent on formation of the agreement, but since ST's birth has also provided a notarised consent. There is in fact additional evidence that the first respondent entered into this agreement on an informed and considered basis, and has supported the commissioning parents' wish to be treated as ST's parents throughout. She has cooperated throughout, had appropriate and timely legal advice and been fully aware, and been a party to all the necessary legal steps in Iran and in the United Kingdom. She has in addition spoken recently to the Reporting Officer, which confirms the above.
2. I am also satisfied that all the technical requirements (e.g. Pt 13.11(4) FPR 2010) as well as the requirements in fact demonstrate that section 54(6) and (7) are very obviously satisfied.

21 Section 54(8) of the HFEA – money or other benefit

1. Under the terms of the Gestational Surrogacy Agreement the applicants have made a number of payments, both to the clinic and directly to the surrogate mother. Those payments do not exceed £10,000.
2. Whilst there is no statutory guidance in relation to the Court's discretion to authorise payments, there is a very considerable body of case law from *Re X and Y* 2008 EWHC 3030 (Fam) to the present day.
3. In this case there is no doubt that the sums paid could not be described as disproportionate to reasonable expenses. The payments have obviously been made in good faith, nor is there any anxiety in relation to public policy. There is no suggestion that the sums paid have in some way overborn the will of the surrogate.
4. Taking these matters shortly I am entirely satisfied that the Court should and does give retrospective approval for the sums paid.

22 Finally, I come to the most important part of my adjudication, ST's welfare the Court's paramount consideration. Section 1 of the Adoption and Children Act 2002 provides:

> **"Considerations applying to the exercise of powers**
>
> (1) This section applies whenever a court or adoption agency is coming to a decision relating to the adoption of a child.
>
> (2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.
>
> (3) The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.
>
> (4) The court or adoption agency must have regard to the following matters (among others)—
>
> > (a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),

(b) the child's particular needs,

(c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,

(d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,

(e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,

(f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—

(i) the likelihood of any such relationship continuing and the value to the child of its doing so,

(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

23 The Court must consider the whole range of powers available to it (under s.54 HFEA 2008) and must not make an order unless it considers the order would be better for ST then not doing so. ST has the benefit of a most experienced Reporting Officer, whose clear recommendations are as follows:

> "I have investigated the matter. I have met the applicants, and with ST. I have spoken on the phone to the surrogate. I have liaised with the health visitor. I am satisfied that ST's welfare will be best provided for with his place in the applicants' home being legally secured. It is my view that all the criteria for the making of a parental order have been met, and I am very satisfied that this mature, sensitive couple will be able to provide for their son across every measure."

24 I add to that that it is quite evident that he is a much loved and cared for child, he is evidently thriving, and it gives me very great pleasure to grant the applicants the parental order which they seek.

CERTIFICATE

Opus 2 International Ltd. hereby certifies that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge