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Childless couples win right to pay a surrogate mother to bear their child

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Landmark: Couples have won the right to pay a surrogate mother after two Britons were allowed to keep their child despite illegally paying another woman

A couple who illegally paid a surrogate to have their baby will keep the child after a landmark court ruling.

In a case which may open the floodgates to foreign surrogacies, the Britons paid an American an unspecified sum to carry their child.

It is forbidden in England and Wales to pay more than 'reasonable expenses' to a surrogate mother – even if she is abroad – because it would encourage a profit motive.

But a High Court family judge yesterday backed the couple, while making clear that the sum they paid was far in excess of what is allowed.

Their surrogate lives in the state of Illinois where no restrictions on payments apply and British authorities allowed the baby to enter the UK temporarily on an American passport pending court proceedings.

Mr Justice Hedley saved the youngster from limbo when he 'retrospectively authorised' the payments made to the surrogate mother and recognised the couple as the lawful parents.

In making the decision, the judge said the child's welfare was of paramount concern.

Issuing a parental order, he described the couple as 'most careful and conscientious' and said they had fully met all the other criteria for surrogacy.

'It is clear to me that payments in excess of reasonable expenses were made in this case,' he added.

'Welfare is not merely the court's first consideration, but becomes its paramount consideration.

The effect of that must be to weight the balance between public policy considerations and welfare decisively in favour of welfare.'

He added that the court would rule against surrogate parents only in the clearest case of the abuse of public policy.

He described the concept of reasonable expenses as 'somewhat opaque' but said the surrogacy process must continue to be policed by the courts.

The first case of surrogacy in the UK was in 1985 and while there have been more than 700 cases since, the practice is still controversial.

The Human Fertilisation and Embryology Act states that parents must be over 18, and either married, civil partners or living together in an enduring family relationship.

At least one must be a biological parent of the child and at least one must have permanent roots in the UK.

They must offer the child a home and the court must be convinced the surrogate mother acted of her own free will, fully understanding what was involved.

It is the second time Mr Justice Hedley has allowed parents to flout the law on surrogacy payments.

In 2008, a couple using eggs from an anonymous donor were allowed to keep their twins, borne by a Ukrainian surrogate they had paid £23,000.

At the time, the judge expressed deep sympathy for the couple's anxiety and said: 'The court shares their hope that their experiences may alert others to the difficulties inherent in this journey.'

UK law recognises the surrogate mother as the legal parent of a baby unless a parental order is made, although she has no genetic link to the children.

Gamble and Ghevaert LLP, a law firm based in Poole, Dorset, which specialises in surrogacy law, warns: 'While foreign surrogacy arrangements can seem attractive, great care needs to be taken over the legal issues.

'English law will not automatically recognise your status as the parents even if you are named on a foreign birth certificate and this can lead to difficulties over immigration and citizenship.'