Articles

RE X AND Y (FOREIGN SURROGACY): 'A TREK THROUGH A THORN FOREST'

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Surrogacy is a sensitive subject and different systems of family law around the world deal with it in a variety of ways. English law has always taken a middle path: sanctioning surrogacy arrangements if there is no dispute between the parties and if no more than reasonable expenses has been paid, but prohibiting enforceable commercial arrangements. The recent case of *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR (forthcoming), heard by Hedley J in the High Court in December 2008, has tested the viability of this middle-ground approach to its very limit, and demonstrated quite how complex things can become where English law comes into conflict with a foreign system of law which takes a very different approach. As Hedley J aptly commented, at para [2], 'the path to parenthood has been less a journey along a primrose path, more a trek through a thorn forest'.

Hedley J published his judgment as a 'cautionary tale' for anyone considering foreign surrogacy, and in order to draw wider attention to some of the difficulties with the current law. The case indeed shows just how complex and difficult the law can become, and practitioners advising any of the growing numbers of British couples travelling abroad for surrogacy need to be aware of these complexities.

THE FACTS OF THE CASE

The case involved a British couple who, after a long and unsuccessful history of exploring different routes to parenthood, joined an established and respected surrogacy programme in Ukraine. They conceived twins through IVF, who were biologically the children of the British father and an anonymous egg donor, and who were carried by a Ukrainian surrogate mother and born in Ukraine.

In accordance with Ukrainian law (and following normal practice there), the British couple agreed to pay the surrogate mother €27,000 (£23,000), a sum the surrogate mother planned to use as a deposit on a flat for her own family. The British couple were reassured by the Ukrainian hospital that the legalities would be simple and that, under Ukrainian law, they would be treated as the parents of any child automatically. Though the couple investigated the position in the UK, there was nothing to alert them to the fact that the legal position was in fact much more complex. However, once the children were born, the parents found themselves caught in a legal minefield. To be able to keep their children, they faced an application to the High Court for parenthood status, and a need to obtain special permission from the Home Office to bring their children home to the UK.

THE LEGAL MINEFIELD

The difficulties in the case arose at the most basic level from a conflict of law. Under Ukrainian law, neither the surrogate nor her husband had any responsibility for the children at birth, since Ukrainian law treated the British commissioning parents as the twins' legal parents. But under English law (as explained in more detail below), the English commissioning parents

had no responsibility either, since the parents of the twins were regarded as the surrogate mother and her husband. The practical effect of this conflict over legal parenthood was that each system of law abdicated parental responsibility for each set of parents. The children were, therefore, born parentless, and, by extension, stateless (entitled to neither British nor Ukrainian citizenship).

The twins were essentially stuck in a legal vacuum without parents and with neither a right to remain in Ukraine nor to enter the UK. And their position was extremely vulnerable: the British parents took responsibility for them from birth, but were only entitled to remain in Ukraine for the duration of their limited tourist visas, leaving the children with an uncertain future (possibly in a Ukrainian orphanage) if the legal issues were not resolved. As Hedley J described so graphically, at para [10], the law had left the twins, 'marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home'.

In the end, having satisfied the immigration authorities by DNA tests (which had to be processed in this country, thus causing further delay) that the commissioning father was the biological father of both children, the children were given discretionary leave to enter 'outside the rules' for a period of 12 months to enable them to regularise their status under English law by way of an application for a parental order.

UNDERSTANDING THE ENGLISH PARENTHOOD RULES

The crux of the problem faced by the British couple and their children lay in the English legal treatment of parenthood. The Human Fertilisation and Embryology Act 1990 (HFEA 1990) provides that, in assisted reproduction cases, it is the woman who gives birth to a child who is his or her legal mother (s 27). Section 27 of course provides important protection to women conceiving with donor eggs, ensuring the position of the mother and excluding any claim to parenthood from the egg donor. However, in surrogacy cases where the factual situation is very different, s 27 produces the wrong outcome for those involved, making the legal mother at birth the surrogate rather than the intended mother. The English legal rules on fatherhood in surrogacy cases are even more complex. Perhaps one of the most surprising features of the case (and certainly so to the parents involved) was the fact that the British commissioning father – who was the twins' biological father – was not treated by English law as their legal father.

This outcome centred on the marital status of the surrogate mother. Section 28 HFEA 1990 provides that, where a married woman conceives through assisted reproduction with sperm from someone other than her husband, her husband is treated as the legal father unless it is shown he did not consent. Like s 27, s 28 was designed primarily with donor conception in mind (it protects the father's status where a married couple conceives with donor sperm). However, the wording of the section also catches surrogacy situations, providing that where a surrogate mother is treated with sperm from the commissioning father, the commissioning father is in essence treated as a sperm donor and the surrogate's husband becomes the legal father. The effect of s 28 was in some respects the whole cause of the problems which arose in practice in *Re X and Y*. Had the surrogate mother been unmarried, the twins would have been neither parentless nor stateless since their British biological father would have been treated as their legal father and been automatically entitled to bring the twins into this country.

Re X and Y scrutinised whether s 28 should apply in foreign surrogacy cases where the surrogate's husband is not domiciled in England and Wales. Hedley J decided that a distinction should not be drawn between domestic and foreign surrogacy cases and that Parliament had intended to give the surrogate's husband status in the surrogacy arrangement. The parents of the twins under English law were therefore the Ukrainian surrogate and her husband, the effect being to exclude the status of both British commissioning parents.

THE SOLUTION: A PARENTAL ORDER

Section 30 HFEA 1990 provides a mechanism for the parents of a surrogate born child to apply for a 'parental order' to

reassign legal parenthood from the surrogate parents to the commissioning couple. A parental order acts like an adoption order, extinguishing the parental responsibility of the surrogate parents and conferring full legal parenthood on the commissioning parents. Various conditions must be met, and these include that 'the court must be satisfied that no money or other benefit (other than expenses reasonably incurred) has been given or received by the husband or wife . . . unless authorised by the court' (s 30(7) HFEA 1990).

In *Re X and Y*, the surrogate mother had been paid £23,000 and it was clear and openly acknowledged that she had not merely been compensated for her financial loss. The key issue for the court was therefore to decide whether to authorise the commercial payment so that a parental order could be granted.

AUTHORISATION OF THE PAYMENT

There is no guidance in s 30 HFEA 1990 about the factors the court should consider when deciding whether to authorise a payment for surrogacy which exceeds reasonable expenses. Though there have been similar cases under adoption law, the only previous case of authorisation under s 30(7) HFEA 1990 was *Re X* [2002] EWHC 157 (Fam) in which a payment of £12,000 was authorised following a deception by the surrogate mother as to her true expenses. The payment of £23,000 in *Re X and Y* represented nearly double this figure and was a payment which had always been recognised as having a commercial element. Hedley J therefore set out that, in considering how the authorisation process should be managed, the court should pose itself three questions (para [21]):

(1) Was the sum paid disproportionate to reasonable expenses?

Essentially, this amounts to an assessment of the scale of the payments made. Hedley J noted that what might be deemed acceptable will vary from country to country to reflect different costs of living, commenting that 'the whole basis of assessment will be quite different in say urban California to rural India'. In this case, given the evidence about the cost of living in Ukraine, he was 'prepared to conclude that the sums paid were not so disproportionate to expenses reasonably incurred that the granting of an order would be an unacceptable affront to public policy'.

(2) Were the applicants acting in good faith and without 'moral taint' in their dealings with the surrogate mother?
(3) Were the applicants party to any attempt to defraud the authorities?

The bona fides of the applicants and their lack of 'moral taint' was critical and Hedley J emphasised that, on the facts presented, he had 'no doubt that the applicants were acting in good faith and that no advantage was taken (or sought to be taken) of the surrogate mother who was herself a woman of mature discretion. Moreover there was never any suggestion of any attempt to defraud the authorities; quite the opposite. I am satisfied that these applicants sought at all times to comply with the requirements of English and Ukrainian law as they believed them to be.' (Para [21]).

Ultimately, however, assessing how badly the parents had offended public policy against commercial surrogacy was only one part of the decision-making process. The court also, of course, had to consider the welfare of the children, and the case for granting a parental order on welfare grounds in *Re X and Y* was stark. The twins were stateless and parentless, and it was difficult to see what their future might hold if the court did not grant the order. Hedley J commented, at para [24], that this made the process of authorisation 'most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (ie the child concerned) that rigour must be mitigated by the application of a consideration of the child's welfare.' He added: 'The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the

case comes to court the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.'

These comments are enlightening. Although the judgment articulates carefully why the parents in *Re X and Y* had not offended public policy to an unacceptable degree, it seems that in practice this contributed only marginally to the outcome. As Hedley J noted so vividly, the only sanction the court holds against commercial surrogacy (ie to refuse a parental order) has the effect of punishing an innocent child, and it would be difficult – even impossible – for an English family court to do this, no matter how badly the parents had infringed public policy. The case therefore goes a significant way to allowing fully commercial surrogacy in the UK, particularly where the court is in practice presented with a *fait accompli*.

The case highlights a very basic defect with the current law's ability to prohibit commercial surrogacy. The legal mechanism for controlling payments for surrogacy comes too late in the process, and the effect is that, in practice, the court can do little more than pay lip service to the public policy it is charged with upholding.

OTHER PROBLEMS HIGHLIGHTED BY THE CASE

It is noted above that many of the problems in this case would not have arisen had the surrogate been unmarried. Though an application for a parental order would still have been advisable in order to secure the British mother's position, in practice the children would have been entitled to enter the UK and to be cared for as the legal children of the British father. Hedley J expressed concern that other, less scrupulous, couples conceiving through foreign surrogacy could deliberately avoid any judicial scrutiny of the commercial nature of their arrangement simply by choosing a surrogate who was unmarried. As well as representing circumvention of the law, this could create a market for unmarried (and potentially more vulnerable) foreign surrogate mothers. The pool of willing surrogate mothers has traditionally been married women who, having experienced the joys of motherhood for themselves, are altruistically motivated to carry a baby for a childless couple. Greater understanding of the application of English law to foreign surrogacy may mean that an artificial demand for a very different type of surrogate mother is created.

Another problem which Hedley J emphasised was the inflexibility of some of the other conditions in s 30 HFEA 1990, including:

- The non-extendable time limit of 6 months from the date of birth for the commissioning parents to apply for a parental order. If the 6 month deadline expires (which may be more likely in foreign cases), the opportunity to apply for a parental order is lost forever.
- The absolute legal requirement that both the surrogate and her husband give their consent to the making of a parental order. Though in this case the surrogate parents' consent was not an issue, Hedley J noted that the surrogate and her husband have an absolute veto (unlike with adoption where the court can waive the requirement for consent if the best interests of the child demand it). He commented, at para [27], that those involved in surrogacy need to understand that their, 'rights may depend both upon the unswerving commitment of the surrogate mother (and her husband if she has one) to supporting the surrogacy through to completion by section 30 order and in their honesty in not taking advantage of their absolute veto.'

Perhaps most importantly though, the case highlighted the widespread confusion about the complex legal issues surrounding international surrogacy and the lack of good quality and readily accessible public information. Hedley J acknowledged that the British parents in *Re X and Y* had been diligent in their enquiries about parenting options and made what they felt was an informed decision. None of the legal difficulties they experienced were 'foreshadowed in any of the extensive enquiries the applicants had made before leaving this country, whether on Home Office websites or the information given by the bodies who advised them in the United Kingdom or the information given to them in and through the Ukrainian hospital'

(para [10]). While this state of affairs continues, there is a very clear risk that many other couples will fall into a similar trap. As Hedley J commented, at para [27]: 'The quality of information currently available is variable and may, in what it omits, actually be misleading'.

THE WIDER CONTEXT

Though the facts of this case may seem unusual, the prospect of other children being born into similar complications is worrying. The numbers of British people travelling abroad for fertility treatment (including surrogacy) are growing fast, driven by ease of access to information about foreign fertility services via the internet, cost, the acute shortage of egg donors in the UK, the lifting of anonymity for donors, and public policy restrictions which prohibit commercial surrogacy and advertisements for surrogate mothers. Hedley J acknowledged this trend saying, at para [26]: 'As babies become less available for adoption and given the withdrawal of donor confidentiality (wholly justifiable, of course, from the child's perspective), more and more couples are likely to be tempted to follow the applicants' path to commercial surrogacy in those places where it is lawful, of which there may be many'.

This suggests that some of the problems with the law highlighted by this case (as well as the lack of good quality public information) should be addressed as a matter of urgency. Surrogacy was an issue not looked at in detail as part of the government's review of fertility laws last year, though the government did suggest in Parliament that it was minded to review surrogacy separately. Hedley J noted, at para [29]: 'It is no part of the court's function to express views on that, save perhaps to observe that some of the issues thrown up in this case may highlight the wisdom of holding such a review.'

The language is moderate but Hedley J is right: surrogacy law urgently needs a review. What *Re X and Y* has demonstrated so graphically is how complex and difficult the current law is for British children born through foreign surrogacy, and at the same time how the law fails in practice to uphold the public policy of discouraging payments for childbirth. Parliament needs to take a fresh look at surrogacy and find a more effective legal solution fit for the twenty-first century. In the meantime, anyone contemplating foreign surrogacy (and their legal advisers) should proceed with extreme caution lest they too find themselves on 'a trek through a thorn forest'.