Case No: FD14P00262

Neutral Citation Number: [2015] EWFC 36
IN THE FAMILY COURT
(Sitting in the HIGH COURT)
IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF THE CHILDREN AND FAMILIES ACT 2014
AND IN THE MATTER OF M (A Child) (born 27th January 2014)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2015

Before:

MS JUSTICE RUSSELL

- -

Between:

H & B

1st & 2nd Applicants

and

S

and

M (A Child)
(by her Children' Guardian)

1st Respondent

2nd Respondent

- -
- -

Ms Elizabeth Isaacs QC (instructed by **Natalie Gamble Associates**) for the **1st & 2nd Respondents**
Ms Alev Giz (instructed by **R A Savage & Co**) for the **1st Respondent**
Ms Alison Moore (instructed by **Morrison Spowart**) for the **2nd Respondent Child**

Hearing dates: 19th -21st January 2015 and 18th & 20th February 2015

Judgment

The Honourable Ms Justice Russell DBE:

Introduction

1. This case is about the future arrangements for an infant girl (M) who was born on 27th January 2014. M was born as the result of artificial or assisted conception and of an agreement, the basis of which is highly contested, between S (the 1st Respondent and the mother) and H (the 1st Applicant and the father) and B (the 2nd Applicant) his partner. H is in a long-term and committed relationship with B and was at the time of conception. H and B contend that they had an agreement with S that she would act as a surrogate and that H and B would co-parent the child but that S would continue to play a role in the child's life. S says that she and H entered an agreement that excluded B that H would be, in effect, a sperm-donor and that she would take on the role of M's main parent and carer. She described herself and H as being like two heterosexual parents that have a child and are separated. Through out these proceedings S has vociferously rejected B playing any parental role in M's life.

2. Very sadly this case is another example of how "agreements" between potential parents reached privately to conceive children to build a family go wrong and cause great distress to the biological parents and their spouses or partners. The conclusions this court has made about the agreement between the parties which led to the conception and birth of this child will inform the basis of future decisions the court has to make about the arrangements for the child. The lack of a properly supported and regulated framework for arrangements of this kind has, inevitably, lead to an increase in these cases before the Family Court.

Law

3. The case consisted of applications by H and B (the Applicants) for parental responsibility and for residence and contact (now child arrangement orders) and of cross-applications by S (the Respondent) for residence and contact. These applications were made under s8 of the Children Act (CA) 1989 in February 2014 prior to the Children and Families Act (CFA) 2014 coming into force. On the 25th April 2014 Deputy District Judge Morris made an order that H has parental responsibility for M. There have been repeated references to surrogacy in these proceedings particularly on behalf of H and B as it is the Applicants' case that they had reached an agreement that S would act as their surrogate so that they could have a child who would be a part of their family. S says that H had agreed to be her sperm donor. The legislation which governs altruistic surrogacy has no part in the decisions of the court as S does not consent to a parental order or to having acted as a gestational surrogate; indeed even on the Applicants' case S was to play an active role in the life of the child. The law which applies is that which applies in all private family disputes and is set out below.

4. On the 21st May 2014 the Applicants applied for prohibited steps orders regarding the child's name and her baptism. The Respondent had registered the child on her own with her surname and with first names chosen by her that had not been discussed with the Applicants or agreed between the parties. The Applicants also applied for an order prohibiting S from having M baptised according to Christian Orthodox rites as although all three of the parties are Christian H is a Protestant and B is Roman-Catholic. An order was made by Recorder Bazley QC which prohibited any party form removing M from the jurisdiction or from causing or arranging for her to be baptised or christened. In the event S not only disobeyed the order of the court and had M baptised but lied about having done so. She informed the court and the parties that she had M baptised in October 2014 at the hearing in January 2015; this despite her assurances to the contrary to the guardian in December 2014 and to the court in her own statement dated the 7th January 2015.

5. There has been no dispute as to the law which applies. The court is concerned with the welfare of a child and as such its principle concern is that child's welfare. The paramouncy principal as set out in s 1(1) of the CA 1989 applies to all of the applications before the court; I will have in mind the welfare checklist contained in s 1(3), to which I shall return. In addition to those applications referred to above which concern decisions by the court about with whom M should live, the time she should spend with the parent or parents with whom she is not living, the court has to decide whether M's name should be added to, restrictions on travel outside the jurisdiction and the issue of a Romanian passport for her, and whether further applications to the court need to be limited pursuant to s91 (14) of the CA.

6. The decisions I must make are governed by the CA 1989 and the CFA 2014. Currently M lives for most of the time with her mother and I am being asked by H and B to change that arrangement so that M lives with them; this is supported by M's guardian. The standard of proof in all cases involving the welfare of children is the balance of probabilities as set out by the House of Lords in the case of *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141, confirmed by the Supreme Court in *Re S-B (Children)*[2009] UKSC 17.

7. I have been referred to numerous cases including that of *Re N (A Child)* [2007] EWCA Civ 1053, a case which has similar facts to this one, in which the Court of Appeal endorsed the following approach as an impeccable statement of the issues the trial judge had had to decide:

> *'…the test here is…as between the two competing residential care regimes on offer from the two parents (with their respective spouses) and available for his upbringing which, after considering all aspects of the two options, is the one most likely to deliver the best outcome for him over the course of his childhood and in the end be most beneficial. Put very simply, in which home is he most*

likely to mature into a happy and balanced adult and to achieve his fullest potential as a human?'

8. This court will approach the issues in this case as set out by the Court of Appeal in *Re N*. The circumstances of M's conception and birth are relevant because M will, in time, need to understand the background to her birth, and secondly because it will inform and assist the court in reaching its decisions to conclude what agreements were made prior to M's conception and birth. This approach to a factual dispute was endorsed by the Court of Appeal in *Re N*. In that case the court at first instance found that the "surrogate" mother had deliberately embarked on a path of deception, driven by her compulsive desire to bear a child or further children, and that she had never had any objective other than to obtain insemination by surrogacy, with the single purpose of acquiring for herself another child. The Court of Appeal held that determination of this factual issue was fundamental to the judicial task at [4]:

> *'This was crucially important, since it informed the…review of the judge of the medium and long-term future of* [the child]*, if the responsibility for his future care were left with the* [surrogate parents].'

9. The court must consider the decision about M's living arrangements as it would in any such application and as endorsed by the Court of Appeal in *Re N* at [12] and as I have already set out above at paragraph 5. Counsel for the Applicants urged me to adopt the welfare checklist set out in detailed form in the guardian's final report dated 12th January 2015. I have had regard to the guardian's report and to her recommendations as I should and if and where I do not follow her recommendations I will indicate in my judgment the reasons why I have not done so following the decision of the Court of Appeal in *Re M (Residence)* [2004] EWCA Civ 1574, [2005] 1 FLR 656.

10. The issue of parental responsibility in respect of B remains contentious; he is not M's legal father, for the purpose of s4 CA 1989**,** or her step-parent, as he and H are not married nor in a civil partnership. A child arrangements order that M should live with both Applicants would confer parental responsibility for M on B pursuant to s12 (2) CA 1989. I can make a parental responsibility order in B's favour pursuant to s 12 (2A) CA as a person who is not M's parent but who is named as a person with whom she is to spend time or otherwise have contact; and I do so as the evidence is that he is a significant person in her life; her biological father's partner who cares for her had has taken on a parental role when she has spent time with the Applicants.

11. Any decision about child arrangement orders in respect of contact or time spent with the party or parties with whom M is not spending the majority of her time is determined by consideration of the welfare checklist in s1(3) CA 1989. Whatever order the court makes determining where M should live will be subject to a defined contact order because of the difficulties that have

already occurred during M's short life and to which I make reference in this judgment.

12. The guardian supported the Applicants' view that M should be allowed to make up her own mind about her religion when she is old enough and recommended that M was not baptised into any specific religion. This question has been overtaken by S breaching the court order made in June 2014 prohibiting baptism. I consider that there is a need for M to be allowed self-determination about her religious practice and beliefs as she grows up. For I must treat M's welfare as the paramount consideration and apply the welfare checklist in s1(3) CA 1989. It is not for me or any court to weigh one religion against another following *Re G (Children) (Religious upbringing: education)* [2012] EWCA Civ 1233 and I do not do so; references to her baptism are made solely as an example of S having breached a court order.

13. In determining whether the child's surname should be changed I have applied the law as confirmed by the House of Lords in *Dawson v Wearmouth* [1999] 1 FLR 1167, HL and summarised by Lady Justice Butler-Sloss in *Re W, Re A, Re B (Change of Name)* [1999] 2 FLR 930 namely i) each case must be decided on its own facts; ii) the child's welfare should be the paramount consideration; and iii) all the relevant factors should be weighed in the balance at the time of the hearing. I am referred to *Re H (Child's Name: First Name)* [2002] 1 FLR 973, CA in respect of any change to M's first names and keep in mind as observed in that case that it is regarded as commonplace for a child to receive different given names during the course of family life

14. Prohibited steps orders preventing any of the parties removing M from the jurisdiction have been in place since 25th April 2014. M's British passport, for which Ms S applied without consulting H, is currently held by her solicitors. S has said that she has not applied for a Romanian passport for M; based on her past behaviour the court and the Applicants remain concerned that she may do so without their involvement or consulting them. S has in the past sent her two older children to Romania in breach of a court order for them to have contact with their father, and S has admitted that she lied to the court at that time saying that the children did not have Romanian passports. The guardian expressed her concern in her report the damaging effect on M if she were removed to Romania and it is her belief that S "*might remove [M] from the jurisdiction if she believes she has nothing to lose.*" The Applicants sought a prohibited steps order preventing S from removing M from the jurisdiction (without their express written permission) during her minority.

15. The Applicants have also sought permission to take M out of the jurisdiction from time to time for occasional family holidays and that should the court make a child arrangements order in their favour that permission for such removal would not be required pursuant to s13(2) CA 1989**.** The guardian has recommended that the parent with whom M lives should hold her UK passport. As it remains unknown whether S has obtained or applied for a

Romanian passport for M the court will consider what orders should be made in respect of her passport/s at the conclusion of the proceedings.

16. It was the view of the guardian, shared by the court that is not in M's best interests for there to be continued or prolonged private law proceedings as this would only create anxiety and instability and lead to further conflict. This approach has a statutory basis following enactment of the CFA 2014. The guardian invited the court to consider whether further applications by S in respect of M should be restricted only to those where she has been granted the court's prior permission pursuant to s91(14) CA 1989. The Applicants endorse the concerns of the guardian and the imposition of an order. S resists it.

17. The approach to be taken in considering applications under s91 (14) CA 1989 have been set out by the Court of Appeal in *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573. The court must carry out a balancing exercise between the child's welfare and the right of unrestricted access of the litigant to the court. The jurisdiction of the court to restrict applications is discretionary and I must weigh in the balance all the relevant circumstances in the exercise of that discretion. I shall return to this application at the end of my judgment.

The proceedings and the evidence

18. Since the order of 2nd June 2014 the child (M) has been separately represented through her Children's Guardian. This case has been a difficult one to manage, not least because M has been acting in person for lengthy periods during the proceedings and created an additional undercurrent to the litigation to which I shall return. It was further complicated by the choices S has made, again without any consultation with H, regarding the way she parents and cares for M. In particular S decided to breast feed on demand and to "co-sleep" with M; this directly affected the amount of time that M could spend with her father.

19. The case was heard in London and in Birmingham over five days. The court heard the oral evidence of the Applicants during the first three days of the trial in London. Each days hearing was interrupted and protracted by the need for S to express breast milk. During the second part of the hearing in Birmingham when S gave evidence it was noticeable to the court that the interruptions to express milk were less frequent and better managed in that they fitted more readily into the court timetable and took place during the luncheon adjournment, for example. The case was able to be conducted with markedly less disruption. The court also heard the oral evidence of B's mother regarding an incidence during a contact handover in December and S's claim that this lady was to live with the Applicants and would take over the care of M, should she live with them.

20. There was a large amount of documentary evidence filed amounting to 3 lever arch files of court papers and documents, a fourth of medical records and reports and a fifth of papers from the proceedings concerning S's older children in the Family Court in Kent. I do not intend to rehearse all, or even most of this evidence in my judgment. I will restrict it to the matters which I consider to be relevant to the decisions which I must make and to those which directly concern M herself.

21. The positions of the parties are as follows: the Applicants ask that the court makes a child arrangements order that M live with them and spend some time with S; they proposed up to twice a week in their closing submissions; S asks for an order that M should live with her. At the end of the hearing on the 20th February it was her case that there should be no overnight staying contact until some indeterminate time in the future when M stopped being breast fed, however as a direct result of being refused permission to appeal the earlier order of 1st October 2014 in March, she changed her instructions and said she would now agree to overnight contact continuing as it has been since October 2014. M's guardian has recommended to the court that M is moved to live with the Applicants and should see S once a month for a period of supervised contact.

22. In addition there are the applications for prohibited steps and other orders which I have set out above.

Preliminary issues: disclosure & expert evidence

23. The court had two issues to decide at the outset of the hearing in January 2015; one regarding disclosure the other an application by S for permission to adduce expert evidence.

24. Disclosure Pursuant to the Consent Order of dated 1st October 2014 the Children's Guardian had sight of papers filed in the proceedings concerning the mother's two older daughters which continue in the Family Court at Dartford. The guardian has obtained and considered disclosure from Kent Police and from children's services in Kent and Medway. Following the directions of the court on the 12th November 2014 the solicitor for the child wrote to the court and the parties setting out a list of the documents and the disclosure that the Guardian considered necessary in this case. By then S was acting in person and sent numerous emails which contained, amongst other matters, her opposition to disclosure being made of the papers from the Kent proceedings.

25. The guardian had previously undertaken her consideration of the documents and their disclosure as directed by the consent order of 1st October 2014, and I was reminded that S had previously invited the court to disclose papers filed within the proceedings concerning her two daughters from her marriage to W. The legal representatives had filed written Submissions which were

prepared on her behalf of along with a schedule of the disclosure from the police. The Applicants' supported the disclosure sought by the guardian. I directed that the issue of disclosure would be determined at the beginning of the final hearing as a preliminary issue so that the issue could be ventilated as S was, by then disputing the need for any disclosure.

26. It has been agreed as a matter of principle between counsel that S was entitled to see all documents in the proposed bundle apart from the Safeguarding Letter (regarding the two daughters of S and W). Counsel for the guardian prepared copies of the disclosure bundle for the court, the Applicants and the witness box which were made available as on 19th January 2015; an additional bundle was made available to S and her counsel to enable her to prepare her arguments in respect of disclosure.

27. The child's representatives had hoped that S would agree to the documents being disclosed as she once again had the benefit of legal representation and her counsel has been able to consider the relevant papers. The guardian's completed assessment included reference to the proceedings in Kent which she had filed with the court by the 19th January 2015. The guardian remained of the view that the papers she identified as relevant in November 2014 had continued relevance and should be disclosed. It was in her report (dated 12th January 2015) that the guardian expressed considerable concern in respect of the conduct of S during the long running private law litigation between her and W. The guardian's analysis in respect of S' parenting capacity of M was partly based on her analysis of the evidence in respect of S's parenting of her older children, which, of course was a matter that was not before me and about which I could not make any findings.

28. After hearing from the parties at the outset of the proceedings I allowed disclosure of most, but not all, the documents which the guardian had sought to disclose. The exception was a report of the wishes and feeling of the two girls as I considered that they were of limited relevance and private to the two young people. The principal reason that I allowed disclosure was that the guardian had, as referred to above, relied on the Kent proceedings, to an extent in her analysis and it would have been unfair and a possible disadvantage to the Applicants were they to remain the only party without sight of some of the documents relied on and referred to by the guardian.

29. I was and remained mindful throughout of the need not to be drawn into what could amount to speculation about the nature and reason for the protracted proceedings in Kent. I cannot find that the fact that the proceedings are lengthy is as a result of S's conduct and not that of W. The s91(14) (CA) order restricting applications in respect of the young people is directed at both of their parents; there is no judgment about that matter from the court which I can rely on and I have not seen or considered all the evidence that has been before the judges in Kent over the years.

30. I can and I do rely on some pertinent facts that were not disputed and which were relevant as they concern S's conduct in the past. It is the past which informed my analysis of the likely behaviour of S in the future. The first was in regard to contact; S blatantly flouted a court order in respect of taking the girls to Romania on holiday without informing their father in April 2008; and, she failed to return the girls from contact in December 2012. The second is that the court found that she had made unfounded and serious allegations about her daughters having access to pornography whilst in their father's care, as seen in the decision of District Judge Smith in August 2010 which has not been the subject of an appeal. In addition, after this judgment was given, there is a police record of S complaining to the police that W's computer was full of pornographic images and that he had acted as a sperm donor in relation to the conception of the two girls.

31. I cannot reach properly any conclusions about the two older girls' relationship with their mother and I do not intend to do so; nor do I rely on any conclusions reached by the guardian in this case about the proceedings or S's conduct in those proceedings apart from those which are based on those admitted and accepted facts referred to above. I do not intend to make any findings or place any reliance on S's relationship with her two elder daughters; I have not heard or read the evidence and therefore cannot do so. I am concerned with M and there is more than sufficient evidence before this court to reach conclusions about S's parenting abilities, her conduct and her credibility in relation to the matters which concern M.

32. Expert evidence The guardian filed a position statement in advance of the hearing on 1st October 2014 which considered, inter alia, the need for expert evidence. In the course of that hearing the guardian invited the court to consider in principle whether an expert assessment was necessary; not because it was her case that an expert assessment was necessary, but because of the difficulties over S's legal representation and in consideration of how she put her case regarding breast-feeding and co-sleeping. The guardian, presciently, thought that an assessment in respect of attachment would be sought by S at some point. The guardian wished to avoid a late application for an assessment and the possibility of further delay in this case, in circumstances where she had already expressed concern as to why it has taken so long to settle arrangements for M. Should the court have determined that an expert assessment was necessary, the solicitor for the child was prepared to undertake the practical steps so that the mother would not be unduly disadvantaged by her lack of legal funding and further delay would not occur.

33. However there was no Part 25 application before the court and no application was made on the 1st October 2014 and although submissions were made on S's behalf in principle about the need for an assessment on matters of attachment no expert had been identified. I considered that such assessment was not necessary, as the guardian would be undertaking her own assessment

which included the child's attachment to both her mother and her father, and to B. Again at the hearing on 18th & 19th December 2014 before Mr Justice Newton to enforce the contact order S said she wanted to make a Part 25 application for expert evidence to be adduced. No such Part 25 application had been issued and the court decided that, in any event, any such application should be heard by the trial judge. The Part 25 application was issued on 31st December 2014.

34. The guardian was concerned that the proceedings, which had been current since February 2014, would be delayed by several months before the matter would be resolved should permission be given to instruct an expert. She expressed a further concern, shared by the court, that it would be detrimental in terms of M's welfare that any delay would take place in the context of the very poor relationship between the three significant adults in M's life, not least in respect of overnight contact.

35. The decision regarding the application under Part 25 was not a difficult one to make for not only would it have caused a delay clearly inimical to M's best interests, S sought permission to instruct as an expert in attachment, a registered educational psychologist, Dr Rothermel, to provide a report on the following three issues, overnight contact and the impact on M; the quality of M's attachment with S; and the quality of M's attachment with H but not B. Dr Rothermel, whose CV I studied with some care, is an educational psychologist who has some peripheral experience in children who have been breast-fed until they are toddlers (or longer) and co-sleeping because, she said, of working with families who home-school. As is clear from her CV she is not an expert in attachment but in education and her specialisation is home tutoring. As such Dr Rothermel does not have the qualifications or the expertise to give "expert" evidence on attachment. The terms of the proposed instruction are outside her remit. Her decision to exclude B is was a blatant example of the continuous attempts by S to belittle his relationship with H and, of course, with M.

36. In considering the law in respect of the instruction of expert witnesses I am bound by s13 Children and Families Act (CAFA) 2014. Section13 (6) CAFA provides that the court may give permission for such an instruction only if the court decides that the expert evidence is necessary to assist the court to resolve the proceedings justly. The guardian has the experience and expertise of a social worker of many years and had carefully assessed the impact of overnight contact on M and had observed her at her father's home at bedtime; she reported that M is content and settled in her father's home. The guardian was well able to consider M's relationships with S, H and B. The guardian's conclusions and observations did not suggest that there was evidence that M has any difficulties in forming an attachment with any of the parties to this matter; she recognised the bond and attachment between M and her mother. Her concern was that S sought to have an exclusive parental relationship with M and did not give proper regard to the significance to M of other important

adults in her life, particularly her father and his partner B. Had I considered that the guardian did not have the necessary experience and expertise to give an opinion on the matter of M's attachment to the significant adult carers in her life (and I did not) I would not turn to an educational psychologist to provide an expert opinion on the attachment an infant in particular or to their carers.

37. S's expressed view to Mr Justice Newton in her submissions on 19th December 2014 was that the guardian "knows nothing about attachment" or about children was baseless and a reflection of her disagreement with the guardian's conclusions. I accepted the submissions on behalf of the guardian that she had filed a detailed report based on her comprehensive enquiries and that it was disproportionate and unnecessary to supplement the guardian's expertise in relation to issues of attachment and M's welfare with the evidence of an educational psychologist. Given the lack of relevant expertise the cost of the proposed "expert" report was wholly disproportionate and unnecessary and in all the circumstances set out above I refused the application to instruct Dr Rothermel.

Social Media

38. At the outset of the trial the guardian (on behalf of M) and the Applicants drew my attention to the publication of information regarding the case on social media. The first was a posting on Facebook on the 5th October 2014 by a person known to be a friend of S. The guardian was made aware of this post soon after it was published but considered that there was no information by which M herself could be identified and decided not to bring it to the court's attention. I accept from the information contained in it that the source of that information must have been one of the parties (or someone very close to them) and it is more likely than not that that source was S. The person concerned wrote to the court and had been involved in "mediation" between the parties. This is an example of S's mode of conducting her case not through the court alone but by recruiting support from others to pursue her case in other arenas. I do not accept that he would have published this or the Tweet in January 2015 without her knowledge or consent.

39. On the 16th January 2015 the guardian was made aware that the same person had made the following Tweet:

"*Wealthy gay couple force child from good mother's breast setting bad precedent. Starts Mon19Jan 10am High Court RCJ, court 35,*"

40. The Tweet which was available to anyone online was tagged to alert a reporter at ITN. S denied any part in this tweet, and while it may be the case that she did was not directly involved in posting the tweet, it is in keeping with her conduct of the case during which she sent emails copious emails to the court, to the President of the Family Division and pursued an appeal

against the order made on the 1st October 2014 apparently against legal advice. The solicitor for the Applicants, sent an email to the person who had tweeted requesting him to take the tweet down and informing him of the objections of the Applicants to him tweeting about this matter.

The parties' background

41. The child is M. She was born on the 27th January 2014 as a result of the sperm of her father H being placed artificially in S. M is a child of mixed Romanian and Hungarian extraction and heritage and of Orthodox and Protestant Christian tradition.

42. S is a Romanian national, born in Romania. S is an Orthodox Christian, who regularly attends her church. She was married to a British national W and they had two children who are now teenagers and living with their father. There have been protracted proceedings concerning these children in the Family Court in Kent.

43. H, the 1st Applicant was born in Romania in 1972, of Hungarian extraction. His religion is Christian Protestant. B, the 2nd Applicant, was born in Hungary in 1977; he is a Roman Catholic. I do not know about the extent of their religious practice nor do I consider that to be relevant to the decisions I need to make except that it means that M's parents have a difference in religious practice and belief and that difference forms part of her background.

44. I was told that H and S had known each other for many years prior to the agreement for S to conceive M as they met each other in Romania in 1990. H moved to the UK at the age 18 with his mother and subsequently became a naturalised British citizen. In 1999 H and S spent a period of time sharing a house.

45. S met her former husband W and has two daughters with him, born January 2002 and October 2003. They are now adolescent. S separated from W in 2007. Between 2008 and 2012 there were Children Act 1989 proceedings in the Dartford County Court. The children moved to live with their father, W, from October 2010 and spent alternate weekends and half of each school holiday with their mother. On 23rd January 2013 the court made a s91 (14) (CA) order preventing either parent making any further application in respect of either child without permission of the court.

46. Meanwhile in 2004 the 2nd Applicant, B, moved to the UK. He and H met in London when they started a relationship and began living together shortly thereafter. The couple decided that they wanted to have a child. H told the court, and it is not disputed, that it was he who particularly wanted to have a family. Both the Applicants say that in 2012 S offered to act as a surrogate for them and that they declined the offer to explore other surrogacy options in the UK and overseas.

47. It is the Applicants' case that in February 2013 S again offered to help them become parents and, following discussions between them, first with H and then involving B, the parties agreed to proceed on the basis that H and B would be the parents to the child and that S would have a subsidiary but active role. On 20 or 22 April 2013 M was conceived by artificial insemination using sperm from the 1st Applicant at the Applicants' home. It is agreed by all parties that B was at home when the insemination took place. Indeed that presence formed the basis upon which S later raised the question of paternity leading the District Judge to order DNA testing.

48. During the summer of 2013 the Applicants moved to Clapham to a larger house which they said was for the purpose of accommodating their new family and had sufficient room to allow for S and her two other children to stay. They say that S was involved in the choice of accommodation and it is accepted that she made a contribution to the deposit, although she says it was a loan. By autumn 2013 the relationship between S and the Applicants had apparently deteriorated and when M was born on 27 January 2014 in St Thomas's Hospital, London S had made sure that the Applicants were not aware of exactly when the birth was happening; H was notified by at around 5pm that day.

The Agreement

49. I have made some reference to the agreement leading to M's conception and birth above. It has been referred to by Miss Isaacs QC, counsel for the Applicants as a "failed surrogacy" agreement. As the Applicants on their own case have always accepted that S was to play a continuing role in the child's life, that description is not quite accurate. The important issue in respect of the Applicants' case is whether the court accepts on the evidence before it that they had agreed with S that they would be the main carers, and take on the role of the parents of M when she was growing up. S says that she and H agreed to have a baby together to the exclusion B and that there was no surrogacy arrangement. She claims that the emails between them support that claim.

50. I have now heard the oral evidence of all the parties and read copies of electronic communication between them. The dispute about the agreement is largely based on S's assertion that she and H decided to parent a child together, and that B was to play no part other than as the child's father's "boyfriend"; to use her word. S has sought to present herself throughout the proceedings as a victim and someone whose "rights" as a mother and as a woman have been trampled over and abused. She claims, in terms, that H and B are attempting to remove her child, from her breast, in a cruel and calculated attempt to build a family and that she is being discriminated against and victimised. She describes H and B in an openly disparaging and dismissive way saying that they are not like a very well known celebrity

couple (who she names) who have had children by surrogates; "*They are not a gay couple having a child*".

51. S repeatedly made allegations, wholly unsupported by any objective evidence, about H and B; about their relationship and about their lifestyles. About the former she repeatedly relied on stereotypical views on the nature of their relationship suggesting that she knew "*they have an open relationship, what gay people call it, have sex in groups.*" There is no foundation to this claim which I consider to be a reflection of her deliberate attempt to discredit H and B in a homophobic and offensive manner. At the outset of the case she filled in a form (C1A dated 19th February 2014) alleging harm and domestic violence. She said in this form that H *"has an open view on class A drugs. He believes that it is OK for people to use class A drugs and has said he would like to try it himself"* She went on that H *"is a self-confessed antibiotics user he gets his own supply of very strong antibiotics from Belgium and use [sic] them all the time"*. S went on to allege that H might give them to M if he had unsupervised contact; and to allege that there were "*loads of people coming and going*" from the Applicants' address and that drugs may be used at that address. None of these allegations were followed up before or during the hearing when the Applicant's gave oral evidence. The abandonment of allegations during the trial lends little to the weight that that court can give her evidence as a whole.

52. I had the opportunity of re-reading the emails sent to the court and evidence filed by S both during this case and after it concluded. It is peppered with allegations, innuendo, offensive and disparaging comments about H and B. I do not need to set them all out or repeat them as most of it was never put to the Applicants and was not pursued in evidence. I had the opportunity to see the Applicants and S in court during the five days of the hearing and on other occasions when they have appeared before me. I saw S give evidence and observed her while she listened to the evidence of others. There was never the slightest indication of a cowed, submissive or victimised person. On the contrary she conducted herself in a very confident and most assertive manner throughout. She has sought to impose her will on the court and manage the proceedings. The need to express her breast milk while genuine was used to interrupt and disrupt the evidence of the Applicants. The evidence in support of this was the manner in which she could, suddenly, regulate it after their evidence was completed.

53. I found the claim by S that she was a victim was without foundation. Having seen her give evidence I did not find her to be a credible witness. I have already made reference to her failure to follow through on some of the more lurid allegations which she has made to the court about the Applicants conduct. The emails in February 2013 which passed between S and H they are, from the point of view of S's case, at best ambiguous, and cannot be said to provide proof that the agreement was that H would act as a sperm donor so that she could have a child. In a an email from S on 7th February she said that she was <u>not</u> saying that B would be excluded and that he would be part

of the child's life. She said *"I learnt that I can live without seeing my kids every day. When it comes to my two daughters it is harder, as i know that [W] does not care about them. But knowing my child is with you and [B], I would be satisfied because I know they would be well looked after and loved."* It is difficult to read into that email anything other than a reflection of the agreement as H describes it.

54. The emails do not set out an agreement in terms and it is H's case that after the beginning of February the discussions were oral and went on to include B. The fact that there are not any emails produced after February supported his case. It also fits in with the insemination taking place about the fourth week of April 2013, in the Applicants' home with B there on at least one occasion. It is, and I use the term advisedly, inconceivable that B was not aware of what was going on before April and was not party to any of the discussions. In this as in much else I do not accept the evidence of S. Her later use, in evidence, of the term "sperm donor" is completely at odds with the tone and contents of her emails in February. It is not possible to accept both from what H told her in the emails and from the obviously close relationship of H and B (which I have seen at close quarters throughout the trial) that S could have ever thought that she was having a child with H to the exclusion of B; she says so herself in her emails. I conclude that she must have either deliberately misled the Applicants about her intentions or changed her mind as the pregnancy progressed.

55. On the balance of probabilities, and for the reasons set out above and in the following paragraphs of this judgment, I find that S deliberately misled the Applicants in order to conceive a child for herself rather than changing her mind at a later date. Having at first encouraged H to be involved S was already trying to exclude H not long before M was born from involvement with the birth and with the child. I accept the evidence of H and B that S was a part of the arrangements that were made to rent a larger property. If as she claimed they were aware from the outset that any child would be her's and live with her there would have been no reason to go to the expense of moving and furnishing a larger home. It highly unlikely that S could ever have thought H, who had told her he so desperately wanted a child in his emails, would decide to act as a sperm donor for her, there was no reason for him to do and it would have been entirely at odds with his own plans and wishes.

56. S has consistently done all she can to minimise the role that H had in the child's life and to control and curtail his contact with his daughter. Far from being a child that she conceived with her good friend, as she describes it, her actions have always been of a woman determined to treat the child as solely her own. She made sure that H was not at the hospital when M was born; she registered the birth without putting H on the certificate and did not give the child any names except those chosen by her and did not reflect the child's paternal family names in that choice. The history of these proceedings bears this out; H and B were left with no choice but to issue applications.

57. It cannot be argued that breast feeding brings health benefits to a child however the determined way in which S used it to limit M's contact with H is plain to see. At first in April 2014 S said (in her statement filed with the court) that she wanted to breast feed "*for as long as 9 month[sic]";* but by the time she gave evidence before me there was no suggested date or time when breast feeding would come to an end. S has repeated used the emotive image of a child being removed from her mother's breast and refused breast milk as part of her attempts to gain sympathy and opprobrium for the Applicants and the court. It is not in the interests of any child to use breast-feeding, or co-sleeping, to curtail that child's interaction with another parent or to deny her an opportunity to develop a healthy relationship with that parent. I have little doubt that that is what S set out to do, at least in part, and it was an action which was contrary to M's best interests and emotional well-being.

58. I have already made some reference to S's oral evidence but overall I found her to be both obdurate and evasive in her replies to questions put to her. Her explanation, in oral evidence, that a DNA test was undertaken because her friend said M looked like B had not formed part of her case until she said it in the witness box; I do not accept it. S used the DNA test to delay H's involvement in M's life. In that first statement she claimed that H was not interested in seeing M and accused him of being controlling and manipulative; a description which more accurately applies to her own actions.

59. In contrast to the oral and written evidence of S I found that the written and oral evidence of H was measured and showed marked empathy and understanding for S's position. His decision to have M with S may have proved to be unwise and was not what he was led to expect but, unlike S, he has actively sought to keep her involved and has never suggested that she would not or should not have played a role in M's life. Indeed he went out of his way to provide her with a role and a place in M's life. Despite being disparaged by S and having allegations made about his conduct and financial probity he continued to offer contact at much greater frequency than the guardian recommended when he could so easily have adopted the Guardian's regime.

60. H's evidence regarding the agreement is in keeping with the substance and content of the emails as are the actions he took subsequently including renting a larger property so that S could stay there; along with her daughters if she wished. I accept his evidence that S looked at houses with them and that the money she gave them was a part of the deposit and not a loan. There was no other reason for S to lend H and B money (they were better off than she was) and the timing of the transaction coincided with the house rental. H's evidence that he was quite desperate to have a child and his anguish was described in the emails he sent. H wanted to have a family with B; there is nothing in his words or actions at the time the agreement was broached or later that even obliquely indicates that he wanted to either act as a "sperm donor" or have a child to bring up in conjunction with S. I do not accept that

H would have entered into the kind of agreement that S now claims to have been the basis for M's conception.

61. I shall consider the evidence of B which supports that of H below.

The proceedings and contact between M and the Applicants

62. On the 11th February 2014 these proceeding were started when the Applicants applied to the court for parental responsibility for the child's father (H) and for permission to apply for residence and contact in respect of the 2nd Applicant (B) and for residence and interim contact with the child in respect of both Applicants. Their applications were issued by the PRFD on 17th February 2014. Meanwhile on 13 February 2014 the 1st Respondent (S) cross-applied for residence, and made allegations of harm and domestic violence against the Applicants. That application was issued at Medway County Court on 19th February 2014 and transferred on that date to the PRFD to be heard with the Applicants' applications.

63. S filed her statement on 27th February 2014; on the same day there was a hearing before District Judge Gibson at which the Applicants were represented and S appeared in person. An order was made giving the Applicants visiting contact, directing a DNA test to confirm paternity as S had raised the matter with the Cafcass officer and intimated that she did not know which of the two Applicants was the child's father. The District Judge ordered statements to be filed and Cafcass report and listed the matter for a further hearing on 25th April 2014. The Applicants agreed to an order prohibiting them from removing the child from the jurisdiction.

64. During March 2014 and as directed by the court the Applicants filed a statement each and the DNA test results confirmed that H is M's biological father. The initial welfare report was filed by Ms Ritson (as reporting officer) on the 22nd April 2014; she recommended that H be given parental responsibility and that both the Applicants should have unsupervised contact with M as regularly as possible up to 5 or 6 times each week to allow them to build a bond with her. She also recommended that once M was being bottle fed, contact should be increased to include day visits leading to overnight contact before longer term residence arrangements were settled. All parties were to attend a Separated Parents Information Programme. S refused to attend and the programme was only attended by the Applicants. This decision of S would seem to contradict her claim to me in her oral evidence that she sees herself and H as separated parents and wanted him to have contact.

65. On the 25th April 2014 there was a further hearing before Deputy District Judge Morris. The Applicants were again represented and S was in person. A child arrangements order was made including that the child was to live with S until further order; there was to be unsupervised contact with the

Applicants 6 days per week for three hours (the Applicants to collect and return M). In addition parental responsibility was granted to H and M's birth certificate was directed to be amended to register the First Applicant as her father. There were prohibited steps orders preventing any party removing M from the jurisdiction. Further evidence was directed to be filed in respect of M being breast-fed from the GP and midwife lactation consultant to assess whether a breastfeeding child can be away from her mother overnight to allow staying contact and what steps can be taken to best manage separation. The case was listed for further hearing on 2nd June 2014.

66. During May 2014 a letter from M's GP confirmed that he has no medical concerns about the S's ability to look after M and that she was developing normally. On the 19th May 2014 H and S went to the register of births together to register the H as M's father. Pursuant to the order of 25th April 2014 the Applicants sent C2 applications to the court dealing with the child's name and baptism so that the court could with these specific issues at the next hearing and filed a further joint statement. On the 23rd May 2014 the midwife lactation consultant recommended that M's breastfeeding continues.

67. On 2nd June 2014 there was a hearing before Ms Recorder Bazley QC. The Applicants were represented but S did not attend the hearing and submitted a letter from her GP which said that she was unwell due to the pressure of the proceedings and requested an adjournment. The court ordered that M be joined as a party to the proceedings and Ms Ritson appointed as guardian; existing child arrangements and prohibited steps orders were extended until the next hearing listed on 9th September 2014.

68. On the 5th June 2014 the S applied for permission to leave the jurisdiction for a holiday to Romania and applied for a UK passport for M; but by the 4th July 2014 S had secured pro bono legal representation and withdrew her application for permission to leave the jurisdiction. On the 15th August 2014 contact broke down following a disagreement between the parties; and contact between M and her father did not take place.

69. On the 9th September 2014 a hearing took place before Her Honour Judge Pearl and then before Mr Justice Baker, at which all parties were legally represented. It was ordered, by agreement, that B was given permission to apply for a child arrangement order. The was to be longer but less frequent contact arrangements which were agreed at six and a half hours 3 times each week and allowed for M to go home with her father and B. W (the father of S's older daughters) was to be approached to ask for his consent to the disclosure of papers relating to proceedings in Dartford County Court concerning the S's older children. I noted above that this disclosure was agreed to by S. The case was transferred to the High Court and was listed before me for an interim contact hearing on 1st October 2014 and a final hearing (time estimate 4 days) on 19 January 2015.

70. On the 1st October 2014 (when the matter first came before me) all the parties were legally represented; S had the benefit of representation by experienced counsel pro bono. The orders were made by consent and it was directed that existing daytime contact arrangements were to continue until 10th October 2014 when overnight contact for M with her father at the Applicants' home was to start, with M staying overnight every Tuesday and Friday from 11:00am until 11:00am the following day, and additional time during the day to be spent with her father, for six and a half hours on alternate Mondays and Thursdays. Either or both the Applicants were to collect and return M at London Bridge station. In addition as W had not given his consent for disclosure of Children Act proceedings in Kent, the child's guardian was to be provided with documents in respect of S's older children which comprised of court papers, police and social services records. The guardian was to then decide which documents were relevant and should be disclosed into these proceedings and all parties were given the opportunity to object. The estimated length of the final hearing was reduced to 3 days to allow for S to continue to be legally represented by the Bar pro bono unit.

71. On the 2nd October 2014 when S had ceased to be legally represented contact did not take place; S's solicitor said this was a misunderstanding on her part. Contact between M and her father did take place on the 4th and 7th October 2014 but on the 8th October 2014 S made two without notice applications to vary or discharge the order of 1st October to stop M staying overnight with her father. The applications were refused by Mr Justice Holman and then by me. The order of the 1st October 2014 was the subject of an unsuccessful application for permission to appeal which S pursued in person throughout the currency of these proceedings.

72. S then made a further application to discharge the order of 1st October 2014 for M to spend time with her father overnight, this time on short notice to the Applicants. S claimed to have been under duress to agree to contact at the hearing and that as M was still breastfeeding meant that overnight contact was not in her best interests. A letter was received from S's solicitors confirming they were coming off record. Contact took place during the day on 9th October 2014 and on the 10th October 2014 the first overnight contact took place.

73. The day after, on 11th October 2014, S took M to A&E in her local hospital immediately following M's return from contact, saying she was concerned about M suffering from dehydration. The medical records confirm that S was reassured that M was not dehydrated, and that no medical treatment was provided; indeed there seems to have been nothing wrong with M at all. She was recorded as alert and active, showed no signs of dehydration, looked very well with no fever no vomiting and as a very well child.

74. On the 14th October 2014 I directed that I would consider the application to vary/discharge the interim contact order on paper on 22nd October after

position statements had been filed by all parties. The following day, on 15 October 2014, Her Honour Judge Hammerton at the Family Court in Medway ordered that the court papers in the proceedings relating to the 1st Respondent's older children be disclosed to the child's guardian without W's consent.

75. The Applicants and the child's guardian filed position statements in respect of S's application to vary contact arrangements. S who was acting in person had sent the court numerous emails, then sent a letter with attached documents, an "application" to instruct an expert witness and photographs of M following contact. S claimed that M was distressed following overnight contact, which had an adverse effect on her health and feeding and that she was dehydrated and unable to drink from a bottle. M continued to stay overnight with her father. S continued to send emails to the court and approached the office of the President of the Family Division. She continued to pursue her case in several different avenues throughout the proceedings regardless of whether she was represented or not.

76. On the 22nd October 2014 I refused the 1st Respondent's application to discharge the consent order for overnight contact and her application to apply for an expert witness which did not comply with FPR 2010 Part 25. I invited the child's guardian to return the matter to court if she had any concerns about M's welfare. Contact continued in October but not without difficulty, including S arriving late for handovers on 24th and 27th October 2014. On the 31st October 2014 there was no overnight contact; S had contacted H to say that M was too unwell to attend contact and that she had consulted the GP by telephone. When H spoke to M's GP by telephone he was told that there were no concerns about M which might prevent contact taking place. On the 4th November 2014 overnight contact was disrupted for most of the day B arrived to collect M at 11am (as H was working) but S refused to hand the child over to him. H could not get there until 5pm when S then handed M over to him.

77. The child's new solicitor, recently instructed, wrote to the court seeking an extension of time for filing the bundle of documents for proposed disclosure. The Applicants confirmed agreement to the delay but S objected. I granted an extension of one week to the timetable relating to disclosure of documents. The child's solicitor wrote to the court listing the documents which the child's guardian proposed were disclosed into these proceedings. S objected to disclosure.

78. Contact continued but was again disrupted on 17th November 2014 when S sent texts to the Applicants from 3pm onwards. The texts read that M was unwell, with a temperature of 38.7C, sleepy and breastfeeding. S said she had called the GP for advice and been told to call again in the morning if M was not better. M's GP records confirmed that there had been a telephone consultation and reported temperature of 38.7C. On the 18 November 2014 no overnight contact took place. S had again taken M to hospital where she was

admitted with a possible viral fever; the records report that M was eating and drinking well, crawling, very active. A small bruise or mark was seen on her right ear lobe which seemed to be part of her illness. M was discharged at 5pm when S took her home. There was nothing on the hospital records of any real concern; nor that contact should not have taken place.

79. On the 19th November 2014 M was again taken back to hospital by S and admitted overnight. Nothing of a serious nature was diagnosed; it was recorded that the symptoms looked as if there was most likely a viral infection but that M could go home. However, according to the hospital record, S was said to have expressed concerns about M having a temperature so M was re-admitted to hospital. As a result there was no day time contact on 20th November 2014. M remained in hospital for a second night and was referred to the safeguarding team because of "mum's concerns". S told the staff at the hospital that there were court proceedings and difficulties in making arrangements. On the 21st November H attended the hospital too; there conflict between S and H recorded and as M was not well the parents were "*counselled that since the child was ill [she] should be with mum for a few days*". I shall return to this later in my judgment. As a result there was no overnight contact on the 21st November.

80. On the 2nd December 2014 I directed that a bundle of the proposed documents for disclosure be lodged with the court by the child's solicitor by 28 November 2014, and that the Applicants respond to S' objections by 5 December 2014.

81. On the 4th December 2014, after daytime contact when M was returned, S informed H in person and later that evening by email that starting from the following day she would no longer be making M available for overnight contact. There was no overnight contact on the 5th December and no daytime contact on the 8th December 2014 when S texted H just 40 minutes before contact to say that M was too unwell to attend contact. H telephoned M's GP who advised him that M could see her father and advised to keep her in a warm environment as she had symptoms of a cold. There was no overnight contact on the 9th December 2014.

82. The Applicants issued an application to enforce the order of 1st October 2014 and S issued an application for permission to appeal the order of 1st October 2014. S' solicitor confirmed that she had secured an exceptional legal aid certificate and was representing the First Respondent again. There was no overnight contact on the 12th or the 16th December 2014.

83. On the 10th December 2014 I ordered that the issue of disclosure be dealt with at the start of the hearing on 18 January, following further submissions from all parties.

84. On the 13th December 2014 M was again taken to the A & E Department of the hospital local to her mother's home. The observation was that M was a "*well looking, alert and smiling baby*". As a result of going to the hospital S was sent to the out of hours GP.

85. On the 18th December 2014 there was a hearing before Mr Justice Newton to enforce the consent order of 1st October 2014. Therefore daytime contact could not take place on that day. The Applicants and child's guardian were represented and S appeared in person. The judge ordered that M's GP and out-of-hours physician attend court the following day. The guardian undertook further enquiries overnight. As a result there was no overnight contact on the 19th December 2014.

86. On the second day of the enforcement hearing before Mr Justice Newton, M's GP filed a letter confirming that he did not advise S that M could not attend contact. The judge ordered a penal notice be attached to paragraph 4 of the order of 1st October. Despite this S remained unwilling for overnight contact to take place on that day because B would need to collect M, and so, exceptionally, it was agreed that overnight contact could instead take place the following day.

87. H went to the handover with B's mother and it was said that S behaved in an aggressive and inappropriate way towards B's mother. I later heard from B's mother about this incident during the hearing. H complained that S later telephoned his aunt and sister in Romania and made disclosures about his sexual orientation and lifestyle. This, if true and it was not denied by S, would seem to be a similarly aggressive act designed to cause distress to H and his family, and to B.

88. On the 26th December 2014 overnight contact was again denied. S contacted the First Applicant in the morning to say that her usual train did not run on Boxing Day. She did not take an alternative route using public transport; and said that there were no alternative routes by public transport available. In fact this was not the case. However there was an alternative contact on the 27th December 2014. On the 5th of January 2015 S was again denying contact, this time during the day and this time because S refused to hand M over to B (the 2nd Applicant) who had arrived to collect M without H. The case came before me a fortnight later.

89. It can be seen from the chronology I have set out above that S continually disrupted contact. S flouted the order of the court even after the order was enforced by Mr Justice Newton. She repeatedly took M to the GP or to the hospital when the child was not ill or had no more than a cold. This pattern of behaviour was consistent with her attempts to recruit people to support her cause and as a way of stopping contact taking place; it involved M in unnecessary visits to the doctor and hospital with the attendant intrusive examinations and time spent in an alien environment. It was not in her best

interests to be put through the experience repeatedly by S who was clearly putting her need to further her case before the needs of the child.

Evidence and the position of the parties

90. During the five days of the hearing I heard oral evidence from H and B, from B's mother, from S and from the guardian. I have read the statements filed on behalf of the parties, the guardian's report and had the opportunity of observing S, H and B during their evidence and while they have been sitting in court over the five days of the trial. S had the support of a clergyman, who sat next to her in court with my permission and without objection from any other party; he was not from her church as she is Christian Orthodox and I believe that he is the vicar of her local parish church. This gentleman remained in court throughout the hearing and, very kindly, brought S to the court in Birmingham. He and his wife provided S with considerable support and I am grateful to them for having given up their time to do so.

91. On the first day S asked to have another representative or supporter sitting behind her in court. This young woman was introduced to me as a law student who was assisting with S's appeal. I refused permission for her to remain as the appeal was against the hearing which had taken place on the 1st October 2014 and there was no need for her to remain, S had her solicitor and counsel in court representing her. I consider that these actions of S were taken to bolster her case that she was being victimised and oppressed and in need of support and to remind the parties and the court of the outstanding application to appeal.

92. Throughout the hearings S's behaviour in court was noticeably different from the two Applicants who sat very quietly throughout and did not draw attention to themselves. S was visibly more tense and reacted to what was said, making it clear when she disagreed with any aspect of the evidence or the proceedings. While S was markedly more vocal and reactive, and much more agitated than the Applicants while sitting in court she did not present as nervous, anxious or intimidated by the proceedings; quite the reverse she was very assertive and at times almost aggressive in her demeanour and her manner.

93. S disrupted the Applicants' evidence; for the first three days of the hearing in London and particularly while H and B were giving their evidence the flow of the proceedings had to be interrupted on numerous occasions for S to express breast milk. When the case was heard in Birmingham and when S was giving her evidence the interruptions were noticeably fewer, shorter and took place when the court was adjourned.

94. Throughout the proceedings S has quite deliberately and explicitly sought to portray herself as a victim. Indeed she describes herself as such and claims that she is discriminated against as a mother and, more particularly as a

breast-feeding mother. She claims that the court, and the proceedings in general, the Applicants have favoured to her detriment. At the same time S used offensive language including stereotypical images and descriptions of gay men to portray the Applicants; for example she repeatedly insinuated that gay men in same-sex relationships behave in a sexually disinhibited manner and are habitually sexually disloyal to each other. S has continually described the relationship between H and B as "on-off" and likely to be short lived. There was no evidence at all before the court to support this; indeed the two men were, and are, clearly devoted to each other.

95. Throughout the proceedings and in the final submissions made on her behalf, S was set against overnight contact for M with her father and his partner. On the 25th February the Court of Appeal refused S permission to appeal and Lord Justice Ryder certified that her application was totally without merit. The order read that there was "*insufficient material to suggest that an expert was necessary and accordingly no basis to interfere in the decision made in the Part 25 application. The orders were made on a consensual basis in relation to the father's contact. The assertion of undue pressure is difficult to sustain where an applicant will not even release the notes of hearing that have been prepared. In any event, general material relating to breast feeding is quite insufficient to establish a basis for a child not having a relationship with and/or contact with a father. The article 8 issues are makeweight and extravagant*."

96. After permission was refused, on the 5th March 2015, S's solicitors emailed a letter to the court which said that S would now agree to overnight contact continuing and would propose that it remain at the frequency put in place in October 2014 of twice a week until M went to school full time. I directed that S file a statement. I did so as she had previously attempted to distance herself from the agreements or submissions made on her behalf by her counsel and solicitor. S then filed a statement directly with the court on the 11th March 2015 which was not prepared by her solicitor (who had informed the court that she had not seen it before it was filed). The greater part of this statement and the attachments that came with it was made up of further invective aimed at H and B with a very few paragraphs at the end agreeing that overnight stays should continue as M was now used to them. This statement was used as an attempt to put further allegations before the court about H and B; at least some of which had not been put to the court before.

97. The Applicants' case as set out in the final written submissions filed on their behalf was that M should live with them and have contact twice a week with her mother, at least initially. The guardian recommended a change of M's residence to live with the Applicants and that there should be supervised contact with her mother once a month. The guardian recommended that there is a Family Assistance order for six months. I shall return to each party's case below.

Breast feeding & co-sleeping

98. S has made a great deal of her status as a breast-feeding mother and the disruption to M's routine of staying with her father overnight; not least because M "co-slept" with S and was breast fed during the night. Although some weeks after the hearing concluded S changed her position and agreed to M staying over-night with her father and B it is evident that she did so as she accepted that she had to following the decision to refuse her permission to appeal. Prior to that S had, as I have set out above, used the fact that she continued to breast-feed M as a reason for reducing or limiting contact and claimed that it was in M's best interest. It is the current orthodoxy, which the court does not gainsay, that breast feeding, if possible, for the first year or more as it provides many health advantages for a child. In her first statement in April 2014 S said that she wanted to breast-feed for the first 9 months; as time has progressed so the length of time she wishes to breast-feed has increased. In her oral evidence she was unable to say how long it would go on but indicated that it would be as long as M wanted it to which could be as much as several years into the future.

99. Part of S's case is that she sleeps with M which also provides the child with health and emotional advantages in respect of their co-attachment. The practice is not recommended for babies and small infants as there is a danger of over-lay and as a result may be considered to be more controversial, but that was not a matter that I was asked to decide. This practice when it takes place cannot be used as a reason to inhibit or curtail a child's right to form a positive and substantial relationship with her other parent or parents; which was a direct effect of S's practice in this case and she used it as part of her argument to support the curtailment of overnight stays. Based on the needs of a child, as M grows she must be allowed to become independent and grow as a human being separate from her parents and carers. At her age it is most unlikely that she will not suffer any harm sleeping on her own; indeed she has already experienced it without ill effect when she stayed with her father and his partner overnight.

Contact

100. The parties' conduct during contact has been the subject of argument before me with both the Applicants and S claiming that the other party has caused conflict and been aggressive. The evidence which I have set out above is that S has set out to limit and disrupt contact by insisting that M is ill and taking her to be medically examined.

101. I have little doubt that handovers can be fraught and at times quite unpleasant. S has largely contributed to this herself by refusing to hand M over to B or to take her from him. She had no good reason to do this and by doing so created resentment and fuelled conflict and I find she did so quite deliberately. The potential for distress to M being put in such a situation

clearly did not concern S as she was more interested in pursuing her aim to sideline B and ensure, as far as she was able, that he could not and did not play a significant role in M's life. This vendetta comes across in her all of her statements, on the occasion she kept M for most of the day instead of handing her over to B, in her attempts to film and/or record hand overs and in her oral evidence. She proved herself incapable of saying anything positive about B.

102. S insisted that the court watch a DVD of a hand-over which she had filmed on a CCTV camera which she had installed near the entrance to her flat. As it was filmed by S and the DVD prepared by her to further her case it cannot be considered to be an objective piece of evidence; I have no way of knowing, for example, if the recording was altered or is complete. What I could see did not assist her case. The filming itself was provocative; an unnecessary and potentially aggressive act. As it was taken when M was being handed over after contact it could only be designed to show H and B in a poor light and none of the parties appeared to behave very well and in a manner that was in keeping with the need to remain calm and positive for M's sake. The only one who showed and voiced real concern for the effect of the unpleasant scene was H. Given S's conduct throughout these proceedings and her constant attempts to case-build I conclude that she deliberately tried to set up a scene to discredit H and B.

103. There was an allegation, denied by S, that she had tried to involve B's mother in the conflict when she had accompanied B to Waterloo East station to hand over M. I heard the evidence of B's mother. She was a co-operative and calm witness; a woman of some poise and sophistication. She made it plain to me that she wanted to take on the role of grandmother and not of a full-time carer. She told me she has two sons who live in London and contemplated moving there in the future, perhaps to live permanently and with their assistance. She was obviously fond of H, referring to him as one of her three sons. From the way she spoke and gave her evidence she clearly adores M, and calls her "Little Star," but she does so as a grandmother. B's mother accompanied him to hand M back to her mother so that she could spend as much time with M as possible, and I accept her evidence. I it when she told me about the conduct of S at the handover, not least because it was consistent with her conduct throughout the proceedings. S was aggressive and loudly vocalised her complaints about the situation and the behaviour of H and B, and she tried to involve B's mother in the dispute.

Parties' evidence

104. I have made references to the demeanour of S and H as adult parties in these proceedings in the course of my judgement and to their oral and written evidence. I have made less reference to B. B was a composed and quiet witness. He sat with H throughout the proceedings and they are, as far as I could see, a devoted and close couple. B told me that he did not know S as well as H did and that he and S were not as close. I accept his evidence in

respect of their relationship as, like H, I found him to be fair in his assessment of S. He said that he had very little hope that her behaviour towards him would change; and that he had found her negative comments about him, about gay relationships and about his relationship with H, in particular, upsetting and hurtful. Some of the comments and allegations made to the guardian were vituperative; S said that B was a misogynist and that she feared he would be violent to her; that he dressed in such a manner that his pubic hair was visible. None of these calumniatory allegations was pursued or substantiated.

105. When talking about M he was warm and loving and referred to her as "our daughter"; she was clearly very important to him. He was distressed, but not inordinately so, at the effects that S's disclosure to H's family in Romania that H is gay and in a relationship with B, would have on H's family and whether they would be willing to welcome him again. I accept his evidence, and that of H, that S did phone his family, who she knows, to make these disclosures. Given that the action on S's part was deliberately duplicitous and manipulative, designed to make life difficult for both H and B he was remarkably forgiving about it. B gave his evidence in a frank and unfaltering manner. His oral evidence, like that of H, was consistent with his written evidence.

106. I accept B's evidence that he was involved in discussions with S after the initial email exchanges and that she had described her role as that of a surrogate. I accept his evidence that during the discussions involving the three adults that S did not say that she would breast-feed for 2 years or co-sleep. B told me that S did not "make it clear" that she would be the main carer. S spoke to H and B, he said, about playing a role when M was a new-born and that at that time M would sleep in the same room as S; but they discussed having her cot in that room.

107. The discussion was based on S living with H and B; B told me that if it did not work out S had said she would move out and would live nearby. B was certain (as was H) that the agreement was that H and he would be the main carers. I accept his evidence that S was involved in the choice of the house and that it was big enough to allow her teenage daughters to stay. I further accept that S chose to contribute to the deposit. It was his evidence that it was not until the end of December 2013 that it became clear that S no longer wanted to move into the house that they had rented together. B's evidence was that he honestly believed that S had misled them and that she never intended to go through with what the three of them had agreed. I found B a credible and straightforward witness and his evidence supports that of H and the conclusion which I reach in finding that S had set out to inveigle H into acting as her "sperm donor" so she could have another child.

108. In speaking to H's relatives in Romania S behaved in a calculated, pernicious manner that ultimately may affect how M is welcomed into her father's family

in Romania. S did so with no regard to the fact that it is part of M's family; once again putting her own interests before her daughter's. S has intentionally disobeyed a court order in respect of M's baptism, because she did not agree with it and because she sees M solely as an Orthodox child as part of a contrivance to make the child entirely her own. M has a mixed heritage and I doubt that S has the capacity judging on her behaviour since the child was born to nurture all the facets of her heritage which are the essence of her unique identity. In having M baptised and then lying about it to the court and to the guardian was a deliberate machination on the part of S for which she remains unrepentant. S has again disobeyed a court order as she did in the proceedings concerning her older children in Kent.

109. The perceptible ease with which S lied to the court, the defiant way that she has given evidence about the baptism along with the obdurate stance she adopted over the baptism give lie to any suggestion that she is the intimidated martyr to motherhood that she would like to have her supporters believe. It was a conscious denial of the child's heritage and religious ancestry and S then equally deliberately lied to the court about the baptism by denying that it had taken place. In her oral evidence she was unapologetic and her demeanour gave me little if any reason to believe that she would comply with court orders in the future, especially if she does not agree with their prohibitions.

Guardian's evidence

110. The guardian filed a full and thorough report and gave oral evidence. However it is my view that Ms Ritson may have paid too much attention to the proceedings concerning S's older daughters and with whom this court is not concerned. That criticism, if it is seen as such, does not undermine her overall opinion as there is more than sufficient evidence as set out above which gives rise to concerns about S's ability to meet M's needs, which ability I must consider in respect of S and H too, as part of the welfare checklist in s 1 (3) (f).

111. S has at times appeared to be hostile towards the guardian and her representatives at court and I accept the guardian's oral evidence that S was very hostile in the meeting that she and S had on 2nd December 2014. S accused the child's solicitor of trying to undermine her case when all she had done, in an effort to assist a litigant in person and a parent, was offer to explain what the guardian was doing in respect of the disclosure application. The hostility displayed by S, while understandable on one level as the guardian's recommendation for overnight stays had not met with S's approval, on another gave rise to perturbation about S's ability to deal with professionals who may be at variance with S's views or opinions about M's welfare in the future.

112. The guardian recommended that M should live with H and B and that her contact with S should be reduced to once a month and that it should be supervised. In her oral evidence the guardian was concerned about S's negative view of B and how that would affect M, with whom she has formed an attachment and who is and will remain an important figure in M's life. She was concerned, and with good reason, that continued conflict, S's negative estimation of H and B and her rancorous attitude towards their relationship would affect M causing her emotional harm and confusion about her identity. The guardian told me that her concern was that S could not prioritise M's needs over her own. Ms Ritson was concerned that in order to further her purposes in future S would designedly seek out the professional that gave the advice that she wants as she had when she took the child to the hospital instead of the GP when he was of the opinion M could spend time with her father even if under the weather.

113. The evidence which gives rise to the guardian's concern is set out earlier in this judgment; S repeatedly took M to the GP and to the hospital when there was little or nothing wrong with her. These courts are aware that such a pattern of behaviour can of itself be harmful and abusive to a child. In this case it would seem that the primary motivation was to frustrate contact. Both the repeated and unnecessary referrals to medical personnel and the seemingly unnecessary admission to hospital (there was no medical need for the admissions) are not in M's best interests. The fact that they led to M missing contact with her father was of itself not in her best interests.

114. I consider that the guardian was right to be concerned about S's ability in the short term and in the longer term to promote a positive and healthy view of H and his partner B. S has had the opportunity before, during and after the hearing (when she changed her position about overnight contact) to demonstrate to the court that she would at least try to be more positive about H and B, in particular. She singularly failed to take that opportunity up and her latest statement was a further philippic written to deprecate and traduce the Applicants whilst simultaneously professing to accept that overnight contact would be good for M. Her unenthusiastic reasons amounted to no more than a grudging acknowledgment that the child was now familiar with the routine. I can have no expectation or confidence based on S's evidence and her past actions that she would promote a relationship with M's father and with his partner or with the paternal family and with B's family.

115. In her conduct of her case S gave rise to some concern that she will continue to pursue the conflict with H and B in the future. I base this on her concerted efforts to pursue her case through any and all avenues where she perceived a possible support or means of engaging in her campaign. The guardian recommended that there should be an order under the provisions of s91 (14) CA and a Family Assistance order. In respect of the latter I say here there is no point if S does not agree to it and there it nothing to suggest that she would.

Conclusions

116. The evidence has to be considered in the light of the child's best interests. I have used the welfare checklist as the basis for my decision because I am concerned with how to best provide for M's physical, emotional and educational needs under the provision of s 1 (3) (a) CA. Although M is not yet at school it is more likely than not that the parent who can best meet all her other needs and is most likely to be able to provide her with a secure home and stable upbringing with room to grow emotionally for the remainder of her infancy is more likely to meet her educational needs fulfil her potential in the future. The latter requires that M is afforded the scope to grow up in an environment where conflict is at a minimum. M is not yet able to say as she is just learning to talk so I do not know her expressed wishes and feelings but I assume it that for the immediate future she would want to continue to remain with S and continue to spend time with and H and B, including overnight stays.

117. Any decision that M lives with H and B and spends much less time with S is bound to affect her, likely to upset and distress her in the short term at least and necessarily amounts to a change in her circumstances. However familiar M is with her home with H and B she would miss her mother with whom she has spent most of her time. Against that I will weigh the harm that she is at risk of suffering if she remains with her mother. As she gets older she will become more aware of, and will be directly affected by, her mother's negative views about her father and B. These views will affect her own sense of identity; negatively inform her view of herself and where she fits into the world.

118. I can only judge S's ability to parent M based on recent history and based on that history M is more likely than not to suffer harm; to continue to be taken to the GP and to hospital at times when it is not necessary in furtherance of S's determination to control M's contact with H and B or in respect of contact or any other dispute she may pursue over M with H in the future. It is likely that S will present H and B in a negative way to M and give her limited opportunity to understand the history behind her conception and of how she came to be here; nothing in S's conduct of her case can offer any assurance to the court that S is capable of doing that for M in a balanced way that is free from S's own agenda.

119. At present S is able to care for M well physically but there are already grounds for concerns about her mother's over emotional and highly involved role in this infant's life. Ultimately the role of a parent is to help the child to become independent. This is a child who at 15 months old is still carried by her mother in a sling on her body. M spends most of her time with her mother who does not set out any timetable for returning to work, as S would have to, to provide for M and for herself. There is a potential for enmeshment and stifling attachment rather than a healthy outward looking approach to the

child's life. The question is who benefits most from this chosen regime which points towards an inability to put the child's needs before her mother's need or desire for closeness.

120. The attachment which will develop in an infant who sleeps with her mother, spends all day being carried by her mother and is breastfed on demand through out the day and night raises questions about the long term effect on M. From the point of view of this judgment it further begs the question as to who benefits most from the regime S has chosen to impose without reference to M's father, H. I have little doubt that the breast-feeding was used a device to frustrate contact during the proceedings, a conclusion supported by S claiming at first that she could not express her milk which so reduced the time available for contact; subsequently when it was clear that M could be fed and was able to eat other foods S no longer had difficulty expressing milk. I am forced to conclude that S has shown herself to be unable to put M first and that she is unable to meet M's emotional needs now and in the long term.

121. The contact that S has with H and B has been very successful; the guardian who has observed it more than once described M as alert, happy and relaxed in her surroundings. Unlike S, H and B have not made a plethora of allegations against S; apart from those directly concerned with contact or her conduct towards them during contact. They have said that they want there to be as harmonious a relationship as possible between the adults and their support of M spending time with her mother is evinced by the level of contact they suggested. Their conduct has been consistent with this approach and while it is exemplified by an offer of contact which is greatly in excess of that proposed by the guardian they have never sought to exclude S from M's life and to the end of the proceedings expressed the hope that the relationship between the parties could become more harmonious for the sake of M. The Applicants could easily have adopted the recommendation of the guardian that contact should be once a month but they have not done so.

122. While to move a young child from her mother is a difficult decision and is one which I make with regret as I am aware that it will cause S distress I conclude that H is the parent who is best able to meet M's needs both now and in the future. It is he who has shown that he has the ability to allow M to grow into a happy, balanced and healthy adult and it is he who can help her to reach her greatest potential. I accept the evidence of the guardian that H and B have had a child-centred approach throughout. It was obvious from their oral evidence and their statements. H, in particular, has always sought to put M first.

123. H thought carefully about having a child and his discussions with S in the emails that they exchanged in February 2012 are an illustration of his awareness of the difficulties that would be encountered as well as a clear expression of his very great desire to have a child; and to have that child with B. It is highly unlikely that H would have reached any agreement about having a child without involving B, not least because it would have

jeopardised his relationship with B and H's future role as father to the child he very much wanted to have.

124. The best that can be said for S is that she deluded herself about the nature of the agreement she was reaching first with H and later with H and B. It is very unlikely that such an obviously astute and determined woman would have left anything to chance when it came to having a baby. While I do not rely on the substance of the CA proceedings in Kent I do take account of the fact that S no longer has her daughters living with her and has limited contact with them. This situation, whatever its cause and whatever her role in it, will indubitably make it more likely that she wanted, as she said, to have another child for herself. The emails that she sent were deliberately misleading and S continued in the deceit, allowing H to believe that he and B would be the main carers for the baby until pregnancy was well advanced.

125. 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.

126. M should live with her father H and his partner B as it is in her best interests to do so; I reach that conclusion having had regard throughout to the welfare checklist and to M's interests now and in the long term.

Orders

127. I shall make Child Arrangement orders in the following terms; M shall live with H and B, by virtue of this order both will have parental responsibility. I will give the parties an opportunity to discuss the frequency of contact; but regret to say that it must be supervised until there is no longer any need.

128. While I accept that M has been living with S and has come to no serious harm I am concerned that S will not be able to accept the decision of the court and there will be conflict around contact and that it is in M's best interests to ameliorate or at least reduce the likelihood of conflict as a result of the court's decision about where M should live. There are two further reasons for this decision, I have remained concerned about the existence of a Romanian passport for M and cannot accept S's word that there is none in existence that without confirmation from the Romanian Embassy which the court has not as yet received. The second reason is that S has not shown that she is able to put

M's interests first during contact. S has provoked conflict by filming and recording handovers; by accosting B's mother when M was there and by using all or any device she could think of to try to stop contact from the outset, whether it was breast-feeding or taking M to the GP or to hospital.

129. As S has deliberately flouted court orders in the past I share the concerns of the guardian that she is likely to do so again in the future particularly as she may feel that she has little to gain in obeying the orders made following this judgment. It is a serious and substantial change to have contact supervised and it is one that I have, frankly, struggled with but I have concluded that the protection afforded by contact being supervised is necessary step to reduce conflict and enhance the likelihood of contact being a positive experience for M. I consider that it is necessary to ensure that S does not use contact as a means of continuing the contest for ownership of M and use her mode of parenting to try to undermine the decision of the court as she has in the past and during these proceedings. Moreover it is intended that a regime of supervised contact should not continue for long but that once M is settled and living with the Applicants the parties will be able to reach their own agreement and arrangements over contact which was always the intention of H and B and so that M can spend time with S in a relaxed environment including in S's home.

130. It is part of this decision that the time M will spend with S is for the benefit of M; to help her develop her own sense of identity and her because it forms an important part of her background. It should not be so frequent as to lead to any confusion in the child's mind about where and with whom she lives and who are her main carers; nor should it be so infrequent as to lead to distress or anxiety. M is very young and will settle quickly; the role of S will be more peripheral than it has been in the past and its importance and frequency for M will be dependant on its quality; the purpose of time spent with S is to assist M's security, sense of identity and to enhance a settled existence for her. There will be an order setting out the time M is to spend with S (s11C (1) (iii) CA) and it would be prudent to have a Monitoring Order pursuant to s 11H.

131. In respect of s91 (14) CA 1989, time and again the court has been reminded that this power must be used with care, and sparingly, and should be the exception rather than the rule. It is submitted on behalf of the Applicants and the guardian that although there is no history of making unreasonable applications I can be satisfied that the facts go beyond the commonly encountered need for a time to settle to a regime as ordered by the court and the equally common situation where there is animosity between the adults in dispute, and, secondly, I can be satisfied that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] 1 FLR 1279.

132. In considering this issue I considered, as I was asked to, S's conduct since the order made on 1st October 2014 and her attempted justification for her repeated non-compliance with the provisions of that order in relation to overnight contact. S submitted that she was placed under duress to agree overnight contact by the extremely experienced counsel who represented her pro-bono at that hearing; the application to appeal was rejected. The fact that S has now accepted that she should abide by court orders must be viewed with some scepticism given her previous breaches of orders.

133. I find that these proceedings were brought about by S' conduct starting with the manner in which she deceived the Applicants about M's conception and that they have been drawn out by S who could have reached some agreement about M's care being shared earlier on. The nature and duration of these proceedings on the Applicant fathers must have been very stressful and was certainly very costly. They have undoubtedly been subjected to the strain and provocation as a result of S's course of behaviour over the currency of the proceedings including her informing H' family in Romania of his sexual orientation and of his relationship with B; S repeated disparagement and allegations about the nature of the relationship between H and B caused personal distress to both men; and her antipathy towards B which caused practical difficulties in contact arrangements.

134. If I were to make an order it would be as a result of S's conduct and the likelihood that if it were to continue it would cause unacceptable strain on H and B; the length of the order is a matter of discretion of the court *Re C-R (Children)* [2014] EWCA Civ 1627. I would ask that the parties address me further on this once the child arrangements order is finalised and keep in mind that since February S has not made further applications.

135. In respect of M's name. Given the orders that I make and taking into account all the circumstances of the case, including that S registered M's birth without reference to H and did not include any name from the child's father or his family (and I include B in that family), I shall order that M is known by the surname H, but she should retain S as part of her name. H and B can add the name L to her forenames but will continue at present to call her the name she is used to; in due course she will call herself what she wishes.

136. There will be a prohibited steps order prohibiting S from removing M from the jurisdiction without the written consent of H and B. This order will remain in force until M's sixteenth birthday.

Reporting Restriction Order

137. There will be a reporting restriction order to protect the identity of the child and her carers. This is put in place because of the posting on social media early in the proceedings. The judgment will be published in anonomised form.