INTERNATIONAL SURROGACY AND SAME SEX PARTNERS: THE ISRAELI APPROACH

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Introduction

In my article in the September 2013 edition of Family Law Newsletter, *The Israeli Family Court: Judicial Powers and Therapeutic Interventions*, I described briefly the jurisdiction, principles and practices of the Israeli Family Courts.

In this article I show how these principles and practices are applied, by reporting on a case decided in March 2014 by the Family Court in Tel-Aviv[1]. The court was able to deal with a novel situation involving a same sex couple and international surrogacy, even in the absence of specific legislation.[2]

The Facts.

The plaintiffs, A and G, are two males who have lived together since 2006, and married (outside Israel; Israel has not yet passed legislation for same-sex marriages) in 2009. In 2010 they wished to expand their family, and entered into a agreement whereby they would obtain ova from an anonymous donor, fertilize the ova with sperm from each of them, and have the fertilized ova implanted in a surrogate's womb, in the hope that two children would be born. They made a surrogacy agreement in California, USA, with a woman whom they chose. After the pregnancy had been confirmed, they also made and signed a parenting agreement, which included provisions that the child or children to be born would have both of the plaintiffs as parents for all purposes, irrespective of the identity of the genetic father, and detailed arrangements about custody, visitation and child support in the event that the relationship between them should come to an end. One daughter was born, and in accordance with the law of California, the donor of the ova and the surrogate both waived any legal relationship with the child, and the plaintiffs were recognized and registered jointly as the parents of the child.

The Case before the Court

After returning to Israel, the plaintiffs requested registration and recognition as parents under Israeli law.

[1] FC (Tel Aviv) 21182-04-13, ***A.L. & G.L. v. Attorney-General***

[2] Nothing in this article should be construed as approval or disapproval of surrogacy in general or of same sex parenting. The object is to describe the existing legal framework.

After DNA testing proved that G was the genetic father of the child, and he was duly registered as father, the plaintiffs jointly applied to the Family Court under Sec 1(4) of the Family Courts Law for a paternity declaration, namely that A was also the father of the child.[3]

The Attorney-General, representing the State, was the defendant to the action. The response given was in essence that the State would not insist on an adoption application, but would agree to a judicial parenting order (as opposed to a formal declaration of paternity, which is only granted to a biological father), only after receiving a report from a welfare officer[4].

The plaintiffs contended that there was no basis to require a welfare officer's report.

Surrogacy Law in Israel

In 1996 the Knesset, Israel's parliament, passed the Surrogacy Contracts (Approval of Contracts and Status of the Newborn) Law, (hereinafter – the Surrogacy Law)[5].

The law provides *inter alia* that only a married couple, male and female, may enter into a surrogacy contract; that the surrogate must have already given birth to a child; that the surrogate must not be related to either of the spouses; that all three of the adults must go through checks as their suitability, physical, mental and social; that only after these checks have been carried out, may they enter into a contract, whose terms must be approved by a committee consisting of medical, mental and social work health professionals and a minister of the religion to which the parties belong, before the process of implantation of gametes begins.

In order to obviate problems which might arise immediately after the child is born, section 10 of the Surrogacy Law provides that the child is at this stage handed over, in the presence of a welfare officer, to the physical custody of the proposed parents, and they have all the responsibilities and duties of custodial parent from the moment of birth, but that the sole legal guardianship of the child is granted to a welfare officer.

Section 11 provides that the proposed parents must make an application for a parenting order to the Family Court within 7 days of the birth, and that after receiving a report from the welfare officer, the court will make a parenting order, which grants legal guardianship to the proposed parents, unless the report states that the making of a parenting order would be against the best interests of the child. The welfare officer appointed under the Surrogacy Law thus has three roles: to supervise the handing over of the child by the surrogate to the proposed parents, to act as temporary legal guardian of the child, and to make a report to the court prior to the making of a parenting order.

The Surrogacy Law does not make any provision for international surrogacy, nor does it provide for surrogacy arrangements for same-sex couples or for single parents. For this reason, a commission was set up to propose amendments to allow for supervision of

[3] The plaintiffs chose not to make an application that A should adopt the child; this would have been a possible course of action, but the plaintiffs saw this as being unnecessary in the light of their parenting agreement.

[4] A welfare officer is a senior social worker who has been granted statutory powers under various laws that provide for their appointment. The title "welfare officer" was recently abolished, and welfare officers are now called "social workers appointed under the ….law". But for this paper I shall, for the sake of brevity, call them welfare officers.

[5] As far as I am aware, Israel was the first country pass legislation regulating surrogacy.

international surrogacy agreements and to widen the scope of persons who can enter into such arrangements. The Commission reported in May 2012, and recommended that a parenting order could be made on the basis of international surrogacy agreements which would be recognized in Israel, subject to proof of compliance with the laws of the country in which the child was born. It was also recommended that a parenting order could be granted to a single parent or to a same sex couple.

However, the recommendations have not yet been made law.

The submissions before the court

Bearing in mind the absence of legislation or direct case law, the court was called upon to decide the specific issue: was it essential to have a welfare officer's report, or could the court make a parenting order on the basis of the material before it.

The Welfare (Procedure in Matters of Minors, Mentally Ill Persons and Absentees) Law, 5715-1955 empowers a court, hearing a matter relating to a child, to order that a welfare officer, appointed under the provisions of that law, make a report. The welfare officer is entitled to demand information from any relevant source, and a person so requested is obliged to give all such information as may be necessary. This provision is widely used by the courts, including the Family Courts, the Rabbinical Courts and the Sharia Courts, in matters of child custody and visitation, in applications to appoint a guardian for a disabled person, in applications under the Hague Convention on Child Abduction, and a variety of other cases; the welfare officers are senior social workers in local authorities, and the provision of reports is free of charge to the litigants.

It is under the provisions of this law that the Attorney-General requested the preparation of a report, since as stated, the Surrogacy Law does not apply. It was submitted on his behalf that in a parenting order application under the Surrogacy Law, the welfare authorities are involved in vetting the parties from the outset of the process, before the start of the pregnancy, and a welfare officer's report is an integral part of the proceedings before the court. In a case involving a foreign surrogacy, there is no such vetting, and therefore no independent and objective professional assessment of the suitability of the proposed parents[6].

The plaintiffs submitted that the court has a discretion, in ordinary cases involving custody and guardianship of children, to order a welfare officer to make a report, and that it is not compulsory[7]. They also submitted that the court could decide the case on the basis of the materials that they had provided.

[6] In a case I dealt with a few years ago, I expressed concern that in the absence of an independent assessment of the suitability of the proposed parents by a welfare officer, a child born by surrogacy might be handed over to a pedophile. To my sorrow, last year it was reported in the press that a convicted pedophile in Israel had received custody and full guardianship of a child born to him by surrogacy abroad. The National Council for the Child made immediate contact with the relevant authorities in Israel, so that arrangements could be made to prevent such occurrences, and it to be hoped that legislation, and indeed international conventions dealing with foreign surrogacy, will contain the necessary vetting arrangements.

[7] In adoption and abduction cases, and in child protection matters, and, as we have seen, in Israeli surrogacy cases, a welfare officer's report is, however, compulsory.

This material included their affidavit evidence and the documents attached to the statement of claim. They pointed to their stable relationship (as stated, they had lived together since 2006 and were married in 2009), and the various agreements in writing. These agreements included those between the plaintiffs and the surrogacy agency, the surrogate herself, the donor of the ova and the fertility clinic, and the parenting agreement between the plaintiffs. In addition, the court had before it the judgment of the American court recognizing the plaintiffs jointly as parents of the child[8], their registration as her parents in the birth certificate, and a certificate attesting to the child's conversion to Judaism and a ceremony celebrating the conversion[9].

The plaintiffs also made additional submissions, including that there is a constitutional right to parenthood under the Basic Law: Human Dignity and Liberty[10], and that any infringement of this right may only be permitted under specific legislation, and that there was no such legislation. They contended that the only reason for the involvement of a welfare officer was to protect the surrogate. The plaintiffs also stated (and on this there was no dispute) that the welfare officers would not be able to prepare a report for several months, in light of the many urgent cases they have to deal with under conditions of insufficient personnel.

The Attorney-General responded that the establishment of legal parenthood could not be granted merely because a person wanted to be the parent of a particular child with whom he had no biological connection, and for this reason a welfare officer's report was mandated by the Surrogacy Law. Even in the absence of specific legislation, the court ought to deal with the specific situation in the light of the legislative intent of the Surrogacy Law, and that unfair advantages would be given to those involved in foreign surrogacies and that this would be improper discrimination against those couples who chose to undertake the surrogacy in Israel.

According to the Attorney-General, a report was needed to protect the child, and not only the surrogate, and he invited the court to reject the plaintiffs' arguments that an investigation for preparation of a report would be demeaning and intrusive, and that it would be discriminatory and offensive to a particular sector of society. On the contrary, the report would show whether the family unit into which the child was entering was stable and that all the necessary conditions for the child's upbringing were in place, the criterion being the best interests of the child.

The Decision.

The court found that in the circumstances of the case it was not necessary to order a welfare officer to report, and that it would be appropriate to make a parenting order in favour of A.

While rejecting some of the plaintiffs' arguments, especially those relating to sectoral discrimination, the court found that it had before it sufficient information to be convinced,

[8] Israeli law does not provide for recognition of foreign judgments, so far as they relate to personal status.
[9] These last documents were also issued in America, and the question whether the relevant authorities in Israel would recognize the child as Jewish was not an issue in the case before the court.
[10] This Law, passed in 1992, contains the privileges and immunities of persons which are protected, "reflecting the values of the State of Israel as a Jewish and democratic state" (section 1A), and, in the absence of a written constitution, has constitutional status by virtue of special restrictions on its amendment or suspension.

without need for a report, that making a parenting order would be in the child's best interests. This was based specifically on the fact that the Attorney-General had not disputed any of the plaintiffs' factual submissions as to the stability of their relationship and their parenting capacity[11]. The decision whether or not to require a report is in the discretion of the court and not mandatory, and the in the absence of any dispute on the facts a report was unnecessary. The court emphasized that the reports of welfare officers are recommendations to the court, and constitute only part of the evidence before the court, which is in no way bound by the findings and recommendations of the welfare officer.

The court also took account of the proposals to amend the existing legislation to allow foreign surrogacy, and that the plaintiffs had proven the legality of the processes they undertook in the US, including the waiver by the surrogate of any legal or other connection with the child, and the judgment of the American court and the birth registration.

Following recent decisions of the Supreme Court of Israel in other cases of international surrogacy, the Family Court joined its voice to those calling for completion of the legislative reforms.

Conclusion

The case which came before the Family Court demonstrates the ability of the court to deal with a novel situation on the basis of existing principles. The fact that surrogacy is recognized in Israel, and that the Family Court is free, if necessary in the interests of justice, to diverge from the ordinary rules of evidence and procedure, provided the judge in this case (who before his appointment to the judiciary was an advocate with many years of experience in a wide range of family matters) with the ability to determine the matter in the interests of the child.

However, if the Attorney-General had disputed the stability of the plaintiffs' relationship, or had expressed doubts about their parenting abilities, it is reasonable to assume that an independent report would have been ordered.

The case does however point out that the international community needs, as a matter of urgency, to reach agreements as to all the stages of international surrogacy. Any Convention or bilateral agreement on the subject needs to address several issues, including the protection of women from exploitation and the legality of the surrogacy relationship.

But particular importance attaches to the need to establish the suitability of the proposed parent or parents, in their home country, as a condition of entering into a surrogacy arrangement. Since some considerable time must pass between the investigation of suitability of the proposed parent or parents in principle and that the birth of the child, the court of the home country must also be convinced that a parenting order would be in the interests of the child.

[11] According to Israel evidence law, the failure of a party to dispute a factual issue attested to by the other party entitles the court to conclude that those facts are proven, since the failure to dispute them, or to ask to cross-examine, means that there is no dispute.