Case No: ZC16P00228

Neutral Citation Number: [2016] EWFC 77 (Fam)

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

The Royal Courts of Justice
Strand, London. WC2A 2LL

29 September 2016

BEFORE:

MRS JUSTICE THEIS DBE

- - - - - - - - - - - - - - - - - - - -

BETWEEN:

(1) LB
(2) DB

Applicants

- and -

(1) SP
(2) SP
(3) B

Respondents

- - - - - - - - - - - - - - - - - - - -

MR ANDREW POWELL (instructed by **Pennington Manches**) appeared on behalf of the **First Applicant**

The Second Applicant was **in person**

MISS SHABANA JAFFAR (instructed by **CAFCASS**) appeared on behalf of the **Third Respondent through the Children's Guardian**

- - - - - - - - - - - - - - - - - - - -

Digital Transcript of WordWave International Ltd trading as DTI
8th Floor, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 704 1424
Web: www.DTIGlobal.com Email: TTP@dtiglobal.eu
(Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - - - - - - -

Judgment

MRS JUSTICE THEIS:

1. I am concerned today with an application for a Parental Order for a little girl, B, who was born in early 2010 so is six years of age. The applicants are LB and DB and the respondents are SP and SRP.

2. I am giving this extempore judgment to enable the parties to know what the position is as the matter had been set down for a final hearing today. I have had extremely helpful position statements filed with the court from Mr Powell, on behalf of Mr B. Mrs B is representing herself and has been able to helpfully direct the court to extra information, and Miss Jaffar represents B on the instructions of the Parental Order reporter, JS, as B's Children's Guardian. Also present are members of the wider family who are important to B, namely NS and FS, GN and HC and the maternal grandmother, QLFK.

3. B was born following a surrogacy arrangement that was entered into in September 2009 between Mr and Mrs B and Mr and Mrs P. This arrangement was entered into through the fertility clinic called Gynaecworld, based in Mumbai. Both the applicants have filed statements which set out the difficult and emotional journey they have made to fulfil their wish to have a child. They have undergone a number of procedures, including IVF, which were sadly unsuccessful and it is that which led to them to consider a surrogacy arrangement. The court has not only had the benefit of reading these statements, but also both Mr and Mrs B have given oral evidence.

4. It is quite clear that following their decision to embark on a surrogacy arrangement they took enormous care in making the decision about which clinic they would use. They made enquiries in a number of different jurisdictions to understand themselves about the type of clinics available and the framework in which they operated in. In particular, Mrs B set out at paragraph 8 of her statement the steps they took and why they chose the clinic that they did. She said:

> *"After many emails and phone calls with the clinic, doctors and past patients, we decided to visit Mumbai and see for ourselves how the process worked."*

She continued:

> *"It was extremely important for me to have first-hand experience of the surrogates living quarters and conditions. To meet and talk to surrogates in person at different stages of pregnancy. To meet the care takers, nutritionists, cooks, drivers, teachers and cleaners that look after the women to see what they do with their days, what choice of educational program the clinic provides as part of their contract and what happens in the run up to the birth and after. I wanted to try and understand the issues from everyone's point of view. There's more to it than just the intended parents and the surrogate. There are so many more people involved in a responsible surrogacy in India, it cannot be done under the radar and nor does it need to be.*
>
> *Visiting the birthing hospital was surprising. It was a new first world European style hospital (far nicer than my local hospital and many I visited privately) with the order of care being quite clearly, those in need come first so the pregnant women, the unborn baby then us.*

Walking through the whole process physically, financially and legally where at the time under Indian law the intended parents the surrogate and her husband attended court with all the correct paperwork. A judge would then verbally check the surrogate understands what she was doing and that she is happy to proceed. If the judge is satisfied they will authorise the agreement."

5. She acknowledges they took their time to make sure the decision they made to embark on the surrogacy arrangement and the clinic they chose was one they were entirely satisfied about, particularly in the way that it managed these arrangements.

6. They decided to engage Gynaecworld, following two unsuccessful embryo transfers with two separate surrogates, they entered into the arrangement which is the one falling for consideration by the court.

7. A surrogacy agreement was signed in September 2009 and the relevant embryo transfer took place soon afterwards. In relation to their meetings with the surrogate mother, Mrs P, they have given some details about this in their statements and their oral evidence. It appears that at the time they signed the surrogacy arrangement, Mr and Mrs P had not signed their part of the surrogacy arrangement, they signed it afterwards. They secured advice from a gentleman called PL, an advocate who practises in Mumbai, which is attached to their statements. He confirmed in his document dated 25 May 2010 that the agreement was signed by the parties in September 2009 was one that, according to him, had been executed by the parties with full consent. All the parties to the agreement were explained the rights, obligations and duty cast upon them and in his view the above mentioned documents were legally valid and subsisting documents.

8. The applicants met the surrogate mother on two occasions. The first occasion was soon after the birth of B. Mrs B was able to gain access to where the surrogate mother was and, as she described in her evidence, she spent about 15 minutes with her where she was able to communicate with her how grateful she was for the part she had played in the pregnancy and birth. The following day Mr and Mrs B were able to have a shorter meeting with her where they were again able to express the same views.

9. They are clear there was no indication at the time that they met Mrs P, albeit very soon after B's birth, that there was any suggestion she was under pressure or had not consented to this arrangement. That view is supported by their wider knowledge and enquiries in relation to the way this clinic operated and also by the communications they had had with the clinic prior to B's birth, when there were photographs sent of the surrogate mother's pregnancy and other information in relation to the progress of the pregnancy.

10. The financial arrangements in accordance with the agreement are set out and summarised in the position statement filed on behalf of Mr B. At paragraph 7 onwards a table sets out the details in relation to the payments made. The headline figures in sterling is a total sum was paid to the clinic of £21,764. Within that there are a number of identified payments. In particular, a compensation payment made to the surrogate and her husband of £2,631 with an additional payment because B was born by way of caesarean section of £328. The balance was retained by the clinic, a commercial surrogacy clinic operating lawfully within India and the majority of the payments made were taken up with medical and other expenses. There would no doubt have been an element of profit, as this was a commercial business.

11. B was born in early 2010. She was placed almost immediately in the care of Mr and Mrs B. They had made extensive efforts prior to B's birth to make sure that the

necessary immigration arrangements were in hand. As a result B was granted a certificate of registration as a British citizen on 1 June 2010. The British passport was given to them very soon afterwards, on 4 June 2010. In mid-June 2010 they were able to return with her back to the family home in the South East of England, where they have remained living since.

12. The applicants intended at that time to apply for a Parental Order and as part of that process they understood the requirements that were needed under s.54 of the Human Fertilization and Embryology Act 2008 (HFEA). Mr B drafted the necessary consent documents they would want Mr P and Mrs P to sign, to provide their consent to this court making a Parental Order, and for it to be done in a way that this court could be satisfied they have freely, and with full understanding, consented to the making of a Parental Order which will, in effect, extinguish any parental rights they have in this jurisdiction.

13. The consent documents now before the court were signed on 20 August 2010. There is one for both the surrogate mother and her husband. They are documents that make clear in referring back to the surrogacy agreement, that it has been explained to them that in spite of the position under Indian law, nevertheless, English law deems them to be the legal mother and/or father of B and that they, Mr and Mr B, wish to apply for a Parental Order in respect of the child and the effect of which, if granted, would be to irreversibly transfer their parenthood of B under English law to Mr and Mrs B. They confirmed they have had the contents of the document explained to them in their native language of Hindi and have received independent legal advice in Hindi from an advocate, PL, in relation to the document and have had the consent document implications fully explained to them. It concludes with them having been afforded time to consider and reflect on the consent, that they irrevocably and unconditionally consent to the granting of a Parental Order in respect of the child.

14. That document is signed and dated in English, but confirming that it had been translated to them. It is notarised, as confirmed by the necessary stamp, and also signed by the advocate, PL.

15. Mr B informed the court in his oral evidence that PL was a lawyer in Mumbai they were put in touch with by the clinic, but he did not represent the clinic and he was therefore available to assist in relation to legal ramifications following on from the arrangement the parties had entered into.

16. The consent document was obtained with a view to pursuing a Parental Order application, but it appears, from what is set out in the statements and the oral evidence, the applicants did not then pursue that application for a number of different reasons. Firstly, they had obtained some quotes in relation to the legal cost of being represented in such an application which in their written evidence they described as prohibitive. They were given quotes of figures of £70,000 or £80,000 to be able to make such an application. Secondly, they had concerns not knowing whether such an application would be successful or not. Mr B in his oral evidence was very clear that the uncertainty of not knowing whether the application would be successful or not raised a real fear with him in relation to any publicity that may arise from such an application not being successful, and even feared that B may be removed from their care.

17. As a consequence they decided that on the grounds they had a Red Book and were able to exercise their parental responsibility in relation to B on a day-to-day basis without the need of an order they, at that time, decided for those reasons not to pursue an application.

18. It was only more recently, when Mr B discovered as a result of a conversation with a colleague that there has been a recent decision of Sir James Munby, President, in *Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135*, which determined the six month time limit was not necessarily cast in stone and the court was able, depending on the facts of each case, to consider whether an application issued after six months should be allowed to proceed. As a result of that, some six years later, they issued their application for a Parental Order.

19. Obviously the delays in making that application have meant there have been difficulties in being able to serve the surrogate mother and her husband with a copy of the application and the acknowledgement of service. The detail in relation to the steps taken have really only come into sharp focus during this hearing, because in the position statement and skeleton argument filed on behalf of Mr B by Mr Powell, he sought at paragraph 5 for the court to dispense with the need for the first and second respondents to be served, as reasonable steps to try and locate them have proved to be unsuccessful.

20. It now appears from a further interrogation of the available documents there is some evidence the respondents had been served with a copy of the application. In July 2016 the clinic, who Mr and Mrs B had been in regular contact with since they issued their application, tried to locate where the surrogate mother and her husband were. They were given an address for her by email dated 1 July 2016. It was an address in Nepal. Following that they located an advocate lawyer in the area who would be able to assist with any issues of service. Mr B's solicitors were given the name of someone who could be contacted in the area and that person was confirmed and identified in August 2016 as Mr KU, an advocate, who could assist.

21. Having received the address in July 2016, Mr B's solicitors sent to that address a letter attaching the Parental Order application and the acknowledgement of service. The covering letter had the following message:

    "These are important documents relating to formal arrangements for a child born to Mrs P on [birth date]. As soon as you receive them please telephone Ruth James or Stuart Webber (with a telephone number) and we will arrange for a lawyer to visit you and explain what the documents say to you at our cost."

    That message was repeated in Hindi and also written in another Indian dialect to ensure that the respondent surrogate mother and her husband would be able to read it. The balance of the documents were untranslated.

22. The emails I have been referred to, which are email communications to Mr KU and Mr B's instructing solicitors, where they sent him the documents that had been sent by air mail direct to the respondent surrogate mother and her husband with a view to him taking those documents to them to ensure they had them. Despite those instructions being relatively clear, it appears by 16 September 2016 this lawyer had gone to visit Mr and Mrs P and retrieved the documents that had been sent to them. The reason why the court is able to reach that conclusion is by the email dated 16 September 2016, sent to Mr B's solicitors, the documents attached are the original documents that were sent to

23. Mr and Mrs P by air mail. That is evident from the markings on the documents sent back, which are not apparent on the documents that were sent to the lawyer by email. As a result of that it is said that the court can infer that notice has been given to the respondent surrogate mother and her husband and consequently no further steps need to be taken.

24. I have found this aspect of the case particularly difficult. Miss Jaffar submits, on behalf of B, the court can be satisfied in the circumstances of this case that the respondents have had notice of this application, as the court can not only be satisfied that the documents were sent and received, the critical part notifying them of what they were was in Hindi. She also submits the court should look at the wider context of the case where there has been continuing contact between the applicants and the clinic. The respondents retained some communication with the clinic, so the clinic were able to establish where they had gone to. There is no suggestion in the period since B's birth in May 2010 that the respondents have not been content with the arrangement that was entered into. In addition, they attended the clinic in August 2010 to sign the necessary consents before the court, for them to be notarised and to receive legal advice about them. For those reasons the court can be satisfied on the evidence that the documents sent by email on 16 September can only be the original documents that must have been received by Mr and Mrs P, and there has been, in the circumstances of this case, effective service.

25. In the somewhat unusual and unique circumstances of this case, where the documents that had been sent are returned back to the court, even though they have not been completed, I am satisfied because of the surrounding circumstances that the respondents have been served with notice of the application and acknowledgement of service. There is nothing to suggest they took up the offer set out in the covering letter and in the contact they had from the advocate who visited them that they did not continue to give their consent. Bearing in mind the wider position in relation to the circumstances of the clinic and the respondents continuing contact and co-operation with them, the application can proceed.

26. Turning now to s.54 of the Human Fertilization and Embryology Act 2008, the court has to be satisfied that the requirements under s.54 are met and, if they are, that B's lifelong welfare needs will be met by this court making a Parental Order. Dealing with the s.54 criteria first, there are eight criteria. I can deal with four of them relatively quickly.

27. Firstly, under s.54(1) the court has to be satisfied that there is a biological connection between one of the applicants and B. The DNA test dated 5 July 2016 from Cellmark confirms Mr B's biological connection with B, and the evidence demonstrates clearly that B was carried by Mrs P.

28. Secondly, the status of the parties' relationship. They married in New Zealand in early 2004 and despite the recent separation, which I shall come to in a moment, they remain married, so that requirement is met.

29. The third matter under s.54 (4)(b) is the question of domicile. The court must be satisfied that at least one of the applicants is domiciled in this jurisdiction. This is Mrs B's domicile of origin. She was born here and has not lived for any extended period anywhere else. She retains her domicile of origin, so that requirement is satisfied. It is probably Mr B's domicile of choice, but there is no need for the court to go any further in relation to that, as just one of the applicants needs to satisfy the domicile requirement.

30. The fourth matter I can take shortly is the applicant's age. I have to be satisfied that both of them are both over the age of 18 years. They are; Mr B is 43 and Mrs B is 53.

31. The remaining four criteria require more attention. I am helpfully assisted by the skeleton argument on behalf of Mr B. Dealing with the four remaining matters in turn.

32. The first is the requirement in s 54 for B's home to have been with the applicants, not only at the time when they issued their application in February of this year, but also at the time when the court is considering making a Parental Order.

33. The circumstances of this case is that when the parties issued their application there was no doubt they were living together. Unfortunately the parties have separated during the currency of this application and the court needs to consider whether it can be satisfied that B has her home with the applicants at the time when the court is considering making a Parental Order.

34. This issue has been considered in a number of cases, most recently in *A and B (No. 2 Parental Order)* [2015] EWHC 2080 (Fam). I was dealing with a situation where the applicants in that case had been separated at the time when the application was issued, and at the time when the court was considering making an order. At para 48 I said as follows:

> *" In Re X the commissioning parents were separated at the time the application was issued, although had reconciled by the time the matter was heard by the President. At the time they made their application there was a shared care arrangement between the parties with the child splitting his time between the two homes. The President considered the child had his home with the commissioning parents, with both of them, albeit that they lived in separate houses. The President laid emphasis on the fact that the child in that case did not have its home with anyone else. The same applies in this case (that is the case of A and B). The fact that B is unable to have the children to stay in his home at present does not, in itself, mean that the times when he does see the children is any less important or should be treated in a less significant way."*

In this case, it is submitted, the court can be satisfied this requirement is met because of the extent of time Mr B spends in the family home with B, so B has her home with both of the applicants.

35. In his skeleton argument Mr Powell submits the court should have regard to the following factors. Firstly, that during the majority of her life B has always lived with both applicants. That is right, but the court needs to consider the time period specified in s.54. Secondly, at the time the application was made in February 2016 both applicants were living in the family home with B. Thirdly, whilst the father, Mr B, has now moved out of the family home he continues to spend time with B in the family home each weekday morning, giving B breakfast and taking her to school. Mr B also goes to the family home at weekends and she has started to spend some time at his flat. I was told today that in fact there has been one or maybe two periods of overnight contact at his flat.

Fourthly, that despite the applicants' circumstances in respect of their marriage they went on holiday to France this summer with a group of friends and fifthly, the parents continue to make joint decisions in respect of B's welfare. In those circumstances it is submitted by Mr Powell that the court is entitled to find that family life does exist in respect of all three individuals.

36. I am satisfied on the information I have seen that family life does exist for the applicants in this case, despite their recent separation and when looking at the position in the way the President did in *Re X*, as set out in my decision of *A and B (ibid)*, the

position is clear B does not have her home with anybody else, she lives with Mrs B, Mr B attends on frequent occasions and the parties operate their family life in relation to caring for B in the way that they do. So, for those reasons, this requirement is met.

37. The next matter is the timing of the application. The provisions of s.54 require the application to be issued within six months of B's birth, so the application should have been issued in November 2010. However, the decision of the President in ***Re X*** *(A child) (Surrogacy: Time limit)* [2014] EWHC 3135 makes it clear the court can consider whether it should allow an application issued after the expiry of that time to proceed. As the President made clear in that judgment, each case will be fact specific. He said:

"I intend to lay down no principle beyond that which appears from the authorities. Every case will, to a greater or lesser degree, be fact specific."

38. In relation to this case it is submitted both applicants have been candid, frank and consistent in their explanations as to why they did not issue the application in 2010. This case is different in some respects from cases the court has considered hitherto in relation to timing, as a common feature of those is the applicants did not know that they could issue or, if they did, that they could not do it whilst, for example, they were still abroad.

39. The position here is the reasons why the application was not issued is not only because of the expense, but also the fear the application may not be granted, the uncertainty and the risk of publicity outlined in the applicant's statements and described in Mr B's oral evidence. Those, in my judgment, are facts that can be taken into account. The court can take notice of the fact that in 2010 there had only been a very few surrogacy arrangements like this that had gone through the Parental Order application process and, consequently, there were very few reported cases that dealt with the circumstances in which the court would grant Parental Orders. The situation is very different now, there are a number of cases publicly available that set out the circumstances in which the court will make a Parental Order, it appears that once Mr B became aware of that he very promptly arranged and agreed with Mrs B the application they have made should be submitted. So, even though they had knowledge they could issue the application in 2010, when looked at it in the context of the situation in 2010, the uncertainties there were in relation to the procedure, and any fears in relation to publicity, these considerations together with a lack of understanding as to the need of a Parental Order and the consequences if one was not obtained, I am satisfied the circumstances are clear the court should permit the application to proceed.

40. As JS, an extremely experienced Parental Order reporter, astutely observes at paragraph 28 of her report, if the application for a Parental Order had been made at the time it is unlikely that it would have caused any concern about the criteria being met.

41. The third matter the court needs to consider in a little bit more detail is the question of consent. The forms I have already referred to are dated 20 August 2010, the originals of which have been seen by JS. They set out the consent being given had been explained to the respondent surrogate mother and her husband, making it clear they fully and freely consent to this court making a Parental Order. The document they signed set out the effect of this court making a Parental Order will remove any parental rights they have in this jurisdiction and records they understood the effect of signing that consent. The court can when looking at these documents consider the wider circumstances, namely the enquiries that have been made in relation to this clinic, how it operated, the information the respondents had in relation to legal advice and that this issue has not caused any concern to the experienced Parental Order reporter who has

provided a report in this case. For those reasons the court is entitled to rely on the written consents, without any further enquiries being made, as establishing that the respondent surrogate mother and her husband have consented to this court making a Parental Order freely and with full understanding in relation to what is involved.

42. The final matter the court has to consider under s.54 is the question of payment, in particular any payments that have been made other than for expenses reasonably incurred. The schedule set out at paragraph 7 of the position statement filed on behalf of Mr B set out a summary of the payments made. The figures that attract the particular attention of the court are the payments made to the respondent surrogate mother by way of compensation. The total figure is about £2,960 at the exchange rate in 2010.

43. There is no evidence and nothing to suggest the payments made under the agreement were not paid to the surrogate mother, although the court does not have direct evidence in relation to that. The surrogate mother and her husband have co-operated with the signings of the consent and the continued contact they have had with the clinic support the conclusion the payment to Mr and Mrs B were made. The level of payment set out are not significantly different than other payments that have been authorised by this court for similar arrangements in India.

44. When considering whether the court should authorise those payments the court needs to look at whether the sum paid was disproportionate to reasonable expenses, whether the applicants acted in good faith without moral taint and whether the applicants were party to any attempt to defraud the authorities.

45. The level of payments made by way of compensation to the surrogate mother are not of such a level to raise the concern of the court. In terms of the applicants' good faith and dealings with the authorities, all the evidence indicates that Mr and Mrs B took enormous care in selecting this clinic, ensuring all the necessary procedures were complied with and, in particular, in relation to the immigration position to enable B to return back here and, albeit belatedly, to issue their application for a Parental Order and comply with the directions made by the court.

46. For those reasons, I am satisfied that the court should authorise the payments that have been made other than expenses reasonably incurred, either to the clinic that was lawfully operating as a commercial surrogacy clinic in India at the time and also in relation to the compensation payments made to the surrogate mother.

47. Turning finally, but importantly, to B's welfare needs. The court has to consider her lifelong welfare needs and whether the making of a Parental Order will secure those lifelong welfare needs.

If the court does not make a Parental Order the applicants would retain parental responsibility pursuant to the Child Arrangements Order, but the respondent surrogate mother and her husband would remain her legal parents as a matter of English law. That situation is far from satisfactory.

48. The court has the enormous benefit of the report prepared by JS dated 8 September 2016, which followed a visit she had made to the family home in early September 2016. It sets out the details of her observations made regarding B's circumstances, her analysis in relation to the criteria for the court to make a Parental Order and at paragraphs 27 through to 36 she sets out her assessment in relation to B's situation and whether her welfare needs will be met by the court making a Parental Order.

49. I accept that welfare analysis. She recommends at the end of the report, at paragraph 37*:*

> *"The applicants have proved themselves to be excellent parents over the six and a half years that they have been caring for B. It must be difficult for them to be described in this court process as her intended parents when she has been the centre of their lives for such a long time.*
>
> *However, they are now intent on correcting their error of judgment they made in not pursuing the application for a Parental Order within six months of B's birth."*

She continues:

> *"It would clearly be in B's interests for the Parental Order to be made to formalise legally her relationship within her family and provide emotional security for her as she grows in understanding about her situation."*

In her final paragraph she recommends that the court should make a Parental Order.

50. I have been able to consider all the papers, particularly statements from Mr and Mrs B and I have had the benefit of being able to hear oral evidence from them. I have no hesitation in concluding that B's lifelong welfare needs require this court to make a Parental Order, that order will extinguish the residual parental rights the respondent surrogate mother and her husband have. Importantly, such an order will confer joint and equal legal parenthood and parental responsibility upon both the applicants and this will ensure that B's security and identity as a lifelong member of the applicants' family is secured in the best way possible.

51. So, for those reasons I will make a Parental Order.