Neutral Citation Number: [2014] EWHC 1303 (Fam)

Case No: IL13P00094

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2014

Before:

MRS JUSTICE THEIS DBE

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Between:
Re: WT

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Ms Kathryn Cronin (instructed by **Goodman Ray Solicitors**) for the **Applicants**
Mr Jeremy Ford (instructed by **Cafcass Legal**) for the **2nd Respondent**

Hearing date: 4th March 2014
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Judgment

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment 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:

1. This case provides another cautionary tale of the difficulties that can be encountered in entering into foreign surrogacy arrangements.

2. The applicants request the court to make a parental order in their favour in respect of WT born 2 October 2010 pursuant to section 54 Human Fertilisation and Embryology Act 2008 (HFEA 2008).

3. WT was born to an unmarried surrogate mother SA, following the transfer of an embryo created by KR's gametes and eggs from an anonymous donor.

4. This surrogacy arrangement was commissioned by the applicants through a clinic in India called Sai Kiran Hospital, a unit of Kiran Infertility Centre (hereafter called the Kiran Clinic).

5. The applicants embarked on this arrangement following difficulties they encountered in conceiving. Their written statements describe the detail, involving 11 rounds of IVF treatment over the course of about four years in clinics in India. Each of them unsuccessful, although BR became pregnant on four occasions, but tragically miscarried each time. There can be little doubt this was an extremely traumatic and difficult time for them.

6. Before they considered surrogacy they investigated adoption. However, upon being informed there were likely to be considerable delays in them being assessed, due to their history of undertaking fertility treatment and miscarriages; they did not feel they could wait that long and decided to embark on a surrogacy arrangement.

7. The applicants investigated surrogacy clinics both in India and USA before they registered with the Kiran Clinic. They made contact with other couples who had used the Clinic; one couple did remark that they thought the Clinic slow with its paperwork but otherwise the general experience of other couples was positive. Following email contact with the Clinic they arranged to visit it in May 2011. After meeting the clinic director Dr Samit Sekhar and his assistant Mr Anjani Kumar they were able to see round the Clinic, but were not able to see the houses where the surrogate mothers stayed. They decided to engage the Clinic and registered on 20 May 2011.

8. At the time of registration they met Mr Anjani Kumar, the Clinic's assistant director. They selected their egg donor from information given to them about the egg donors characteristics (such as height, skin colour, age) however they were not given information about potential surrogates, and were told it was the Clinic's policy that surrogates did not meet with commissioning parents. The Clinic subsequently chose their surrogate and the only information they were given about her was in December 2011 when they were given her name and a copy of the surrogacy agreement signed by her on the 29 December 2011. The written agreement showed SA's father had approved the agreement. The applicants asked to meet her, but report that this was refused by the Clinic. They were told SA did not wish to meet them. The applicants were concerned that SA may have undertaken this arrangement in secrecy from her family; they were assured by the Clinic that this was not the case.

9. The only other information the applicants had about SA was a copy of her ID card and proof of her bank account, which were given to the applicants at the time they were making their application for travel documents for WT to leave India.

10. The applicants paid a total of nearly $28,000 for the surrogacy arrangement as well as some additional payments for further legal documents. This fixed fee included four embryo transfers. Between May 2011 and February 2012 there were three embryo transfers, all of which were unsuccessful. However the fourth transfer was successful. The applicants were given weekly reports from the Clinic about the progress of the pregnancy but, despite asking, were given no information about the wellbeing of the surrogate mother.

11. WT was born prematurely on 2 October 2012 at 36 weeks gestation. The applicants were informed the day before that SA had gone into labour. They immediately flew to India and arrived at the clinic when WT was only 2 hours old. WT was in intensive care for a week and the stress of their situation caused KR to become ill and he required medical attention.

12. Once WT was discharged from hospital the applicants and WT lived in a hotel whilst the documentation was sorted out to enable WT to come to England.

13. The applicants did not have an independent lawyer advising them and were assisted by the Clinic lawyer, but they found they were receiving conflicting information. For example, the Clinic lawyer advised the applicants to make the application for an exit permit for WT at the Indian Foreigners Regional Registration Office (FRRO) in Delhi, rather than the office branch in Hyderabad where they were staying. They in fact chose to make the application to the FRRO in Hyderabad. The applicants applied to the British consulate for WT to be registered as a British citizen and they were issued with a British passport or emergency travel documents to allow them to leave India with him.

14. To enable these applications to be made a number of notarised documents were supplied by the Clinic, all signed on 12 or 13 October 2012 by SA:

    (1) a document entitled "Receipt cum declaration" which confirms SA was paid 3,50,000 Rupees, said to represent 'surrogate mother compensation' as well as her food, travel, living expenses from December 2011 to October 2012 and the caretaker arranger, Dr Sesha Sai and service charges from Dr Samit Sekhar. This document also confirmed SA's consent to the applicant's application for an exit visa and that she had no further relations with WT;

    (2) an affidavit signed by SA to confirm she was single and not married;

    (3) a document entitled 'No objection certificate' where SA confirmed that she has received all payments and had entered into the surrogacy agreement of her own free will and had given up all her rights and responsibilities in respect of WT and had no objection to the grant of British citizenship for WT;

15. The applicants obtained British Citizenship for WT and an emergency travel document. They were initially refused an exit permit for Tamarni from the FRRO in Hyderabad, they were informed the Clinic has not arranged for SA to attend the FRRO offices, as had been requested. BR sought the advice of the Head of Consular Services who contacted the FRRO in Hyderabad. BR attended the FRRO the next day and the director ordered the Clinic to produce SAto their office within two days. The exit permit was subsequently granted and the applicants assumed the Clinic had met the FRRO requirements, in particular the attendance of SA. The applicants have subsequently been informed that this exit arrangement forms part of the Indian regulatory arrangements for surrogacy. Commissioning parents are required to obtain a medical visa to visit India for surrogacy arrangements and it is a condition of their visa that they obtain an exit permit for their surrogate born child.

16. The applicants left India with WT on 10 November 2012 and have lived in their family home here since then.

17. A form A101A (Agreement to the making of a parental order) was signed by SAon 23 February 2013 and notarised by Abdul Aziz, Advocate Notary.

18. The parental order application is dated 14 March 2013. I have dealt with the four directions hearings prior to the final hearing on 4 March 2014. The main concerns I had on the information that was available when the matter first came before me can be summarised as follows:

    (1) all the documents signed by SA were in English, including importantly the consent Form A101A. There was no information available as to whether she spoke English, was literate or had had the documents read through and interpreted for her;

    (2) the applicants had not met SA and were unable to provide any information about her first language or her level of literacy;

    (3) the enquiries they made with the clinic to seek clarity about the circumstances in which SA signed these documents were not responded to by the Clinic in a helpful or constructive way;

    (4) the attempts to locate SA at the address on the documents were unsuccessful as the address given by the clinic for her covered a very large area;

19. Whilst the applicants had initially sought legal advice they represented themselves at the early directions hearings. I joined WT as a party to the application in November and the Court had the immeasurable benefit of Mr Jeremy Ford from Cafcass Legal to represent WT, through the Children's Guardian Ms Clare Brooks. The specialist Cafcass Legal team has built up considerable expertise to assist the court on the issues that arise in these cases, and the court is extremely fortunate to have that wealth of experience to draw upon in these cases.

20. Fortunately the applicants instructed specialist solicitors, Goodman Ray, and since December the court has had the benefit of detailed submissions made by Ms Kathryn Cronin, who has particular expertise in these cases. Her written and oral submissions have been invaluable.

21. With the assistance of their legal team the applicants were able to get more information about SA's address and secured her attendance at an appointment with an independent lawyer in India. It is not necessary to go into the detail, but making these arrangements has involved additional expense and stress for the applicants and considerable delay in the court dealing with this application.

22. By the time the matter came before me for final hearing the applicants had filed a sworn affidavit dated 28 February 2014 from Shireen Baria, an Advocate and managing Partner of Vakils Associated, a law firm based in Secunderabad, Anhdra Pradesh. This affidavit detailed a meeting she had attended on 19 February 2014 with SA (surrogate mother), Ms Baria's Partner Mr Rajvinder Singh Ahluwalia and Dr Samit Sekhar (Sai Kiran Clinic). This meeting confirmed the address on the documents signed by SA was missing a critical part, which explained why the applicants had not been able to locate her. All the relevant documents were read over again to SA, including the consent Form A101A, and she confirmed she had signed

them, understood them, that she had received the sum of 3,50,000 Rs and understood what was involved and the terms of the surrogacy arrangement.

23. In the light of that information the final hearing was able to proceed.

Section 54 Criteria

24. I can take most of the s 54 criteria relatively shortly. WT was carried by SAas the surrogate mother following embryo transfer undertaken at the Kiran Clinic involving an embryo created with KR's gametes and an egg from an anonymous egg donor. No DNA evidence has been obtained (and was not required by the Indian authorities) but documentation from the Clinic confirms the biological connection between KR and WT clearly manifests KR's ethnicity which I accept as part of the evidential picture in being satisfied that this criteria is met (s54(1)).

25. The applicants are clearly in an enduring family relationship. They have been together as a couple since 2002 and their relationship has remained strong despite the long and difficult emotional journey they have undergone to fulfil their wish to have a family (s54(2)).

26. The application for a parental order was issued within six months of WT's birth (s 54(3)).

27. WT had been in the continuous care of the applicants since shortly after his birth and remains so (s 54 (4) (a). Both applicants have English domicile of origin (s54 (4) (b)) and both are over 18 years (s 54 (5).

28. Turning to the question of consent this is one of the areas that has caused the court most anxiety, for the reasons outlined above. The court must be satisfied that SAhas freely, unconditionally and with full understanding of what is involved agreed to the making of a parental order and the consent needs to be given more than six weeks after WT's birth. The evidence of her consent comes from a number of sources:

    (1) the signed notarised surrogacy agreement dated 29.12.2011 stated to be agreed with the consent of her father. In that document SA states that she had a full discussion with Dr Samit Sekhar on 20.5.2011 and understands the methods of surrogacy treatment; that she has worked out the financial terms of the agreement with the couple in writing and agrees to hand over the child to the Applicants as soon as she is permitted to do so by the hospital clinic where the child is born. Dr Sekhar signed the agreement as did Anjani Kumar. The endorsement which allows for confirmation that the ART clinic personally explained the details and implications of the agreement to SA and 'made sure to the extent humanly possible that she understood these details and implications' is not directly adopted, but forms part of the document;

    (2) a signed, notarised affidavit dated 12.10.2012 where SA confirmed her age (about 24), her confinement, that she gave birth to WT, was single/ unmarried and her family status was brought to the attention of the hospital authorities when she enrolled as a surrogate mother;

(3) a signed, notarised statement entitled 'Receipt cum Declaration' dated 13.10.2012 that 'there may be no future allegations also regarding relations with the babies by me or by of any of my family members in any way' and she has no objection to the issue of an exit permit to WT;

(4) a signed and notarised 'No Objection Certificate' dated 12.10.2012 that 'with my own will and conscience' and 'well informed of the risks' she acted as a surrogate carrier for the Applicants and 'with her own will and consent' she hands over all the rights and responsibilities' of WT to the Applicants and has no objection to the issue of a passport, British citizenship and an exit visa toWT;

(5) a signed and notarised Form A101A 'Agreement to the making of a parental order in respect of my child' dated 23.2.2013 where SA agreed unconditionally and with full understanding to the making of a parental order. This consent was given more than six weeks after WT's birth;

(6) the affidavit from Ms Baria providing independent confirmation and witnessing of SA's free and informed consent to the contract, the relinquishment of WT to the Applicants and to the making of the parental order. SA confirmed she had signed and understood all the documents listed at (1) – (5) above;

29. The notarised statements evidencing SA's consent have each been notarised before a notary public in India in accordance with the requirements of *Family Procedure (Adoption Rules) 2005/2795* which states that any form of consent executed outside the United Kingdom must be witnessed by specified persons, including a notary public, and in those circumstances the court has the power to accept this as evidence of consent.

30. I am satisfied, particularly in the light of Ms Baria's affidavit, that SA has consented to the making of a parental order in accordance with the requirements of s54 (6) and (7).

31. The herculean efforts undertaken by the applicants and their legal team to satisfy the court that there is evidence of consent underscores its importance as one of the s 54 criteria. Were in not for the affidavit of Ms Baria the court may have been in some difficulty in being satisfied this criteria was met.

32. Turning finally to the question of payments under s 54(8). Whilst the focus of the court's consideration is on payments made directly or indirectly to the surrogate mother, it is clear from cases such as *Re C [2013] EWHC 2408 (Fam),* the payments made to commercial surrogacy agencies operating within the law of foreign jurisdictions require authorisation by the court, insofar as such payment cannot be considered to have been for expenses reasonably incurred.

33. The applicants have produced a part breakdown of the payments they made totalling almost $28,000. The breakdown given appears incomplete: $11,675 was paid when they registered with the clinic in May 2011 followed by 6 payments of $2,500 between March to October 2012. There are then some one off items listed as post birth administrative fees ($245), notary fee ($260), SA's travel expenses ($350) and courier charges ($45). No other breakdown of how the sums paid to the Clinic is given, despite requests being made to the Clinic to do so. The Clinic's unhelpful

response to such a request is as follows *'payments made to clinic for the entire surrogacy process are available with your clients'*. If that was the case the request to the Clinic would not have been made.

34. The applicants had no direct dealing with SA. The only information they have regarding payments made to her are the documents signed by her that confirm she received 3,50,000 R's. In a subsequent email from the clinic dated 3.1.14 they confirmed that SA was not required to pay the caretaker or Dr Sekhar out of the monies she received and SA in her meeting with the Ms Baria confirmed she received 3,50,000 Rs. This level of payment to the surrogate is the same as authorised in *D & L [2012] EWHC 2631 (Fam)* [2013] 1 WLR 3135 which concerned the same clinic.

35. 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.

36. I am entirely satisfied the applicants have acted at all times with good faith and without moral taint. They took great care to select the clinic they used, undertook extensive research and enquiries and also formed their own judgment when they visited the clinic. They have displayed independent judgment by not always following the advice of the Clinic, for example which FRRO to secure the exit permit from. There is no evidence to suggest they have been otherwise than honest and candid in all their dealings with the Indian and UK authorities and have complied with the directions of this court. The amounts paid to the Clinic were set by the Clinic in a jurisdiction where commercial surrogacy is not unlawful. The amount paid to SA was not negotiated by them, appears to have been fixed by the Clinic, is the same as a previously authorised payment approved by this Court and is not dissimilar from payments made in similar surrogacy arrangements in Indian clinics. There is no evidence to suggest SA did other than freely consent to the surrogacy arrangement.

37. In those circumstances the payments made other than for expenses reasonably incurred are authorised by the court.

Welfare

38. WT's lifelong welfare is the court's paramount consideration in accordance with section 1 Adoption and Children Act 2002. The court has the enormous benefit of a detailed report from Ms Brooks in her capacity as the Parental Order Reporter. It is a detailed account of the history of the application and her assessment of WT's welfare following her enquiries, in particular her visit to the family home. Having considered the welfare checklist, and subject to the court being satisfied that the s 54 criteria are met, she recommends a parental order is made. She expressed some concern in her report that the applicant's friends and family were not aware of the surrogacy, but I was re-assured by the applicants at the final hearing that this is no longer the case.

39. Ms Brooks records in her report that *'the applicants care for him lovingly and have been proactive in ensuring that his needs are met. WT demonstrates secure attachment to the applicants.'*

40. All the evidence the court has points overwhelmingly to WT's lifelong welfare needs being met by a parental order being made. It is only that order which will provide lifelong security for WT and secure his legal relationship with the applicants as his legal parents.

The Wider Picture

41. As can be seen from what I have detailed above this application has not had an easy journey to the final hearing. Adopting the words of Hedley J in the first reported foreign surrogacy case heard over 5 years ago *Re X&Y (ibid)* paragraph 2 '*..the path to parenthood has been less a journey along a primrose path, more a trek through a thorn forest. The court shares their [the applicants] hope that their experiences may alert others to the difficulties inherent in this journey.'*

42. Having dealt with a number of these cases, many of which involve unrepresented applicants, it may be helpful to highlight the areas that cause most difficulty in these cases:

(1) Those who embark on surrogacy arrangements abroad need to be alive to the pitfalls there can be with such an arrangement and it may be wise for commissioning parents to consider taking specialist advice at the earliest opportunity, both here and in the jurisdiction where the arrangement is entered into. To proceed in the absence of such advice can lead to significant emotional and financial hardship and further delay.

(2) It is critical that an accurate documentary account of the various steps is kept by the commissioning parents so it can be available, if required, in support of a parental order application to assist in satisfying the relevant criteria under section 54. This is particularly relevant when considering any payments made and what, if any, are caught by the provisions of s 54(8). What is most helpful for the court is a schedule setting out the payments made and what they were for.

(3) A parental order application has to be made within six months of the child's birth. There is no power vested in the court to extend that period. The recent decision of Mrs Justice Eleanor King in *JP v LP and Others [2014] EWHC 595 (Fam)*, although in the context of a domestic surrogacy, is a timely reminder of the legal complexities if such an application is not made in time. Parental orders change parental status permanently, extinguishing the parental status of the surrogate mother entirely (and her husband, if applicable). Such orders confer legal parenthood and parental responsibility on both applicants for such an order.

(4) The requirement for the surrogate mother (and her husband if she is married) to give consent freely, unconditionally and with full understanding of what is involved is a fundamental part of the s 54 criteria. Depending on the circumstances the commissioning parents may need to consider meeting the legal fees for the surrogate mother, limited to taking advice on the consequences of a parental order being made. The cost of such advice is likely to be considered an expense reasonably incurred. In addition, it is clearly essential there is evidence to demonstrate (if required in the circumstances of the case) that any document signed by the surrogate mother is understood by her and, if necessary, translated into her first language before she signs it. Again, any costs incurred for this are likely to be considered an expense reasonably incurred.

(5) In this case the applicants were not able to meet the surrogate mother which in the Court's experience is relatively unusual. If they had met her they may have been able to provide helpful information to the Court. In the event commissioning parents are not able to meet the surrogate mother they should seek to establish clear lines of communication with the surrogate mother, and ensure she is made aware during the pregnancy that she will need to give consent at least six week after the birth.

43. The Clinic in this case has not always been helpful in the way it has responded to reasonable requests made on behalf of the applicants, often such requests were following specific directions made by this Court. They were given the opportunity to make representations to this Court but have not done so. Delay was caused as the

Clinic insisted on being sent hard copies of the letters requesting information and consent from the applicants to do so. The Clinic makes the fair point that it is not in their interests not to help their clients obtain parental orders. Some of the documents signed by SA appeared to be in a standard form and contained provisions that were not accurate, or were not completed. For example, the 'Agreement for Surrogacy' signed on 29 December 2011 contained a provision which stated *'I have worked out the financial terms and conditions of the surrogacy with the couple in writing and an appropriately authenticated copy of the agreement has been filed with the clinic, which the clinic will keep confidential'.* The applicants said they had had no contact with SA in writing and were not aware of any agreement being filed with the Clinic prior to the Agreement for Surrogacy.

44. I hope that steps can be taken by the Clinic that will avoid the delays and difficulties that have taken place in this case.

45. I am going to direct that Cafcass Legal send an anonymised version of this judgment to the Clinic, the FRRO in Hyderabad and Delhi and Ms Rapson (Director General, of UK Visa and Immigration). This should include a request that Ms Rapson may wish to consider amending the British High Commission New Delhi's standard letter to support medical visa applications by British nationals seeking surrogacy services in India dated 8.8.13 to stress the importance of the requirement under s 54 (6) and (7) HFEA 2008 for the birth mother's post-birth full and informed, notarised written consent (at least six weeks after birth) to hand over her child to the commissioning parents and agree to the making of a parental order in favour of the commissioning parents. This medical visa support letter is included in the Foreign and Commonwealth Office's 'Surrogacy Overseas' information leaflet for British nationals who are considering entering into surrogacy arrangements in foreign countries. In the Court's view the suggested additional information could help to inform those seeking and providing surrogacy services as to the legal requirements for a parental order.