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Case No: ZC15P01038, ZC15P00322, ZC150514

IN THE FAMILY COURT at the ROYAL COURTS OF JUSTICE

IN THE MATTER OF THE HUMAN FERTILISATION & EMBRYOLOGY ACT 2008 AND IN THE MATTER OF A, B AND C (Infants)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2016

Before:

MS JUSTICE RUSSELL

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Between:

F and G	**Applicants**
- and –	
X, Y & Z	**1st, 2nd & 3rd Respondents**
- and –	
A, B and C (by their guardian)	**5th, 6th & 7th Respondents**

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Mr. Andrew Powell (instructed by **Natalie Gamble Associates**) for the **Applicants**
1st, 2nd & 3rd respondents appeared in person
Ms. Samantha King (instructed by **Dawson Cornwell**) for the **5th, 6th and 7th Respondents**

Hearing dates: 15th – 16th October 2015

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JUDGEMENT APPROVED

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Ms Justice Russell DBE:

Introduction

1. These are applications for parental orders in respect of three children, born within the space of 6 months, who were all born as the result of surrogacy agreements entered into by the Applicants F and G with three surrogate mothers X, Y and Z. This is a case which brings into sharp relief the "surrogacy market" referred to by Moylan J in *Re D* [2014] EWHC 2121 and could be considered to provide further illustration of the need for better regulation of surrogacy agreements in the United Kingdom recognising the reality that there is an existing market.

2. This is not the only case which has come before this court where commissioning parents (here a same sex couple F and G) met the surrogates online, on a Facebook site set up and run by W, and others, to provide a forum on social media for such introductions with a view to such arrangements being reached between commissioning parents and potential surrogate mothers. I was told by W, who has given evidence before this court in this case, what she had arranged were also face – to – face group-meetings which took place at her home or at public houses.

3. The court heard that in this as in other cases, the surrogates were paid sums of money at what was considered to be the "going rate" which is between £8,000 to £15,000 (although I understand that sometimes surrogates receive a larger sum than £15,000). The law provides for no such tariff for expenses for UK surrogacy, or indeed any definition in respect of "expenses reasonably incurred". There is no universally acceptable figure to pay for surrogacy expenses in the UK irrespective of the circumstances in law, whether it is £15,000 or more or less.

4. There had been some suggestion that W had taken payments as an agent (which it could be argued would be illegal under the Surrogacy Arrangements Act 1985 if found to be third party brokering) but, as all parties accept, there is no evidence before me that she received any such payments in this case in respect of any one of these children.

5. From the evidence before me it is abundantly clear that the applicants had originally set out to mislead the court about the sum they had paid each surrogate, indeed they do not deny that they did; however the surrogates themselves were not party to any deception to the court (although X had been party to the initial discussions) and all three were unequivocal in their desire and expectation that parental orders should be made. They had never had any intention or expectation of retaining their legal status as the babies' mothers which they had at the time of birth and would continue to have until orders were made. In these circumstances on the facts of these three applications, briefly outlined here, I considered that all the relevant provisions of s54 of the Human Fertilization and Embryology Act (HFEA) 2008 were met and made parental orders in respect of the three children at the end of the hearing last year.

6. The delay in handing down this judgement came about as a result of W giving evidence in another, entirely separate case, where commissioning parents had been introduced by W to a surrogate online and where there had been a much less satisfactory outcome for both the surrogate and the commissioning parents; the only common feature in both cases was that W had played a role at the outset in the surrogacy arrangement, as had the social media forum for which she was an administrator.

7. I decided, although that case has no direct bearing on this case, as W's role as administrator had gained some notoriety and she is closely related to X and Y (two of the surrogates who gave evidence in this case), that the court should hear her evidence in both cases before giving judgement to allow for some relevant facts emerging later in respect of the social media forum or W's conduct which impinged on this case. As W was not represented, and as she chose not to seek or take any legal advice despite being encouraged to do so, and I considered it necessary to delay giving judgement in this case to enable her to give her best evidence, knowing that no judgement was given in either trial until she had completed her evidence in both. Her role in this case was, in any event, peripheral. It was not necessary to consider wider issues regarding the Facebook site, its administration or the activities of other people on that site as the court was only concerned with the agreements between the three surrogate mothers and the applicants.

8. Unfortunately the second case had to be adjourned and was not heard until April 2016 and the delay in handing down this judgement was much longer than had originally been anticipated. Fortunately, as the parental order in respect of A, B and C were made without any opposition in October 2015, there has been no prejudice to the children.

Welfare: guardian's analysis

9. The three children were born to surrogate mothers; A to X in January 2015, B to Y in February 2015 and C to Z in July 2015. As well as being concerned about the actual amounts paid to the surrogates and the dishonesty of the applicants to the court in disclosing the amounts they had paid, the welfare of the three children was an issue that had to be determined by the court, as it would be a challenge to any parents to manage three children born in such close proximity to each other; their decision to enter agreements which meant they had three babies to care for within the space of six months raised questions about whether the applicants had taken appropriate, child-centred decisions about "building their family".

10. The three babies were separately represented and their guardian prepared parental order reports on each child considering the needs of each and their welfare by applying the welfare checklist in the Adoption and Children Act 2002 which is to be applied in applications for parental orders following the 2010 Regulations which accompany the HFEA and which came into force in April 2010: paragraph 2 and schedule 1 of the Regulations apply s1 of the Adoption and Children Act 2002 to Parental Order applications so that the child's welfare must now be the court's "*paramount consideration... throughout his lifetime*". In the case of each child she recommended that a parental order should be made.

11. The guardian, Ms Helen Thompson, was concerned primarily with the welfare of the children and investigated *"how the demanding care needs of three such young children will be met."* During the course of her investigation and preparation for writing her reports she visited the applicants at home and observed them caring for one, two and then three infants. She interviewed them and the three surrogates, and at the conclusion was more than satisfied that the applicants had demonstrated insight in advance of becoming parents to three infants; they had anticipated the challenges involved and responded appropriately by minimising their working hours and arranging assistance from the parents of G and an au pair. She said they had shown

"*enormous pride and joy*" in devoting themselves to caring for the children and her observations were that the children receive "*excellent parenting*"; the applicants *"have good routines and appear to have an excellent understanding of each child's individuality and individual needs."*

12. I have no reason to doubt Ms Thompson's analysis which was as a result of meeting the applicants over many months as their family grew. She had doubts about the wisdom of having three children so close together but was convinced by their care of the children and the love and delight that they had in their family. The applicants have the support of family and friends and had planned for the children in advance. They had good relationships with the surrogates, which they later compromised by their dishonesty to the court about the amount they had paid in expenses, however that does not alter the fact that X, Y and Z have freely, with full understanding, and unconditionally given their consent pursuant to s54(6).

Section 54 requirements

13. I am satisfied on the evidence before me that all other conditions under s54 are met and it is not necessary for me to set them out in full here as there is no dispute. The three children are each the biological child of one of the applicants; the applicants are civil partners; the timing of each application conforms with the time limit in s54 (3); the applicant F is domiciled in England (s54 (4)); they are over the age of eighteen (s54 (5)); and following that, the remaining issue for the court to determine is the amount of payments to the respondent surrogates and whether those payments should be authorised under s54 (8) in light of the applicants' dishonesty to the court.

14. The essential question is whether the payments I now know to have been made to each X, Y and Z were for expenses reasonably incurred; if I am satisfied then that is an end to the matter as it makes no difference, in fact, that the applicants previously misled the court about the amount that they paid. If they are payments that are above reasonable expenses then they would require the court's authorisation and the applicants' dishonesty may have a bearing on whether the court should retrospectively approve such payments. If the court were to refuse to do so, it could be seen to be an encouragement to applicants to lie in order to achieve parental orders; on the other hand questions were raised about attempts to hide payments and avoid any effect on the welfare payments or tax credit concurrently being made to surrogate mothers.

15. Section 54 (8). The evidence heard was that sum of £13,192.80 was paid to X, £12,477.61 to Y and £15,000 to Z. These sums were, in each case, agreed without any reference to the expenses that they were covering or likely to be incurred. None of the parties, applicants or respondent surrogates had any legal advice or other professional guidance. The fact that the levels of payments were initially concealed from the guardian and the court by the applicants could be said to indicate an awareness that the payments may not entirely represent "reasonable" expenses.

16. I accept without any difficulty that each of the respondents did incur expenses. Some of these; the replacement of Y's mattress and bedding; and the purchase of specific medications and a mobility scooter for X must be reasonably incurred expenses. The guardian helpfully calculated approximate loss of earnings for Z to be in region of £8,740. There would have been expenses incurred as a matter of course during pregnancy which would include medicines, hygiene products, travel to ante-natal

appointments and to give birth, the costs of communicating with the applicants, childcare for their own children when attending all their ante-natal appointments and any additional and necessary support during the pregnancy; such as takeaway meals for their children when they were unable to cook due to nausea or sickness caused by pregnancy.

17. Both X and Z had payments for recuperation holidays which they said constituted a reasonable expense; certainly it would be hard to argue that a period of convalescence, particularly after a difficult pregnancy (such as that experienced by X in particular) should not be regarded as a reasonable expense. I accept that it is entirely reasonable for any surrogate to receive payment for expenses incurred as a resulting from the need for physical and emotional recuperation from pregnancy and giving birth.

18. In their written evidence before the court the applicants and respondents did not provide a detailed account of all the expenses that were in fact incurred in each case. The applicants accept that some part of the payments made were other than for expenses reasonably incurred and they seek the court's authorisation of these payments; however having heard the explanation of each of the surrogates for the payments that they received I do not think that it is necessary for me to do so.

19. In respect of X, who experienced a difficult pregnancy; she received £13, 192.80; while only £1,192.80 is immediately explicable in expenses for mobility scooters and morning sickness medications, there were many other expenses which were not set out in detail; for takeaway meals for herself and her children during the times she was sick; a cleaner and home help twice a week (again necessary as a result of sickness or being physically unable to do so); maternity clothing (including underwear); more clothing after giving birth, as she did not immediately fit in to her pre-pregnancy clothes; footwear and shoes (due to swelling caused by pregnancy and limited mobility); diet supplements; travel to all ante-natal appointments and physio-therapy. As a result of a medical emergency (a thrombosis caused by the pregnancy) X lost £2,000 on a holiday for herself and her children. After all of that it is doubtful that there was much out of the £13,192:80 that could not be accounted for as a reasonable expense. I found X to be a clear and straight forward witness who was, at all times, more than willing to assist the court. She did not seem to me to be defensive about herself, her pregnancy or any details of her arrangements with F and G, and was only so when it came to W, but this is predictable given their relationship as daughter and mother.

20. Y said that she was paid £12,477.66. Again her actual expenses had not been broken down in any detail except for £402.66 for a replacement mattress and bedding. She would, too, would have had numerous other "reasonable" expenses; for clothing (during and after pregnancy) and footwear, medicines, travel costs and fuel costs (to and from all ante-natal appointments, as well as any other medical appointments that came about as a result of the pregnancy), for diet supplements and some food stuff and to pay a childminder and cleaner which she needed as a result of sciatica caused by the pregnancy. Y earns her living as a dog walker and she had to pay someone to walk the dogs when she could not during her pregnancy to keep her business going. Nonetheless her business suffered as a result of her having to take time off during the pregnancy and, she told me, she suffered a noticeable loss in earnings overall during that time. Once again I find it hard to identify what monies if any should be

considered to be over and above reasonable expenses. Y was more restrained in her manner and in giving her evidence than X, and less inclined to go into detail, but I had no reason to doubt what she told me.

21. Thirdly there was the payment of £15,000 to Z. As estimated by the guardian nearly £9,000 of that would have been in loss of earnings so that the balance would have been £6,000 out of which she paid for a recuperative holiday with her children. I fail to see how such a period of recuperation could be said to be anything other than a reasonable expense. Although, thankfully, she did not suffer as much in the way of ill health as X and Y during her pregnancy Z had to stop work sooner than she had expected because she was suffering pain in her lower back and pelvis. Z, too, would have incurred expenses for clothing, footwear, dietary supplements, takeaway meals for herself and her children, travel costs to and from all ante natal and associated medical appointments, child care costs (when in hospital and at birth) and medication. There was no breakdown of these expenses but all of them, as for the other two women, were incurred as a direct result of being pregnant. There would have been little if anything left out of the money she received over and above her loss of earnings.

22. Having heard all three women give evidence I was left in no doubt that each had acted altruistically and had not made any real financial gain out of having the babies for the applicants. Any amount that they may have been left with at the end would have been modest if not insignificant and could not be said to approach a commercial agreement. They took a justifiable pride in having bestowed the children and a family on F and G.

23. Although F and G lied to the court and the Parental Order Reporter about the amount that they paid to the surrogates at the outset of these applications they seemed to do so, initially at least, thinking that they were helping X, and by default Y, by protecting their family's income because of the threats that the women had received online from third parties about reporting them to the DWP and the authorities. The action of the applicants raises questions about their attitude towards defrauding the authorities, and their good faith. Moreover at first they seemed to place the responsibility for their action on X, presumably in an attempt to deflect blame from themselves. I accept her evidence that she did not urge them to lie against their will and that they had not told the court about the total amount they had paid her willingly.

24. Notwithstanding their conduct at the outset of proceedings, which was reprehensible, they have since disclosed the full amount that they paid and have tried to present the court with as full a picture as possible. There remains some disagreement between the applicants and the respondent X, in particular, as to the precise details of who said what to whom and when. I have little doubt that, as with all such events, the memory of each party varies and is at odds (that is true of both applicants too) and by the time the parties gave evidence it was almost impossible to discern exactly what had happened in their communications with each other. There was an added layer to their communication in that W had also played a part.

25. I found W to be a defensive and, at times an obstructive, witness. The defensiveness is, in many ways to be expected, as she told me that she had been threatened and attacked via social media, but she did little to help the parties and her obfuscated evidence did not assist either the applicants or the respondents. There was, however, no evidence at all before this court that she had received any payments in the

surrogacy agreements with which I was concerned and any role that she taken in the applicants' decision to lie to the court was a very minor one.

The test in respect of authorisation

26. If there was any money paid to X, Y and Z it was for a residual amount over and above reasonable expenses amounting to a few hundred pounds at most. The court has a discretion to authorise payments in excess of expenses which has been thoroughly explored in case law. Section 54(8) HFEA provides that the court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of the making of the order; any agreement required by subsection (6) above; the handing over of the child to the applicants, or, the making of any arrangements with a view to the making of the order, unless authorised by the court.

27. The welfare of the child has to be from a lifelong perspective rather than just through childhood with regard to the welfare checklist (section 1 Adoption and Children Act 2002). The welfare of the child is no longer simply one consideration among many, but rather the consideration which should override all others; this approach court was set out by Mr Justice Hedley in *Re L (a child)* [2010] EWHC 1738 (Fam) at **[12]**.

> *"I think it important to emphasise that, notwithstanding the paramountcy of welfare, the court should continue carefully to scrutinise applications for authorisation under Section 54(8) with a view to policing the public policy matters identified in Re S (supra) and that it should be known that that will be so."*

28. It remains necessary for the court to consider matters of public policy set out above in considering whether to exercise the power of authorisation under s54(8) HFEA 2008, but the court should only refuse a parental order in the "*clearest case of the abuse of public policy*". The approach developed by Hedley J has subsequently been endorsed by Theis J in *A v P [2011] EWHC 1738 (Fam)* and by Sir Nicholas Wall, the President of the Family Division, in *Re X (children) [2011] EWHC 3147 (Fam).*

29. The need for the court to consider issues of public policy extends to welfare and to ensure that commercial surrogacy agreements are not used to circumvent childcare laws in this country, resulting in the approval of arrangements in favour of people who would not have been approved as parents on welfare grounds under any set of existing law such as adoption. To paraphrase Hedley J, the court must be careful not to be involved in anything that looks like a payment for buying. Such arrangements have been ruled out by Parliament and the court cannot be party to any arrangements which effectively allow them.

30. The statements of the applicants should have dealt with these issues at the outset and they should have set out fully and frankly the sums paid. The amounts paid for expenses reasonably incurred should have been set out in detail and each expense identified, with documentary evidence in support of the amounts paid exhibited to the statements. However I accept that the applicants were acting in good faith and without moral taint in their dealings with the surrogates and that part of the reason that they were not able to set out the evidence of the surrogates' expenses was because it was

not available to them. I can see from their evidence that the parties had a very warm and close relationship during the course of each of the pregnancies.

31. Any attempt by the applicants to defraud the authorities, as referred to in *Re X and Y*, has since been addressed. There is no evidence of any attempt to circumvent childcare laws to result in the approval of arrangements in favour of people who would have been approved as parents under any set of existing arrangements in this country. I do not consider this to be a case where there has been the 'clearest abuse of public policy' and on any case the residual payments that I would have to authorise are very modest.

32. The applicants have acknowledged that their dishonesty in the court proceedings raised significant public policy concerns about which the court is concerned and have taken steps to deal with it by filing further evidence and explaining their actions. Despite the applicants having three babies within six months, the guardian found them to be "*exceptional*" parents, and "*completely attentive fathers*" whose babies "*move seamlessly between people without any stress*". She said that "*it seems like it is what these gentlemen were put on this earth to do*".

33. The guardian recommends the making of parental orders in this case, despite the fact that she is critical of the applicants' conduct. I accept her evidence about their ability to meet the children's needs, both now in respect of managing their care, and in the long term in respect of their commitment to allow the children to grow up with "*strength and pride about their story*". The making of parental orders is essential to their welfare now and throughout their lives not least because one of the siblings is not genetically or legally related to either of her siblings; but also for reasons of identity and their legal inter-relationship as part of the same family with the two fathers; and for reasons to do with inheritance; and because the respondents would retain parental responsibility for them when they are to live with and be brought up by their fathers as their fathers' children. It would be inimical to the interest of each child to remain the child of their biological father and the surrogate when the reality of the children's lives is within their own family. Parental orders are tailor made to resolve parenthood fully and permanently in surrogacy cases, and lead to the issue of birth certificates which confirm the children's lifelong identities. Such security cannot be replicated through any other orders; in the words of Sir James Munby, the President of the Family Division in *Re X (A child) (Surrogacy: Time limit)* [2015] 1 FLR 349 **[54]**:

> "*Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about X's identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity."*

34. This is my judgement.