

SURROGACY CASE LAW¹

NÁHRADNÍ MATEŘSTVÍ V JUDIKATUŘE

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ABSTRACT

The phenomenon of the present family life that is becoming more and more often is surrogacy motherhood. The society does not follow the same opinion about the consequences of surrogacy. Nor the law in many countries. Czech Republic and Slovakia belong to those countries whose hold on traditional motherhood legislature. In fact that means no special rules for surrogacy. As it may cause complicated situations, this article brings a different point of view on the topic. Also very traditional, British legislature deals with surrogacy for couple decades. And still faces new challenges as the society is changing and the family life as well. What are some of the new challenges and what are the legal bounds on surrogacy in United Kingdom brings this article. Its meaning is to initiate the scholarly discussion on the surrogacy in Czech Republic and Slovakia.

ABSTRAKT

Fenoménem současného rodinného života, který je stále častější, je náhradní (surogátní) mateřství. Společnost nemá vytvořené jednotné hledisko na důsledky náhradního mateřství. Natož legislativa mnoha zemí. Česká republika a Slovensko se řadí mezi země, které setrvávají na tradiční legislativě týkající se mateřství. Ve skutečnosti to znamená neexistenci pravidel pro náhradní mateřství. V důsledku to však může přinášet složité situace, proto tento příspěvek přináší jinou perspektivu. Taktéž velmi tradiční legislativa Velké Británie totiž s náhradním mateřstvím pracuje již desítky let. A stále čelí novým výzvám tak, jak se společnost a rodinný život mění. Tento článek přináší nové výzvy a jejich řešení v rámci stávajícího legálního rámce ve Velké Británii. Jeho smyslem je stát se odrazovým můstkem odborné diskuse na téma náhradního mateřství v České republice a na Slovensku.

I. INTRODUCTION

Surrogacy stands for a theme that is becoming very important and topical. The fact is that more and more couples are not able to conceive a baby natural way. There is also a different view on parenthood of the 21st century that consist in increasing forms of the family. As the traditional family containing only a man, woman and their child is lately outdated. The new forms of families are becoming the part of the society and nobody is shocked anymore to see a single parent, divorced parents, children born via in vitro fertilization (IVF), adopted children, and even same-sex couples in role of parents.

Special law on surrogacy has a very long tradition in the United Kingdom. *Surrogacy Arrangements Act 1985* was a reaction to a real case known as “baby Cotton” that occurred

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much earlier, in 1980.² In that case a woman agreed to carry a baby for a Swedish couple. They used the egg from surrogate woman and sperm became from the man from the intended couple. The surrogate agreed never to look for the baby and the intended couple remained in secret. Arrangement was set up by an American special agency. The surrogate mother and the intended couple never met each other and did not know any personal information about themselves. The surrogate mother after the baby was born meant to seek for the baby. She was never successful.

After the case went public, the *Committee of Inquiry into Human Fertilisation and Embryology* included the surrogacy into its special report³. This Committee recommended “that legislation be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother; such legislation should be wide enough to include both profit and non-profit making organisations. We further recommend that the legislation be sufficiently wide to render criminally liable the actions of professionals and others who knowingly assist in the establishment of a surrogate pregnancy.”⁴ The Committee also recommended to make all and every agreements on surrogacy illegal. Then the report became an impuls to Surrogacy Arrangements Act that rushed thru the Government and changed the law according to the recommendations of the Committee.

Since 2008 there is also the *Human Fertilisation And Embryology Act 2008* which contains integrated legal treatment for all types of assisted reproductive techniques and its repercussions on the parental rights as well as rights of the issued children. This act makes clear who the father and mother is in certain events. It also provides the right of the child to get some information about the donors in case of a child that has been adopted or parental rights are exercised by some other person different from a birth mother or birth father.

On contrary in the Czech Republic and Slovakia there is almost no legal bounds on surrogacy set. The surrogacy on altruistic basis is not prohibited but there are no rules nor for the surrogate mother or the intended couples. The special reproductive medical treatment is provided without any social or legal support for both parties. In fact there are some children born with the perspective of being adopted by the wife of the birth father. Surrogacy motherhood in these countries is going on and parents involved are step away to break the law.

Next five examples shows what new challenges are on surrogacy motherhood. They only reflect changes caused by the present family life which is very diversional and colorful.

II. CASE ONE – SINGLE PARENT AND RESPECT FOR FOREIGN JUDGMENT

Case one is concerning a child Z, born in August 2014 in the United States of America, to an experienced surrogate mother. Z was conceived with the sperm of the applicant father and the egg of the donor was implanted to the surrogate woman. After the birth of Z, appropriate

² f.e. MERCER, David. Britain's first surrogate mother still longs for Baby Cotton 30 years on. *Express: Home of the Daily and Sunday Express* [online]. 2015, 4. 1. 2015 [cit. 2015-12-28]. Dostupné z: <http://www.express.co.uk/life-style/life/550033/Kim-Cotton-first-surrogate-mother-UK-misses-baby-30-years-on>.

³ Department of Health & Social Security. *REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY*. July 1984. London: HER MAJESTY'S STATIONERY OFFICE, 1984. Available from: http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf.

⁴ Department of Health & Social Security. *REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY*. July 1984. London: HER MAJESTY'S STATIONERY OFFICE, 1984, page 47. Available from: http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf.

court in Minnesota relieved the surrogate mother according to the law from any legal rights and responsibilities for Z. The only parent of Z became the child's biological father. This father is the citizen of the UK and him and the child returned later on home, to the UK.

Even though the surrogate mother lost her rights under the Minnesota law, in the UK she was still treated as a mother. Father under the UK law did not have parental responsibility for Z and to secure Z he remained a ward of court. For father there were only two possibilities how to make his parenthood legal, respectively to get the parental responsibility awarded in the UK. The first one was the application for the parental order according to section 54 of the 2008 Human Fertilization and Embryology Act. Second option meant adoption of Z in accordance with section 46 of the Adoption and Children Act 2002. The father's choice was to obtain the parental order because the way of conceiving his son was via surrogacy.

Father applied to the court for the parental order (Case No: ZC15P00214; Neutral Citation Number EWFC 73, Royal Courts of Justice, London, 7 September 2015). Section 54 of the 2008 Human Fertilization and Embryology Act requires an application to be made by two people following the set conditions. The paragraph 2 of the Section 54 of the 2008 Human Fertilization and Embryology Act makes clear the applicants must be either husband and wife or civil partners or two people living as parents.

Large changes concerning the same-sex civil partners and later on the same-sex marriage made no changes on the concept of the two parents rule approved by the 2008 Human Fertilization and Embryology Act. The parental order could not be released for the circumstance "a single person is unable to apply for a parental order."⁵ The father changed the option then and the adoption order was made in this case.

The question on this case is clear. Is there a reason to insist on two applicants for the parental order? Is it the best interest of the child that the foreign judgement is not respected?

First question to be answered. The problem is seen in comparison of the parenthood. In case of adoption there is a child who is already born and the child's parents are not able to take care of him. Therefore some other parent, and even single one, is allowed to adopt such a child. If a single woman decides to receive the IVF (in vitro fertilization), it is the woman involved in becoming pregnant and giving birth to her legal child. The surrogacy is different with no parallel to these cases. Surrogacy is based on the agreement of a woman before conception to hand over the child to be born.⁶

Whether the parallel is clear or not, there may be a problem with the applicant as a male. What else makes the difference between the single woman receiving IVF and a single man making the agreement on a child with the surrogate? I do not see any and my opinion is that there is no relevant reason to insist on two applicants for a parental order in every case. There might be some cases where to be taken into account who is the applicant and if the single one is able to treat the child and take care for him. In other words the best child's interest must be examined. If the case above would not be changed into the adoption there would be the surrogate mother still the mother of the child and the father would not be obtained with any parental rights. The child Z would lose both parents. This should be always the priority to seek for the best interest of the child.

There is known one Czech judgement about same-sex partners and their adopted children. Anyway the Czech law does not recognize same-sex partners as legal parents. This couple has been granted the adoption order by the state of California. Due to the fact one of the man was the Czech citizen, he asked the Czech court to approve the decision about the adoption order to ensure the status of his children in the Czech Republic. The Czech court did not grant the

⁵ Re A, B v C [2015] EWFC 17.

⁶ Dawn Primarolo, Minister of Stet, Department of Health for the judgement about Z.

parental order according to the Czech law but approved⁷ the decision of the Californian court even for the Czech territory.

If we compare the way the UK and Czech courts dealt with the decision of the foreign court, the one in welfare of the children and in its best interest was the judgement of the Czech court that ensured position of the children in the country their father is belonging.

III. CASE TWO – SAME-SEX APPLICANTS

A special legislation on same-sex couples in a role of parents is set even for surrogacy matters. It is clearly demonstrated in a case [2015] EWHC 1756 (Fam), No. ZC14P00770 judged by the Royal Courts of Justice, in the High Court of Justice, Family Division. The applicants for the parental order were two same-sex partners. Actually this case was their second proceeding. In the first one this couple received the parental order to a little African boy.

In the observed case these applicants applied for the parental order in relation to a girl A. She was born to an African surrogate mother, the widowed lady. The surrogacy arrangement was set between the surrogate mother and the applicants. Girl A was conceived following the IVF treatment. As in the first observed case, the sperm belonged to one of the applicants. The eggs came from the third party donor.

Same-sex partners as applicants must obey the criteria under the section 54 of the 2008 Human Fertilization and Embryology Act. First is the biological connection between the applicant and the baby. Also mother must be the surrogate one and not being one of the applicants. This criteria were fulfilled by the applicants.

The second criteria follows the relationship of the applicants. The court must be convinced the applicants are able to satisfy the child's lifelong welfare needs the way they are set by the Adoption and Children Act 2002. These needs are usually satisfied by those couples that live together for a long time and are able to secure the family matters. Also this couple must be stable and well doing in every way.

The application must be made within six months of the child's birth and the child must live with the applicants at the time the application is made. These criteria are met in this case. As the age of the applicants who must be over 18 years old was met as well (these applicants are 51 and 46 years old).

The surrogate mother must agree with the application, as the next criteria under the section 54 Human Fertilization and Embryology Act 2008. This woman must freely and with full understanding make her decision to support the parental order. The statement must be done more than six weeks after the baby is born. Such a statement must follow the surrogacy agreement which must be in writing and confirmed by the court. If the surrogate is married or has a partner, this person is always joined in the proceedings. The agreement must obey these conditions:

- i. the commissioning parents must be unable to give birth to a child
- ii. one of the parties must be domiciled in the country of the court jurisdiction
- iii. conception of the child should use the gametes of both parents, if possible. At least one of them is a must.
- iv. the parents must be suitable persons to accept parenthood
- v. the surrogate mother is not being paid for the surrogacy as a form of income {only altruistic reasons are acceptable}
- vi. the surrogate mother must have her own living child

⁷ Judgement of the court in Prostějov, 5th November 2015, No. 0 Nc 4714/2015-85.

As all criteria above were in this case fulfilled the court made the parental order and freed the surrogate mother from her parental responsibility. That means the only child's parents are since the parental order was issued the applicants as two men and this child has no mother according to the judgement.

In such a case I see two important points. First is the acceptable foreign ruling. The UK court was satisfied with the judgements made by the South African Court about the surrogacy agreement. Also the UK court must accept the proceedings to see the child's home that was in the time of the application in the South Africa with the applicants and the second, older child.

The second point is that the parental order means the applicants are becoming parents of the child. The law advantages both parents to have the biological connection with the baby in case of surrogacy. It is avoiding the traditional surrogacy using the eggs of the surrogate. This way is the surrogate mother the one who carries the baby but has no genetic connections to the baby.

Even the same-sex couples are able to apply for the parental order. These couples are now almost at the same position as the couples made by a man and a woman. For the same-sex couple is the condition of inability to give birth to a child fulfilled in advance. There is no need to prove this condition by a medical report. Surrogacy is usually the only way to have a baby for the male same-sex couples. Opening the law to give such an opportunity to gay men especially is a huge step forward on a field of the non-discrimination policy in the UK.

IV. CASE THREE – SURROGACY AGREEMENTS

Third case is one of the cases that are well known to public thru the media.⁸ Even though the applicants for the parental order are gay couple again, this case has different meaning. This is about surrogate mother that changes her mind after baby deliver. Which means different point of view on surrogacy itself. But first the case H versus S.⁹

The main theme of the case is the arrangements about the baby. One party claims there was an agreement about a woman who is willing to carry the baby for the gay couple. This couple admits the surrogate mother was supposed to play some role in the baby's life. The other party represented by the woman argues she was having a baby using a man's sperm and there were no arrangements for the man to play any role in the baby's life.

After the baby was born, the gay couple did not apply for the parental order under the Human Fertilization and Embryology Act 2008 but for the parental responsibility. The woman S denied to be a surrogate and made her own cross-application. As she was about to play an active role in the baby's life, there was not applicable the law on surrogacy. The case matters were considered as private family disputes.

There was no agreement in writing so the court was about to decide whether a woman agreed to be a surrogate for the gay couple where both man would be the parents and main carers for the baby. The court had to deal with the argument of the mother that she and a father of the baby were the only parents of the child. There was no role for the father's partner to a child, according to what mother said.

The court found that a baby girl lived with the applicants. She sought her mother twice a week. Her mother meant to change that and wanted the order that the girl was living with her. The court's role was to decide, what is the best interest of the child, because there was no rea-

⁸ F.e. <http://www.theguardian.com/law/2015/may/06/high-court-orders-surrogate-mother-baby-gay-couple> or <http://www.dailymail.co.uk/news/article-3068796/Deceitful-surrogate-mother-carried-baby-wealthy-gay-couple-refused-hand-desperate-child-herself.html> or <http://www.bbc.com/news/uk-32603514>.

⁹ [2015] EWFC 36, Case No. FD14P00262, Royal Courts of Justice, London.

son to prove the surrogacy agreement, since the mother had an important role in the child's life.

The mother at the hearings made allegations that were not supported by the evidence, which consisted also from the huge email correspondence. Her position at the court went even worse after she made a lot of homophobic and offensive statements. She also used some emotive image pointing the child was breastfeeding by her.

The court had to decide what harm would be for the baby less affective. Whether it would be taking her away from the mother she spent time with or if her staying with her mother would be the harm for her. There was no doubt on the applicant couple to play the positive role in the baby's life since the father was said to have a child-centred approach, to let the baby to grow into happy, balanced and healthy adult.

After all the judgement made by the court was in the favor of the father. He was found to be in the best interest of his daughter even for the future. Mother was enabled to spend only restricted time with the baby to avoid the conflict. The contact was to be supervised.

The paragraph 125 of the Judgement says: "It is not the function of this court to decide on the nature of the agreement between H, B and S and then either enforce it or put it in place. It is the function of the court to decide what best serves the interests and welfare of this child throughout her childhood. It is, however, a fact that M was not conceived by two people in a sexual relationship. The pregnancy was contrived with the aim of a same-sex couple having a child to form a family assisted by a friend, this was ostensibly acquiesced to by all parties at the time the agreement was entered into and conception took place. Therefore M living with H and B and spending time with S from time to time fortunately coincides with the reality of her conception and accords with M's identity and place within her family."

The case shows how important the agreement is for the future needs. Even though the intended couple has some intentions the baby knows her mother, it must be the part of the agreement what the role of the surrogate will be in the baby's life. Such a case proved there was no decision about surrogacy in application for parental order. This case was about two parents and their homes. It was simply about the best interest of the child and if the mother would be in better condition and was not disusing her motherhood to prove she would be the only alternative for the baby, she would stay with her daughter. For her weakness and bad manners she left the court beaten because she had no potential to ensure the baby's welfare.

V. CASE FOUR – SINGLE PARENT

A new challenge for the family type of the 21st century is a single parenting. This case also went public. Not for only the fact there was just a single parent. Mainly for the fact the surrogate mother was real mother of the applicant. That caused the applicant meant to adopt his brother – according to the law. Since the gametes were not coming from his mother although his sperm was used, the surrogate mother had no genetic connection to the baby.

This case¹⁰ was simple. B made an agreement with his mother which was willing to be a surrogate for the baby. Her and her husband after the child was born became the legal parents of the baby and they both supported B in his application for an adoption order. There was no possibility of the parental order due to the fact B was a single man. B was only able to apply for an adoption order under the Children Act 2002. A single person caring for the child that was born via surrogacy is able to apply to adopt that child, subject to provision of section 92 Children Act 2002.

¹⁰ B v C (Surrogacy – Adoption) [2015] EWFC 17.

The Children Act 2002 requires special conditions. One of them is that the child has to live with the applicant for three years during the period of five years preceding the application. Baby concerned was at age seven months. Baby was in care of the applicant since his birth.

According to the paragraph 92 (4) Children Act 2002 the applicant met the condition to be relative to the child because he was a legal brother. Even if the legal parents placed baby to his care they were acting according to the law. Since the applicant met other conditions to provide the child with all needs, the application was granted and an adoption order made.

Even in the judgement is said this case was unusual and before not seen. The problem would be if the applicant was no relative to the child like in this case. If the surrogate is a legal mother and her husband is legal father, there must be for the adoption the condition of living together for at least three years fulfilled. Those years means that the relationship between the real genetic father and his children is questionable and the full parenting belongs to mother and father recognized by the law.

VI. CASE FIVE – WHO IS THE PARENT?

Every surrogacy case has to deal with different parties. Everyone involved has some legal statutory which may not be the same as the parties would like to have. The fifth case¹¹ shows the problems when the adults involved in the surrogacy will not stay together. Actually it does show a lot more.

A child was born via surrogacy. The applicant in this case was a woman that wished to have a baby with her husband. Due to her health she was unable to have a child of her own. The couple decided the way of surrogacy when the eggs will be surrogate's and the sperm husband's (the genetic father LP). This couple made an agreement with a friend willing to be a surrogate and conceived a baby at home by the artificial insemination.

The hospital where the birth should be placed ask the parties to provide the hospital a copy of the surrogacy agreement. Parties asked the solicitors to write one even though such an agreement is enforceable by law. The solicitors wrote the agreement and charged the parties a fee. This was in contravention of section 2 of the Surrogacy Arrangements Act 1985.

When CP was born, the hospital handed him over to the intended couple on the basis of the surrogacy arrangement. As his father was registered the man from the intended couple and as mother the surrogate mother.

After a little time intended couple broke up. The applicant woman left her home taking baby with and made an application in other place for a residence order in her favor. At the court a shared residence order was made. Also the intended couple made an application for a parental order pursuant to paragraph 54 of the Human Fertilization and Embryology Act 2008.

Both parents signed the application on time but was finally issued to the court when the baby was 7 and half months old. In other wording, the application did not meet the limit of 6 months from the baby's birth. Since none of the interested parties has attended listening at the court the parental order was dismissed. After some time and some other applications mother made an application for the sole residence of the baby.

The High Court was asked to address the legal status of each party involved in this case and consider how to settle the parental responsibility. The court was considering the situation that the insemination was made home and the treatment that is necessary for conceiving pregnancy was not served by the UK Licensed clinic. The court also considered a fact the applica-

¹¹ [2014] EWHC 595 (Fam), Cases No: LE12P00429 & BM12P09386.

tion was made after the six months from the birth and also that the intended couple was no longer a couple. The parental order therefore was not an option for the specific situation.

Adoption was the same problem due to the fact father's position would be extinguished pursuant to paragraph 46 and 67 Adoption and Children Act 2002. Very similar situation would become if the special guardianship order would be made. Other option would be a shared residence. That would not bring the wanted position for the mother because with any move from the residence she would lose her responsibility for the baby. It would not deal with her legal status for the motherhood.

Finally the parties offered the solution based on the agreement. The court has endorsed following structure.

- i) The baby remain a ward of court until further order
- ii) shared residence for mother and father
- iii) parental responsibility is delegated to the mother and father
- iv) the surrogate mother is prohibited from exercising any parental responsibility.

This case is leading to the needs of the agreement to be made before conceiving the baby. This should be the very first thing to do when parties are making the arrangements. It also shows how important is to have the counseling. If everyone who is approaching the surrogacy would have the right legal, social, medical, psychological and other care, there would not be results like those cases above shows.

VII. CONCLUSION

It was mentioned above the special commercial agencies are prohibited in the UK. They are prohibited also in the Czech Republic and Slovakia. This does not include non-profit agencies that operate on the bases of the law. They do exist only in the UK. They provide both parties (the intended couple and the surrogate) with informations, legal bounds, they help to make an arrangement and they help with the medical care. Very often such an agency is run by surrogates themselves to support each other.

The huge problem to be solved soon is parental rights. The legal bounds are not satisfying the real needs of the children that are born to surrogates. These babies very soon comes to the care of the intended couple but the parental rights are not transfered at the same time. Mother of a child is the woman who gave birth to the child. No matter what the genetical connections are, no matter what agreement was set up. The intended parents must first apply after the baby is born. There is a time of uncertainty between the application and the parental rights are granted. That brings some dangerous issues because the surrogate can change her mind meanwhile. And at this point we are back on the beginning of the delicate issue that can make the dream come true as well as dissapointment due to the weak legislature.¹²

After all the surrogacy is a very sensitive theme. There will never be the same opinion on the arrangements of the surrogacy across one country. On one hand there is still the problem with the surrogate mother and her right to change her mind and on the other hand there is the right of the intended couple to have a baby via special medical treatment involving some other woman. And also there are even the genetical connections involved. These connections may bring some more involved persons to the problematic parental medley. But they sure are important for the baby.

¹² HORSEY, K., 'Surrogacy in the UK: Myth busting and reform' Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015).

KEY WORDS

Surrogacy, motherhood, fatherhood, family.

KLÍČOVÁ SLOVÁ

Náhradní mateřství, mateřství, otcovství, rodina.

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