

ENGLAND AND WALES / JUDGMENT

K (Minors) (Foreign Surrogacy)

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- ----- RE K (Minors) (Foreign Surrogacy)
- -----
- ----- Miss K. Gieve for the Applicants Mr M. Sherwin for the Guardian
Hearing date: 20th May 2010
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Judgment

1. 2. 3. 4. 5. On 20th May 2010 I adjourned this case generally with liberty to restore. Such an order would not ordinarily require a court either to reserve its reasons or to adjourn their delivery into open court. Yet I have done both, making it clear that nothing may be reported which might reasonably lead to the identification of the children, the subject of these proceedings. The children (who are twins) were born in May last year. They were conceived as a result of a commercial surrogacy agreement between the applicants and a married couple in India. These arrangements were negotiated through a clinic and the children are the product of an egg from an anonymous donor fertilised by the sperm of the male applicant. Such arrangements are treated as lawful in India and are subject to public administration regulation. I say they are treated as lawful because although recognised as not being unlawful, statutory recognition of such arrangements remain confined to a Bill still before the Indian Parliament. Although the children were handed over at birth to the applicants and have ever since remained in their care, English law regards the surrogate mother and her husband as the sole lawful parents of the children for reasons explained in my decision in RE X&Y (Foreign Surrogacy) [2009] IFLR 733. The current position in Indian law is unclear save that the current placement is accepted as lawful. For reasons that will

appear, the children remain in India in the home of grandparents with the parents spending as much time with them as is practicable. The parents are habitually resident in England. Within 6 months of the birth they instituted proceedings in this jurisdiction for a Parental Order under Section 30 of the Human Fertilisation & Embryology Act 1990. They were informed of the conditions necessary to apply for entry clearance for the children and propose now to make such an application. Entry Clearance is of course a fundamental necessity. It is an executive and not a judicial decision. The UK Border Agency has now issued guidance known as "Inter- Country Surrogacy and the Immigration Rules". This deals with three different scenarios and three possible routes of entry. In the circumstances of this case an application has to be made (and can be made) "outside" the Rules. The relevant part of the Guidance is paragraph 41 which reads as follows "If either of the commissioning couple has a genetic connection with the child, entry outside the Rules at the discretion of the Secretary of State may be possible, but such entry clearance will only be granted on condition that a Section 30 Parental Order is applied for within 6 months of birth and where evidence suggests that such an order is likely to be granted, (see paragraph 59 (g) below, for the list of requirements)." In this case the genetic link has been established and the requisite application made within time. The difficulty has arisen over the words "...where evidence suggests that such an order is likely to be granted..." Clearly it is the Entry Clearance Officer who must be so satisfied. 6. 7. 8. 9. This case was listed before me for Directions. However, without the children being in the country the application cannot be progressed. In the first place it appears to me (as presently advised) that the children cannot be said to be habitually resident here and thus the court lacks jurisdiction. In any event a welfare decision is required as part of the Section 30 application and the Guardian cannot complete her assessment until she has seen the children living with the applicants in this country. The parties invited the court to consider indicating (by recital in the order) its view as to the likelihood of an order being granted. I expressed (and continue to entertain) considerable disquiet about doing that. In the first place I am not presently satisfied that I currently have jurisdiction over these children. Secondly, there remain both outstanding welfare enquiries and an invitation to the Court to exercise its jurisdiction under Section 30 (7) to approve certain payments under the agreement. Thirdly the court must be careful not to usurp functions which specifically belong to the executive. And fourthly the giving of advisory opinions (as opposed to Declarations establishing rights or the lawfulness of an action) are alien to the traditional practice of the court. On the other hand it is difficult not to be sympathetic to the actual difficulties faced by these applicants. There was a further reason for anxiety. The court is still at a comparatively early stage of its development in dealing with these foreign commercial surrogacy agreements. The need to obtain orders under section 30 is only gradually becoming fully appreciated. Many have been tempted to trust in the orders obtained in foreign jurisdictions believing that they will be valid (or recognised as such) here. The difficulty is (in stark contrast for example to adoption) commercial surrogacy is unlawful in this jurisdiction and orders based entirely on its lawfulness may well not be capable of recognition. Given the inflexible time limit for application of 6 months this may create problems in the future. Certainly what this application has done is focus attention on

the Section 30 Order: Entry Clearance requires evidence that the Order is likely to be granted. That means that the problem which I confront in this case may recur frequently in the future and it is necessary that the court acts correctly and not simply out of sympathy. For all these reasons I have concluded that the court should say nothing in its order about the probable outcome of a Section 30 application. However, I am not necessarily averse to making obiter comments about this case. It is clear beyond peradventure that the conditions in Section 30 (1)-(6) are fulfilled in this case. The guardian has intimated that she sees no present warning signs so far as her welfare assessment is concerned; however, it must be (and is) understood that that is a provisional observation and not a conclusion. So far as approval of sums is concerned under Section 30 (7), it appears that this was a publicly regulated clinic in which the clinic prescribed that sums paid to the surrogate which were non-negotiable. In other cases such arrangements have been approved.

10. Whether such observations are helpful to the Entry Clearance Officer is a matter for that Officer and for no-one else. In the meantime the court in addition to certain procedural directions specific to this case makes no order than by way of general adjournment with liberty to restore. If and when the children are in the country (and only then) can the court proceed further with this application.

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