St.Mary's
FAMILY LAW SPECIALISTS

Modern Families Update

October 2024

An important and cautionary reminder of the need to seek legal advice early to carefully consider, in advance, the consequences and implications of foreign surrogacy agreements, particularly those that cross a number of jurisdictions.

Re Z (Foreign Surrogacy) [2024] EWFC 304

Facts

This was a case involving a same-sex couple. A was 35 years old and originally from Country C, where homosexuality is not permitted. B was 46 years old and from Country D, again where homosexuality is not permitted.

A and B began living together in 2017 and entered a civil partnership in 2018 having purchased their own home. They wanted to start a family and decided to proceed with a surrogacy arrangement. In 2020 they contacted SurrogateBaby Agency (the agency) said to be based in Cyprus. A and B were informed that although the agency was based in Country Y, all procedures would take place in Cyprus – this was not specified in the surrogacy agreement. All interactions from the agency were addressed to A and B jointly by H, the agency owner. A and B chose the 'Premium Package' paying €64,000 which guaranteed they would become parents. A and B stated that when presented with a surrogacy agreement, they were advised by G, who worked at the agency, that A alone should sign the agreement as a single man, rather than as a same-sex couple to avoid encountering issues. The agreement was signed in early 2021 in A's sole name. On signing the agreement, A and B were under the impression that the laws of Country Y (where same-sex surrogacy arrangements were not permitted) would not apply to their agreement given procedures would take place in Cyprus.

An anonymous egg donor was chosen, medical testing undertaken and eggs collected. A's gametes were used to create embryos with the donor eggs. In May 2022, A was introduced to X, the surrogate, who lived in Country Y. An agreement was signed between A and X on 23 May 2022. Embryo transfer took place in May 2022 and the pregnancy was confirmed. It was subsequently confirmed that X was from Country Y where she returned during her pregnancy.

On 12 October 2022, A messages H enquiring about obtaining a passport for the child to which H responded 'I can't contact the embassy directly. You can call them and explain that you and your girlfriend are expecting a baby, the childbirth will take place in Northern Cyprus. Please don't

mention surrogacy'. Later in October 2022, the agency contacted A and B to inform them that due to the ongoing war, it was not possible for X to give birth in Country Y and that birth could take place in either Cyprus or Country W for an additional €14,000. A and B informed the court that they were advised by the agency that it would be easier to obtain a passport for the child in Country W and X travelled there in December 2022. LGBT surrogacy is not legal in Country W, but A and B state they were reassured by the agency that they could assist with the process only if A attended the birth alone.

A and B travelled to Country W for the birth in January 2023, B returned to England prior to Z's birth. Z was placed in A's care after the birth whereupon X helped with some of the care. A and X registered the birth in Country W and are both named as parents. In February 2023, X signed a power of attorney which gave A sole responsibility for Z until she reached majority and gave permission for A to take Z to Country C without further permission as A's visa in Country W was time limited. A travelled to Country C in May 2023 with Z where they remained until August 2023 when a visa was secured for Z to enter the United Kingdom.

The applicant's estimate that they paid the agency a total of €71,500.

A C51 application for a parental order was issued in November 2023, direction made by Cobb J on the same day and in February 2024, Theis J directed that Z should be joined as a party. A final hearing was adjourned from May 2024 to October 2024 for the filing of further evidence.

Judgment

An application for a parental order is governed by S.54 of the Human Fertilisation and Embryology Act (HFEA 2008), the Human Fertilisation and Embryology (Parental Order) Regulations 2018, and Part 13 of the FPR. On issue, a CAFCASS parental order reporter is appointed to investigate circumstances and submit a parental order report.

Under S.54 HFEA the court may grant a parental order in respect of a child born through surrogacy where such an order meets the child's welfare needs in accordance with section 1 of the Adoption and Children Act 2002 (ACA 2002), and the following criteria are satisfied:

1. The child has been conceived artificially and is genetically related to one of the intended parents (ss1)
2. The intended parents are married, in a civil partnership or living as partners in an enduring relationship (ss2)
3. The intended parents have applied within 6 months of the child's birth (ss3)
4. The child is living with the intended parents and at least one of them is domiciled in the UK (ss4)
5. The intended parents are over 18 years old (ss5)
6. The surrogate (and her spouse, if applicable) has given her consent to the making of a parental order and that consent has been given freely, unconditionally and with full understanding has been given more than six weeks after the birth of the child (ss6,7)

7. The surrogate has been paid no more than reasonable expenses, unless authorised by the court (ss8)

The parties agreed that some of the S.54 HFEA criteria were met [p26-30]. However, criteria 3, 4, 6 and 7 required further consideration.

In relation to the application being made outside the 6-month time period, it was submitted that the application was sent to Court in early September 2023 but not issued for 2 months bringing the application just outside the 6-month time limit. Part of the reason for the delay was wanting to ensure Z had the necessary documentation to travel to the UK.

On domicile, it was submitted that A made the UK his domicile of choice. Reliance was placed on the points set out in Z v C (Parental Order: Domicile) [2011] EWHC 3181 (Fam).

On X's informed and unconditional consent, FPR r.13.11(1) sets out that consent should be given in the Form A101A 'unless the court directs otherwise'. FPR r.13.11(40) directs that 'any form of agreement executed outside the United Kingdom must be witnessed [by a person holding one of the offices set out at FPR r.13.11(4)(a-d)'. Aa A101A dated 9 February 2024 was signed, however it was neither notarised nor translated. On issue of the application for parental order, X signed the acknowledgement of service confirming her consent to the order being made. This was also not translated. The CAFCASS Guardian on behalf of Z spoke to Z on 30 April 2024 and 2 August 2024 with the assistance of an interpreter and X confirmed her consent.

In relation to the reasonable expenses criteria, it was submitted that the surrogacy agreement signed (€64,000) included a €20,000 compensation to X. Of the actual sum paid of c.€71,000, it is unclear how much went to X. X confirmed to the Guardian that she had received c.€17,000-€19,000.

Theis J at [p44] expressed her concern that this was 'regrettably another example where there has been a lack of due diligence by intended parents before they embark on a surrogacy arrangement'. A and B were described as 'naïve' [p45] at the consequences of entering such an agreement.

On deficiencies with the requirements under S.54 HFEA, Theis J said:

- The delay in bringing the application was negligible, to not permit the application to proceed would be contrary to Z's welfare [p47].
- On the facts, A had relinquished domicile of origin and made the UK his domicile of choice [p48].
- On the issue of consent, Theis J highlighted that it 'is a pillar of HFEA 2008. The statutory framework is clear as to what is required, namely consent that is given freely, unconditionally and with full understanding' [p49]. The combination of written evidence and the Guardian's contact with X confirmed that consent was established [p49].
- On the issue of reasonable expenses, Theis J noted that 'there is real concern about the way the agency approached this arrangement, with the uncertainty as to where the child was going to be born in the context of the applicant's relationship and the legal framework in the jurisdictions concerned. On the face of the arrangements the applicants, the surrogate

and the unborn child were exposed to some risk if the true nature of the relationship was discovered' [p50]. It was not without hesitation that Theis J accepted that despite the naivety of the applicant's they had acted in good faith [p51]. On evidence from X, this was an arms-length surrogacy arrangement [p52] and Theis J authorised payments as reasonable [p53].

Theis J noted at [p54] that lifelong welfare had to be considered alongside public policy. The applicant's had turned a blind eye to what should have been obvious and took risks which they later sought to lay responsibility for at the agency's door. On the applicant's case, the agency was also to be deprecated, however 'it was always open to the applicant's not to sign the various agreements' [p54]. Theis J went on to say that 'bearing in mind the consequences in their respective jurisdictions of birth regarding same sex relationships it is inexplicable why they would enter into a surrogacy arrangement in a jurisdiction that holds the same view' [ibid]. A and X likely presented a false picture to the authorities in Country W which was encouraged by the agency.

Despite the arguable public policy points, Z's welfare required an order to be made to give her lifelong stability and so a parental order was granted.

Practical Considerations

Foreign surrogacy arrangements continue to prove complex and this case is another example of the court's seeking to go behind the S.54 HFEA 2008 criteria to make parental orders. Parties thinking of entering any foreign surrogacy agreement should seek advice before embarking on the process.

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