Neutral Citation Number: [2016] EWFC 34

Case No: ZC15P00907

IN THE FAMILY COURT at the ROYAL COURTS OF JUSTICE

IN THE MATTER OF THE HUMAN FERTILIZATION & EMBRYOLOGY ACT 2008
IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF Z (A Child)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2016

Before:

MS JUSTICE RUSSELL

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Between:

A & B	**1st&2nd Applicants**
and	
X	**1stRespondent**
and	
Z (A Child by his guardian)	**2nd Respondent**

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Marisa Allman (instructed by **Direct Access**) for the **1st & 2nd Applicants**
Deirdre Fottrell QC and Richard Jones (instructed by **Ison Harrison**) for the **1st Respondent**
Seamus Kearney (instructed by **Cafcass Legal**) for **the child**
Hearing dates: 11th to 16th April 2016

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Judgment Approved

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MS JUSTICE RUSSELL

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

The Honourable Ms Justice Russell DBE:

Introduction

1. This case, which has been distressing for all the parties involved in it, began as a private surrogacy and then as an application for a child arrangements order in respect of Z, a baby boy born in England in the summer of 2015, as a result of a gestational surrogacy. It is yet another example of the difficulties that arise out of the unregulated market in surrogacy in this jurisdiction. The surrogate (X) is a citizen of the United Kingdom domiciled in England, as are the applicants (A and B). A is the biological father of Z. Conception took place in a clinic in Cyprus (where the applicants had had frozen embryos stored following a previous procedure) when two embryos were placed in X's uterus. The circumstances prior to and surrounding Z's birth are controversial; as are the circumstances which surround the "surrogacy agreement" entered into by the applicants and the respondent.

2. The applicants, who are a same sex couple, were introduced to X through a Facebook surrogacy site, which was run or administered by W and others, to provide a forum for the introduction of potential surrogates and commissioning parents. Although it is the applicants' evidence was they were not members of the forum it was through that social media site that they were introduced to X. There is no screening of either surrogate or commissioning parents and no support available other than support from others involved with the forum. This court has heard, in this case and in others, that the surrogates were paid sums of money for their expenses at what was considered to be the "going rate"; which apparently varied from about £8,000 to £15,000. This unregulated form of surrogacy means that there are on the one side vulnerable surrogates, and on the other commissioning parents who are legally unprotected from unpredictable outcomes.

3. In this case the respondent X, who had acted as a surrogate, was no longer willing to consent to the child being handed over to A and B some months before he was born. By the time that Z was born X had suffered a miscarriage of one of the babies she was carrying and had hidden the fact that one foetus had survived from the applicants. They did not know that she carried Z to full term until just prior to his birth when W (who had previously assisted X in her deception of A and B) had informed them of his impending birth. The applicants immediately launched legal proceedings against X in an attempt to get her to hand the baby over to them. The applicants claimed that she had behaved in a deceitful and calculating manner and that it was not in Z's best interests to remain living with her, her partner and their son. It was said on X's behalf that she lied to the applicants to keep Z living with her as she had felt unable to give him up as the pregnancy had progressed, and that she felt used by the applicants and was made unhappy by their conduct towards her which was unsympathetic, demeaning and demanding.

4. The child, Z, is not her genetic or biological child (being the biological offspring of A and an egg donor) but in law, under the Human Fertilisation and Embryology Act 2008, s 33, X is to be treated as the mother of Z. A is Z's biological father. The case is further complicated by two additional factors; X has learning difficulties and is a vulnerable young woman in her very early twenties of limited income; and Z has been treated for an as yet undiagnosed illness affecting his brain and is, consequently, physically more vulnerable than most babies of his age.

5. During the trial I heard evidence from Dr Willemsen, a psychologist who assessed X's cognitive abilities and recommended that she was assisted in giving her evidence; X was assisted and supported by an intermediary throughout the trial. Z was separately represented and I heard the evidence of his guardian, Janet Sivills. I heard from W who had been an "administrator" or facilitator of the Facebook forum and involved with the applicants, indirectly with their introduction to X (and to their previous surrogate V); I heard oral evidence from both of the applicants and from the respondent. I also heard from the respondent's partner with whom she has been living for several years.

6. The child has been separately represented in these proceedings by Cafcass Legal. It was submitted on his behalf at the end of the hearing, having heard all the oral evidence, that it would be in his best interests to remain with X and be brought up in her home.

7. I shall set out the legal framework which applies in this case below but the lack of consent of X to a parental order has through s 54 (6) of the Human Fertilisation and Embryology Act (HFEA) 2008, which requires that the surrogate's consent is given freely and with a full understanding of the process and its implication and that it is unconditional, means that there is no question of any action under the HFEA for a parental order which had been the applicant's original intention when they entered into a surrogacy agreement with X. Given the difficulties that X has in comprehension and the limitations on her cognitive abilities it is questionable whether she had a full understanding of the process at any stage. The HFEA remains relevant when it comes to consideration of who the legal parents of Z are under the law. However, as in previous cases where the surrogate has changed her mind and refused to hand over the child the court will decide with whom the child shall live by applying the welfare checklist as set out in s 1(1), (3) and (4) of the Children Act (CA) 1989.

Background to the proceedings

8. This child was conceived by in-vitro fertilisation (IVF) at a clinic in Cyprus where they had frozen embryos stored. The applicants had previously used the clinic for the IVF conception of two children carried by V (another gestational surrogate who they had been introduced to through L who is another "administrator" on the Facebook forum) created from the gametes of the known egg donor and both men. The applicants intended to try to have further children who would be biologically the siblings of the twins. The twins, who are not the subjects of these proceedings, live with the applicants and are the subjects of parental orders made in the Family Court in 2014. The applicants' relationship with V has completely broken down and they are no longer in contact with her.

9. The identity of the genetic mother may be known to the applicants but her medical/family history is not. While this is not uncommon in this kind of ad hoc and informal surrogacy, lack of information about the egg donor and her medical history can cause difficulties in cases, such as this, where the child who is born as a result of the IVF suffers ill-health or from a medical condition by limiting the totality of the child's medical history available to the doctors who are treating him or her.

10. In October 2014, at the clinic in Cyprus, a frozen embryo transfer took place of two embryos, one of which contained the gametes of A and the other of B. It is accepted

by A and B that the frozen embryos were not of the highest "grade" and that their viability was, therefore, questionable. X was accompanied to Cyprus by one of the applicants A. She had never travelled abroad before and knew very little about A; it is accepted that most of her dealings with the applicants and which took place online on her mobile phone, had been with B, and that she had found him the more understanding and supportive of the two men.

11. Although X had agreed to act as a gestational or "host" surrogate for the applicants, the circumstances in which agreement was reached and signed by X is a matter of some concern and one that I shall return to. The agreement was one found on-line and based on overseas commercial surrogacy agreements from the USA. The provisions and regulation of commercial surrogacy in the USA do not, in any real sense or detail, mirror the supposedly altruistic and non-commercial surrogacy in the United Kingdom. It was signed by X at a fast-food outlet at or near a railway station after a brief face to face meeting lasting less than two hours. X was accompanied by her young son and a young relative, no more than eighteen years old. X's partner did not support the surrogacy although he did not object to it; as he later told me, he did not believe that it was for him to tell X what to do with her body.

12. When X was in Cyprus she was alone and had limited contact with her family and with her partner. She knew that he was very concerned about her. Her perception of the time in Cyprus differs greatly from that of A, in particular, and is a matter of some dispute. Once back in the UK and when blood tests confirmed the pregnancy, to the satisfaction of the applicants, they started to pay X expenses at a rate of £500 a month. There was a considerable amount of email traffic about the amounts of money to be paid to X, the total amount was agreed to be £9,000 and when payments would start and how much would be paid for various eventualities or contingencies by way of compensation. For example the applicants had agreed a sum of £1,000 in the event of a hysterectomy as they said they "*absolutely*" could not afford a larger sum. This event, had it occurred, would have meant that X could never have any more children. It is accepted that any pregnancy carries with it a level of physical risk to the woman who is pregnant and that the risk increases with the number of foetuses carried.

13. Of the applicants (B) had had the most contact with X, and it was accepted by him in his oral evidence that the payment of expenses commenced only when they had confirmation of the pregnancy in a form they found acceptable and reliable; that is not on the basis of pregnancy tests carried out by X alone. In November it was confirmed that X was carrying twins; by then X was coming to the realisation that she did not want to continue with her agreement and the arrangement with A and B. She considered a termination and contacted W for support. W, who told me in evidence that she could not countenance any termination, encouraged X to continue with the pregnancy. W told me that initially she believed X in her complaints about the applicants' behaviour towards her, and she had in her mind the fact that they had previously fallen out with V, the woman who had acted as their surrogate in the past. W later changed her mind, again, and, she told me, decided that V was in the wrong, that X had become pregnant to have another child of her own so that as far as she was concerned X was no longer to be supported; at its best her behaviour appears capricious.

14. In December X miscarried one of the foetuses and it was at this point, encouraged by W, that she told the applicants she had miscarried both. X decided to continue with

the surviving foetus and to carry the baby to term and she was supported by her partner in this decision. The communications between X and the applicants continued to a lesser extent until February 2015 when they stopped altogether.

15. In late May of 2015 W told the applicants that X was still pregnant and that the baby was to be born by caesarean section which was expected to take place in early July 2015. The applicants instructed solicitors who wrote to X in June 2015; the tenor of the correspondence was to demand that the child be handed over to the applicants; X replied saying that she wanted to keep the child. The correspondence continued as the applicants tried to agree a "holding position pending the birth". When no agreement was reached they made an application, without notice, before Mr Justice Bodey at the end of June 2015 for a declaration of parentage (with directions for DNA testing); a child arrangements order for the child to live with the applicants and spend time with X; for parental responsibility; for prohibited steps orders relating to publication and social media, preventing registration of the child's birth and for a specific issue order in respect of the child's name. The applicants said that the X was "*made aware of the application and when the applicants would be attending court*"; even if she was aware of the application X was in no position to do so as Z was born on the day of the hearing. Unsurprisingly, the applications were adjourned to an on notice hearing in July 2015. The order was emailed to X.

16. The Applicants were told about the birth by someone unknown and unidentified. Meanwhile X was put under pressure by her family to give the baby up. She was unrepresented and had just given birth by C-section but nonetheless during the next few days the applicants' solicitor, on their instructions, had "discussions" with X and concluded that it "appeared" that X was in agreement with the order made by Mr Justice Bodey on the return date in July 2015 which set out that Z was to live with the applicants; X had not attended the hearing.

17. Any agreement that X had signed would never have been legally binding in the UK and in the view of this court the way in which the applicants had dealt with it and with X was less than acceptable, even without knowing about her learning disabilities. By the time of the next hearing, which took place less than two weeks later in July 2015 before Mr Justice Bodey, it was clear that X had withdrawn her consent and there was no agreement extant; X came to court with her partner and asked for the previous order of the court to be discharged. Z was joined as a party and a guardian appointed. His birth had been registered by X who called him by a name which was not the one which had been chosen by the applicants. Z spent some time with the applicants at court that day. X was not represented and the applicants' counsel made enquiries of appropriately experienced solicitors on her behalf, with X's consent.

18. The matter came before Mr Justice Mostyn at the end of July 2015 for an interim hearing, including, specifically, the issue of where Z should live pending a final hearing. By this time Mrs Janet Sivills from the Cafcass High Court team had been allocated the case and she recommended that Z remained with X, with regular contact with the applicants, until the final hearing. X remained unrepresented at the hearing with an application to the LAA for exceptional public funding outstanding. Z remained with X until the hearing which had been listed before me in late September 2015 and the parties were able to reach agreement for interim arrangements for contact. By agreement Z stayed with the applicants overnight in late July and

overnight contact has continued regularly since then, the longest visit was over 6 days during October half term in 2015.

19. On 2nd September 2015 a home visit by Z's health visitor coincided with a visit by the guardian. The health visitor recorded that Z's head circumference had increased by 2 centiles and advised X to raise it with their GP.

20. On the first day of what had been listed as a final hearing in September 2015 it became clear to the court from the guardian's report and her observation that X may have learning difficulties, that X may require specialist support in comprehending the issues being tried and in giving evidence. All parties accepted that this must be investigated without demurral, and that X must be able to have a fair hearing. The court suggested that an intermediary service specialising in children and adults up to the age of 25 may be able to assess and assist X. To allow for this to take place the hearing was adjourned to early December 2015. Directions were given pursuant to Part 25 FPR 2010 for a Clinical Psychologist to be instructed to carry out a cognitive assessment of the 1st Respondent, X, and for Triangle to carry out a communications assessment.

21. In the intervening period it had become apparent that Z had something wrong with him as his head circumference had increased to the 99.6th centile when it was recorded again in late September and X was advised to make a GP appointment that day. The appointment resulted in a referral to a paediatrician, and a head scan took place in November 2015 which confirmed the suspected presence of fluid at the top of his head. A further paediatric appointment took place in late November and Z was admitted overnight for observation. A attended the hospital along with X and remained overnight in hospital with him.

22. Z was discharged the following day with a working diagnosis of "*benign enlargement of the subarachnoid spaces*". He had no signs of raised intracranial pressure. Following his discharge from hospital the Specialist Registrar in Paediatrics arranged for him to be reviewed as an outpatient at a Children's Hospital by a consultant. At the initial appointment in late December 2015 the consultant told both X and A that a firmer diagnosis may not be possible before Z reaches his first birthday. They were told that Z would need to be reviewed monthly "*until we decide whether there is an element of hydrocephalus ex-vacuo here*." Thus no conclusions have been reached about this or any other firm diagnosis, although some differential diagnoses were ruled out following blood tests.

23. Z remains under the care of the Consultant Neurosurgeon and was last reviewed in March 2016, his head circumference continues to increase. Z is to undergo an MRI scan under general anaesthetic and will be reviewed again in late April 2016 when consideration will be given to whether he requires medical intervention; he may require a shunt. The implications for Z of his increasing head circumference remain uncertain, as does the nature and extent of any surgical intervention and treatment which may be required.

24. There has been some concern expressed that Z may be showing signs of developmental delay. The consultant responded to written questions from the parties, before this trial, in early April 2016, and said that Z may be diagnosed with benign subdural hygromas, which are self-limiting and do not need any treatment, or that he

may be developing external hydrocephalus which will require treatment in the form of a ventriculo peritoneal shunt.

25. In early November 2015 Dr Willemsen, Clinical Psychologist, completed his report and cognitive assessment of X; he confirmed that she has learning difficulties of "a likely congenital nature" and suffers from low self-esteem and that the combination of her environment and her learning difficulties render her a vulnerable young woman. He considered that X would benefit from the assistance of an advocate intermediary when she attends court as he said that she had difficulties communicating and that, overall, her written and verbal comprehension and communication abilities were low. Dr Willemsen said X had "*severe learning difficulties which manifest itself in her language related skills"* and that those difficulties limited *"her ability to express herself verbally, understand or comprehend complex verbal or written information, and impairs her ability to read or write*."

26. In November 2015 X applied for case management directions because the LAA had refused three applications to fund a communications assessment to establish what assistance X needed from an intermediary and what directions would be required to be made by the court regarding her evidence and the conduct of the trial. By mid-November 2015 Triangle confirmed that they did not have an intermediary available for the hearing in December 2015. As a result, because of the absence of an intermediary report or an intermediary, the final hearing listed in December 2015 for 5 days could not go ahead and had to be adjourned to 11th April 2016.

27. To ensure that the adjourned hearing was effective the applicants agreed to pay for an intermediary assessment which was carried out by a registered intermediary, Gaynor Miles, who confirmed X needed an intermediary at the hearing and who prepared a detailed report in late December 2015. The court is most grateful to the applicants for their assistance. The report made a number of recommendations for the conduct of the hearing in a manner which enabled X to fully and effectively participate in it. Ms Miles provided to the parties some draft ground rules and responded to the questions posed of her by the advocates at a hearing in March 2016, which were agreed as appropriate ground rules for the hearing, and approved by the court. Questions which were to be asked of X were circulated by the advocates so that Ms Miles could assist X to give oral evidence. The witness template was agreed and prepared by the advocates reflecting her advice.

28. The hearing took place over five days in April 2016 and a draft judgement sent to the parties in May.

Background: the parties

29. In order to understand the background to the case and the disputes between the parties it is necessary to consider the background of the parties themselves; their behaviour and conduct towards each other prior to Z's birth is an issue with which this court must grapple, not only because there are facts and areas in dispute, but also because my conclusions will inform the decisions the court will have to make about child arrangements for Z. Ostensibly the reasons that the parties have reached this point may seem to be of limited relevance as the court's decision regarding the arrangements for this child will be based primarily on his best interests as provided for by statute which places the child's welfare before all other considerations.

However, their conduct towards each other is relevant as it informs the court as to their likely conduct in the future in respect of each other's role in Z's life and towards Z himself as he grows up.

30. The applicants. The applicants are a same sex couple who are in a civil partnership; they are both professionals, A an academic and B works for a charity as an advisor. Socially and economically they are in a much more secure position than X and much more affluent, although by no means wealthy. They are the parents of twin boys born in June 2013 by virtue of parental orders made in January 2014 by the Family Court. Within 48 hours of those orders being granted B started to make contact online to find another surrogate.

31. The twins are the biological children of A and a known egg donor. They were conceived as a result of IVF treatment in the same clinic in Cyprus later used for the conception of Z. The twins were carried by V, a gestational surrogate. This first surrogacy agreement and the circumstances surrounding it are relevant as the applicants' conduct was repeated in their agreement with X. Of particular note was their attitude towards the surrogate V which was mirrored later in their attitude towards X. The applicants 'met' V online or on Facebook in late September 2011, they knew very little about V relying instead on the views of L who was also involved in the surrogacy forum; what they did know was that V was in the process of what they called "matching" with another couple of commissioning parents but that that agreement was breaking down. There is no evidence before me that the reason for the breakdown was explored or that the applicants were concerned about it.

32. Once introduced the applicants and V had become further acquainted online and arranged to meet in person. As was clear from the oral evidence of the applicants to this court the purpose and focus of that, their first meeting, was to sign the surrogacy agreement. A told the court in his oral evidence that the three had met in a services area in a "*restaurant off the motorway in the West Midlands*" and, that at the meeting which lasted 3-4 hours, they had discussed "*the agreement and who we were".* They had signed an agreement at that meeting and that had constituted "matching".

33. It was abundantly clear from their evidence that A and B knew very little at all about V, her circumstances or her motivation for acting as their surrogate when they signed the agreement with her. L, who gave evidence before me, knew that V was in some financial difficulty because her phone had been cut off prior to the meeting or "match". Money and payments were an issue between the applicants and V during the pregnancy and after it; as could be seen from electronic messages exchanged between them. L said, in her written statement, that V had "*money trouble*" throughout the pregnancy. It was known that V had separated from her partner at the time of the "match" so it would be fair to assume that she was, at the very least, more emotionally vulnerable than she otherwise might have been but neither of the applicants appear to have given this any thought and were firmly focussed on what she would be doing for them.

34. In his oral evidence B, who told me that he had found V's behaviour to be too demanding just after the twins' birth, dismissed her need for his support at the time unsympathetically describing it as being "*because of her hormones".* B was unable to demonstrate any understanding or empathy for a woman who had just given birth to twins, was in hospital alone and unsupported there or at home until he was pressed to

do so. L was similarly dismissive and also gave a harsh unsympathetic description of V; who was described in a similar vein by all three witnesses; L, A and B.

35. V was characterised by all three of them as “volatile” without any thought being given as to why she might be in an emotional, still less in a vulnerable, state. When considering their evidence about V in its totality I found the applicants to be dismissive of the considerable positive contribution to their lives she had made, at considerable physical risk to herself. She was unwell for the last three months of the pregnancy and required someone to live in at the end of the pregnancy to look after her own children. In their descriptions of V as a person they were largely negative and appeared almost wholly uninterested in her, rather, it seems, they saw her primarily as a service provider to whom they had paid £12,500.

36. The applicants complained about V demanding too much attention from them after the twins were born and handed over to them. B said that she kept texting him when she and the twins were still in hospital after the birth, and that she kept wanting him to spend time with her. Both he and A saw this as unreasonable as they wanted to be with the twins who had to remain in hospital for some time for treatment. The applicants remained on speaking terms until after the parental orders were granted and it was part of the evidence before the court when the parental orders were made that they had an agreement with V that she would remain involved for the twins’ sake. By the time of this hearing they had “*fallen out with her entirely*”. The terminating event was, they claim, because she had failed properly to acknowledge the children’s first birthday. I find this evidence inherently contradictory as they also claimed they had found it necessary to limit V’s involvement as they found her to be both intrusive and demanding.

37. The final and complete break with V does not fit well with their evidence that they had had an agreement, on which they both placed emphasis in their written and oral evidence, which stipulated that she was to continue to see the twins. As a result I found their evidence lacked any credibility and consider that the break, which came after parental orders were granted, was nothing more than a matter of expediency on their part. It is possible that the applicants had in their own minds some idea of when and how a surrogate should keep in touch, which would be in a manner which suited them, such as having birthday cards to show to the twins over time. If I am right and that was the case they completely failed to set out their expectation of the respective roles of V, as the surrogate and of themselves as commissioning parents and it is not surprising that, as a result, they had fallen out and have now completely ceased to have contact with V. I found that A, in particular, in his oral evidence sought to rely on the “agreement,” which they had pulled off the internet, to justify and explain his expectations, while at the same time displaying no understanding of, or insight into, how V might have felt or consideration of her expectations or, indeed, that he was dealing with another human being whose own expectations and feelings needed to be taken into account and warranted some sensitivity in his approach.

38. What is apparent from the evidence is that there was a regrettable lack of communication between these three adults as to their expectations of each other and as to the details of an agreement which has such fundamental and far-reaching consequences in human terms. It is clear to this court that the applicants and V had had very different ideas about how the agreement would work and, specifically, the extent of their obligations to each other; both A and B accepted in their oral evidence

that they did not appreciate, understand or give any real thought to the extent to which V may have wished to remain involved after the birth. They accept that they did not properly discuss it with her, rather they expected her to work out what it was they wanted and ultimately they continued to blame her for the difficulties and accepted little if any responsibility for the total breakdown in the relationship. This behaviour on their part, along with the similarities in their dealings with X led me to conclude that I would be gravely concerned about their ability to maintain a positive relationship with X in the future. Their negative view of V mirrors their negative and critical view of X as set out in their written evidence.

39. What caused me further concern about the applicants' bona fides was that they had not given the Parental Order Reporter (POR) an accurate account of their relationship with V. I have read his report prepared in November 2013. Although in late October 2013 A had spoken to the POR who had noted that *"he is anxious regarding what information is needed from the surrogate",* A did not apparently elaborate on those concerns. The way they described their relationship with V to the POR is contained in his report where he refers to them thinking highly of the surrogate; of forming a *"close bond";* and, of the intention on both sides to maintain a relationship.

40. This was far from the truth, it is clear, for example, that V had threatened the applicants that she may not consent to the parental orders as could be seen from a message from B to W just the day after the parental order had been made in January 2014, which read, "*It's a shame we felt we had to leave the FB group (and lose contact with everyone) but there's a long story behind that! [L] knows a lot about what went on with [V] especially once the twins were literally born. It has made us much more wary about whom we match with again as we all took the threats made extremely seriously. Thankfully, despite our well-grounded fears since the twins' birth we were finally granted the PO yesterday so are hugely relieved that this journey is finally over with a thankfully happy ending…"*

41. L had said in her statement that V had **"***threatened that she wanted the money or she might not agree to the PO",* which she confirmed in her oral evidence. A and B also confirmed in their evidence that they were aware that V had made the threat and said so to W, in a message in November 2014; *"can you believe she threatened us and said she would mess up the PO if we didn't do what she wanted".* I can only conclude that the failure to tell the POR about their difficulties with V was deliberate omission and therefore an act of deception on their part. At the time the POR was carrying out his investigations it would seem, on the evidence before me, that the applicants had sustained their relationship with V to ensure they would get her consent to the parental order; and to present a rosy picture of their relationship to the POR who would have, as a result, been reassured that the twins would have a positive picture of their origins and personal identities.

42. In contrast to the ending of their relationship with V the applicants maintained what the guardian felt to be a unusually close relationship with the midwife who delivered the twins and a previous health visitor. The contrast in their decision to do this while terminating any relationship with the woman who carried their child is, as submitted on behalf of X, striking; a submission I accept. Any commitment that they claim to have to the agreement which included a continuing role for V is vitiated by their calculated decision to cut any ties with her on the basis that she did not send the twins birthday cards. They apparently find no role for V and it adds to the likelihood that

they would be unsupportive of a continuing role and contact with X in the future should she fail to live up to their expectations; whatever they may be.

43. Both A and B told me that they considered that they had "*learned*" from their experience with V but the applicants did not accept that they may have been at fault or should have foreseen some of the difficulties that they had with V, or, indeed with anyone who was little more than a stranger to them and with whom they had entered into a complex and emotionally charged arrangement about human relationships.

44. What they had learnt in practice was a determination not to use V herself as a surrogate again and they approached the second surrogacy in essentially the same way they had the first. There was no evidence before me that they had reflected on why the first surrogacy had not gone as planned and their role in that failure; there was no indication in either the written or oral evidence of either A or B that they really accepted that the difficulties with V could have been prevented by their own actions and reactions. At no time, for example, did they seek any professional advice from, for example, mediators or counsellors. Their failure to communicate with V to attempt to consider her point of view was missing from their agenda and it is clear that they set off on the next attempt at a surrogacy agreement without having reflected on anything other than their own desire to have more children.

45. The 1st respondent. X is a young woman who was in her early twenties when she entered into a surrogacy agreement with A and B. She has a six year old boy with her partner P and they live together with Z in modest rented accommodation. P is a manual worker and has often been away from home for long days to earn money for the family. X does not work and cares for the children at home. They have limited financial resources but the guardian has described the atmosphere in their home as loving and joyful. Their little boy (who is at primary school) is on the autistic spectrum and X and P have been given considerable practical and emotional support by P's sister particularly in recent times. She has supported X in bringing Z to have contact with A and B and as a mother of children with learning difficulties herself she had been a source of advice and support with X and P's son. I heard her give oral evidence and was impressed by her forthright competent demeanour and the open manner in which she responded to the questions asked of her.

46. X has been assessed by Dr Willemsen as having learning difficulties, which appeared to him to be congenital. Until she was seen by him and his report prepared, it would seem that neither her family nor her partner were aware of her difficulties although she had been perceived as different from her siblings and her peers at school, and her partner told me that while he was aware she was vulnerable he did not know just how vulnerable. X is aware of what she sees as her own short-comings and, as described by Dr Willemsen, will want to please people to hide her shame and embarrassment. X has difficulty in speaking up as observed by the guardian and confirmed by Dr Willemsen. Dr Willemsen told the court in his report that on growing up she has become more aware of her difficulties and this has been accompanied by self-doubt and insecurity; to deal with this she has sought isolation and did so from her partner during the pregnancy. Dr Willemsen, who gave oral evidence, reported that X *"is a vulnerable young woman who is susceptible to influence and pressure from others. She gave a few examples where she felt she had not been able to speak out loud about her thoughts and feelings to the couple who asked her to be a surrogate."*

47. Dr Willemsen emphasised that despite her difficulties she had been able to concentrate during their meetings (with half hour breaks) and that what was not affected was her *"ability to be emotionally available. She was able to relay her frustrations, as well has her love for [her son with P] and [Z]. She was able to speak as openly as she could about her life and the course of events she had found herself in."*

48. P is a plain speaking man with a firm view that it is his place to work hard and to provide for his family. He is not, however, remote, unaffectionate or emotionally unavailable and takes an equally firm view that X is her own person and that he should not tell her what to do. I saw and heard him give evidence and I have no doubt that he loves and is committed to his partner and his family and that that family includes Z, about whom he spoke in the most warm and loving terms.

49. In contrast to the applicants there has been a very thorough investigation of X's family and social history which is set out in the report of Dr Willemsen and in the analyses of the guardian and which I will not set out in detail here as it is not necessary to do so. The guardian observed in her final report, prepared for this hearing, that she has a *"limited knowledge of the applicants' values, social history and current aspirations"* essentially because they had not told her about themselves. The applicants' reluctance or inability to be forthcoming concerned her to the extent that she had taken a senior colleague to observe her when she visited the applicants at home to see if their lack of communication with her had been as a result of her working style and practice.

The surrogacy agreement

50. The second surrogacy agreement with X was entered into by the applicants with little planning or no preparation as they had contacted W the day after the parental orders were made in respect of the twins. From the initial Facebook conversation with W it's clear that the applicants were worried that V would find out and speak to any surrogate they were introduced to; for what must be obvious reasons they were concerned that she may put another surrogate off. As is obvious from the facts I have set out above, the applicants decided not to tell X about V and had been less than truthful with the POR about the state of their relationship with V during the proceedings for parental orders for the twins. There is no evidence that they told X that they had had difficulties or problems with V, although W was aware of it, she also kept it from X. They did not want V to find out about their second "journey" into surrogacy with X because they were concerned that she would put this new surrogate off. In fact their worries were borne out by later events, which were largely of their own making.

51. They were very quickly introduced to X; and within two days of them first contacting W, X had sent them a message emphasizing the importance of being "*honist and be able to talk if theres eneything on each other mind, if theres eney problems discuss it together to be nice friendly ☺ take care of me when Im out of the uk*". The latter being a reference to her travelling to Cyprus. X was lied to by omission in respect of the previous surrogacy and, by doing so, the applicants had deliberately misled her about their previous surrogacy agreement; it is more than ironic that the applicants have later chosen to make a great deal of the deceptive of X. There has been little or no recognition by them of the effects on her and her relationship with them that they

created by failing to provide X with all the information that they should have done at the outset, not least to ensure that the same sort of difficulties encountered in the first surrogacy did not occur again; something the applicants would have done if they had, as they claimed, "learned" from their experiences. They set out to deceive X and that is indicative of their lack of consideration, concern and respect for X who was willing to act as their surrogate. By withholding information from the outset, the applicants were both manipulative and dishonest which set the scene for what happened next.

52. From the first few days the messages on Facebook, as described by Dr Willemsen, provide an illustration of the faux-intimacy that developed between the applicants and X. As he said "*fairly soon an amicable, almost euphoric, atmosphere develops between people who hardly know each other. There is a shared excitement based, probably, on two very different realities. It is easy to read a great deal into Facebook (and email) messages.*" It was his view, and one I share, that X was unable to put forward her opinions, just to say that she was "*totally fine*" when the applicants message that they are now "matched" and "*totally fine*" with an agreement that she had signed, although it is clear that she could not read or understand the contract she had signed. So little were they concerned about any protection for X's position, moreover, that the applicants never even bothered to send her a signed copy. The applicants' sole focus was on signing an agreement. There was little, if any, evidence in their messages of interest in X herself, just as there had been little interest in V.

53. The level of compensation or expenses which the applicants were willing to offer was, at £9,000, at the low end of the scale that is prevalent on the online websites and forums. From evidence I heard, and from the emails and electronic messages provided to the court, it would seem that this was the figure suggested to the applicants by W before it was suggested to X. In his oral evidence B (who was responsible for most of the communication) said that he assumed X was on benefits but admitted he was not sure, did not appear interested either way and certainly took no steps to find out. This presumption would seem to indicate that he expected financially vulnerable or impoverished women to be more likely to be putting themselves forward for surrogacy.

54. In her messages X often referred to having problems using the phone and/or the internet because she had no credit, which should have revealed something of her straitened financial circumstances and economic vulnerability but this was not a matter ever taken up by the applicants. Nor is there any evidence that they considered, at any stage, whether a need for money might affect her ability to enter freely into any agreement. As commissioning parents entering into an agreement which can and does compromise the health of the surrogate they owed her a basic duty of care and did not carry out that duty or signal that they considered they had a responsibility for her well-being other than as a healthy surrogate for their off-spring.

55. The applicants did not consider with X, or discuss with her, what she knew or understood about her rights or legal status in respect of any child or their legal rights and status. In his oral evidence B said he assumed she would know about such things from the Facebook forum. There is no evidence before this court that they had touched on the legal and ethical considerations that arise in surrogacy at all. They had not informed themselves of what professional support may be available to assist in successful surrogacy arrangements such as implications counselling; indeed when giving his oral evidence A did not know what it was. The sums offered, by way of

compensation, for "contingencies," such as £1,000 for a hysterectomy, were wholly inadequate and can only be taken as evidence of the low value that they placed on the physical and emotional well-being of the woman who acted as their surrogate. The language used by the applicants was unequivocally the language of the market-place; "*the absolute maximum we could offer for each potentially happening would be £1000"*. Their approach to X was, at the very least, potentially exploitative and they did little or nothing to ameliorate it.

56. From reading the communications it is clear to me, as it was to Dr Willemsen, that X had a limited understanding of important issues. Poignantly when discussing the additional payment for a hysterectomy (two or three days after they were introduced) X asked B whether the applicants were asking if she wanted one following the birth. X did not understand the effect of a parental order and asked a number of questions about birth certificates which made clear that she did not understand the process. The focus of the applicants, however, was on reaching an agreement that met their needs and there was a replication of their approach to V.

57. L messaged X in mid-February saying that she was the administrator of the group and offering reassurances about the bona fides of the applicants; "*what you see is what you get …they are so upfront and honest"*. As the import of this statement was so at odds with the applicants' conduct it was misleading, particularly so as like W, L was well aware that the first surrogacy had been difficult and had not ended well, something about which the applicants had been neither "up-front" or honest. L's evidence, far from helping A and B served only to confirm that she, like W, had effectively colluded in the potential exploitation of a young and very vulnerable woman.

58. Neither applicant, in his evidence, was able to give more than a perfunctory account of their meeting with X in March 2014 or to recall anything of what she was like as a person. The meeting in the fast-fast-food outlet, near to the railway station they had all travelled to, was very brief. There were three children present, the twins and X's little boy and a young man not much more than a child himself, who was X's 18 year old nephew, and who acted as a witness. From their own evidence it was clear that the applicants discussed only those aspects of the agreement about which they were concerned. X did not, could not, read or properly understand the agreement and such was their self-absorption that neither applicant noticed, and in any case they did not see fit to go through the agreement with her to reassure X, or even themselves, that she understood it. Despite promising to send her a signed copy they only emailed the "agreement" to her several months later leaving her to try to read it on her phone – she does not have a computer. It is inexplicable how the applicants could have ever considered this meeting as an acceptable way to "get to know" the woman who would carry their children and consider that they had, even in the loosest sense, "matched".

59. The discussions that had taken place, online, prior to the meeting in March 2014, did not amount to a thorough discussion of the contents of the agreement. There were some references to X wanting to be involved in the life of the baby to which B responded, "*…as you say, remain in contact <u>if we all get on</u>."* [My emphasis.] Dr Willemsen said that he was troubled by the lack of discussion about the interests of the infant and the manner in which conception would take place, instead the interaction was based on "*overclose comments and medical and physical detail. The conception became a mechanical exchange between three individuals."* He went on,

in his report, that in his view *"…it was a bond between [the applicants] and [X] that was bound to break because of the unrealistic friendship in which [X] found herself and the increased awareness that her body was used without a little acknowledgement for the gift she intended to make available to the two men."*

60. Dr Willemsen concluded his report with the observation that it was particularly *"…the compliant attitude, the ease with which she agreed to complex medical and ethical issues in respect of herself, her body and the infant she was to carry, that stands out as a reflection of her limitations in the Facebook exchanges. The ethical, legal and medical issues are complex and I do not think that she was able to understand these complexities which became hidden behind a euphoric and body-mechanical approach to the new life that was to be created."*

61. Later X told Dr Willemsen that by the time she went to Cyprus she had doubts. He considered that she had created a fantasy in which she could carry a baby, where she isolated herself in an attempt to have a life in which no-one else could interfere and which resonated with her decision to be a surrogate, which she had largely taken by herself. The fantasy that could live on for a while due to the shared "journey" (a euphemistic expression repeatedly used by the applicants, and W and L, to describe the surrogacy and pregnancy) creating some sort of alternative family, away from her daily life and child and away from the troublesome environment she had experienced herself as a child.

Conception and pregnancy

62. There were no further face to face meetings between signing the agreement near the station and flying to Cyprus with A, a man she had met once in a fast-food outlet in a strange town. As Dr Willemsen said, fantasy met reality in Cyprus when the medical procedure took place. It does not take much imagination to consider how this vulnerable young woman must have felt in a room in a clinic attended only by strangers while the "treatment" took place and the embryo was place inside her. It suggest, as A did, that by holding her hand during this procedure he had provided support or reassurance is an example of his total lack of empathy or ability to consider anyone's feelings other than his own. Between the meeting in March 2014 and the trip to Cyprus for transfer of the embryos there were no further face-to-face meetings between the parents.

63. In planning the trip to Cyprus the applicants were concerned with their own convenience, such as A going instead of B, who had had the bulk of the contact with X. B accepted in his oral evidence that they did not discuss between themselves or consider at all how X might experience the trip or how to make it comfortable for her. In his evidence A came across as seeming to believe that X should have been grateful for the trip, which, after all, they were financing. Their behaviour towards her was crass; they did not know that she had never been abroad before because they didn't ask. They took no steps to ensure that she was comfortable or to find out from her what they could do to make her feel supported, and, above all appreciated.

64. The trip was a very unpleasant one for X. In his evidence A spoke only of the symbolism for him of being present during transfer of the embryos and was either unwilling or unable to recognize how lonely or frightening the trip was for X. He came across as emotionally unavailable and entirely self-regarding.

65. X was effectively excluded from discussions at the clinic; certainly she did not, on anyone's account, actively participate in any conversation with the consultant in the clinic. It is understandable that X felt intimidated by A and his suggestion that he had helped her by holding her hand while the embryos were put inside her body is an example of the crass behaviour to which I have already referred. X, naturally, felt nervous throughout the trip and was not at ease with A. The food was strange and unpalatable to her and she felt even more isolated because she did not have credit on her phone. Why A did not see to it that she was able to contact her family and top up her phone is incomprehensible. To repeat what Dr Willemsen said, as fantasy met medical reality she felt used and deeply uncomfortable about the arrangement but she could not find a way of expressing her feelings because she was concerned that she might upset and displease the couple. She found herself caught in a conflict; in the words of Dr Willemsen *"between maintaining the fantasy and facing up to reality. She must have felt very alone at times."*

66. The procedure in Cyprus had a huge impact on X. She had never wanted to carry two embryos and later told W that she did not say anything to the applicants as she did not want to let them down. She was both scared and anxious about it but believed the applicants when they told her that *"probably only one would work."* X's relationship with the applicants deteriorated as the reality of the uncomfortable and intrusive IVF procedure and the pregnancy took hold and she began, increasingly, to see herself as being used. Her reaction at the time has been graphically described by Dr Willemsen; as her emotional state and responses are essentially subjective I accept his evidence, and, furthermore I consider that the way that X responded to her treatment by A and B was entirely predictable. The fact that her own difficulties made her more vulnerable to suggestion and pressure being put on her does not in any way detract from her reaction, but it made it more difficult for her to stand up to the applicants and tell them that she no longer wanted to proceed. She told Dr Willemsen that she had had doubts before the trip but her experience while she was there intensified her feelings of doubt and uncertainty and she felt used.

67. It was from then that she had started to look for a way out of the agreement. It is clear from the messages that she sent in late October 2014 that she felt worried about having twins "*how scairy twins lol xx*" and … "*my partners like its gunna damage your body blah blah…"* to which L, who she was in touch with online, replied "*no it wont [sic]";* a response, which while might have been meant as reassuring, was patently untrue. The applicants had not arranged life insurance as agreed despite the agreement stipulating it would be arranged *before* pregnancy and X became so worried, that this issue was revisited 4 days later, when, in early November 2014, W emailed the applicants about arranging a scan for X and X messaged A "*I would like to get insurance starting today please, as it should have been done befor we [sic]got pregnant xx"*.

68. Then in mid-November V was told by L that X was the next surrogate for the applicants. When A became aware of this two days later he sent a message to W about V saying "*she can turn really nasty"* A sent a message to X telling her "*to try not to get stressed and ignore nasty msgs we had such good news today with the heartbeats lets focus on the future"*. He clearly had not thought about the effect that V might have on X when she would come to realise that they had deliberately withheld information from her about the poor relationship that had developed between V and

the applicants during their "journey". His messages are further evidence that the applicants had sought to ensure that V did not find out about the second pregnancy to stop her from putting any surrogate off entering into a surrogacy agreement with them, not, as they said in their evidence, to avoid confrontation with V.

69. Over the next week in November X received several messages from V in which she complained that the applicants had not paid her fairly; that she had been ill during and after pregnancy with the twins; and that they had treated her badly. Unsurprisingly this increased the fears X already had about her agreement with the applicants. The standard response from the applicants and from L was to minimize the concerns by repeatedly blaming V and saying, amongst other similar epithets, that she was "*bonkers"*. A then sent X a message saying '*its sad but I'm reconciled now to having no relationship'* with V which, far from reassuring her must have sent the unspoken message to X that she, too, could be cut out of any child's life in the future.

70. In their oral evidence both applicants showed limited if any real understanding of the various factors which had undermined X's confidence in the agreement and led her to consider a termination. Instead I was left with the clear impression that they seemed to expect her to be grateful for acting as their surrogate rather than the other way around. From the messages filed in the court bundle it is clear that there were emotionally intense exchanges from V, W and others on the forum to X. Later in November 2014 B travelled to be there during a scan and saw X for the first time since March 2014 (when they met at the fast food outlet to sign the agreement). They do not appear to have discussed V or what had happened between them. X's anxiety had increased and in late November she asked V to speak to or text her sister. It was around this time that she decided to seek a termination and turned to W for support.

71. It is striking how the applicants did not seem able to see how vulnerable X was even at this stage. The guardian was almost immediately struck by it and on her behalf her counsel pointed out how many other people have commented on her vulnerability, over and above Dr Willemsen and the intermediary. The guardian said even on their first phone call she sensed that X was lacking in confidence and that by the time she had met X and spoken to her she believed she had learning difficulties. Everyone that the guardian had spoken to in August and September when she visited the area where X lives, to assess X's support network, all commented on her vulnerability: they included the mid-wife; P's mother who described the X as *'naïve and gullible*'; P, himself, spoke about *"how vulnerable [X] is"*; X's step-father described her as *"gullible"*; her own sister described X as *"very naïve"*; a family friend described X as lacking confidence.

Miscarriage, birth and the role of W

72. Although there is no evidence before the court to establish that W is an agent or runs an agency it is clear that she has had a very strong interest in linking surrogates to commissioning parents and being involved in surrogacy. Precisely what her motivation for taking on this role is not something that this court is in a position to decide. As can be seen from the messages that passed between them W offered to "*link*" or introduce the applicants to X and repeatedly told them she had many other contacts and options for them should the "*match*" not work out. W's influence over X can be seen in her successful attempt to persuade X not to have a termination and W accepted, in her evidence, that she was instrumental in that decision.

73. Although W has tried to insist that she did not want to get involved in things which did not concern her, she actively and deliberately placed herself at the centre of the crisis that X was experiencing and which unfolded on the Facebook site over V in November 2014, and which, in turn, lead to X deceiving the applicants. When W gave oral evidence before me she was by turn defiant and defensive; she was unsympathetic to X and sided with the applicants who she referred to as "*the boys*". W accepted that she had encouraged X to tell the applicants she had miscarried and gave as her own motivation for doing so her determination to ensure that there was no termination. She told me she was aware that the applicants' relationship with V had ended badly and said that when X complained to her, for example about the life insurance not being in place, she had begun to believe that V might have been right about the applicants as there were now two surrogates with complaints about them.

74. It remains unclear from W's written statement or from her oral evidence why she later changed her mind, took against X and decided to inform the applicants that she and X had deceived them about the miscarriage. I accept the submission made on behalf of X that W seemed personally to invest in continuing the pregnancy and then disclosing that X was still pregnant to A and B; she had no reason to involve herself to this extent apart from her own personal gratification in a sense of power or exercise of a controlling influence over the lives of others with whom she was so singularly unconcerned. At first, as can be seen from the messages exchanged between them, W urged X to carry the child rather than terminate a pregnancy; she explained to X that she was the legal parent, as X had thought she would go to prison if she did not hand over the baby at birth (another example of how little X had understood her legal position and the effects of the agreement). There can be no doubt that W can be characterised as manipulative, just as there is no doubting that X was easily led. W's messages were directive and it was she who suggested to X how she should lie to the applicants, going as far as to say "*make sure you get paid first"*.

75. That W was duplicitous is obvious from her conduct; on the one hand she encouraged X to deceive the applicants, and some of the comments she made about A and B were vicious and unkind; and on the other having convinced X to keep the baby she then told the applicants about the pregnancy while pretending to X that she was supporting her. In what Ms Fottrell described as a particularly cruel exchange about X's inability to afford a lawyer in any court proceedings she messaged A "*lets hope she xant afford a solicitor if she cannot even afford credit on her phone! Xxx".* A's response of "*isn't she a joke, [W]!"* exposed the contempt in which he held the woman who had gone through a very difficult pregnancy at his behest, whether or not she had ended up trying to deceive him. This is in contrast to X, who has continued to seek to please the applicants, as evidenced in her readiness to agree to extended contact whenever it has been suggested to her and to ensure that Z has had an opportunity to develop a relationship with his biological father.

76. While W's manipulation of X was calculated and had a direct impact on her, the continued inability of A and B, in their evidence before this court, even to consider that their conduct may have had something to do with the manner in which X had reacted to them is noteworthy, and in keeping with the air of victimhood on the one hand and sense of entitlement on the other trailed throughout their written evidence. It was palpably evident that A seemed to feel he had ownership of Z and that X was merely a gestational surrogate, a mere vessel, with no rights over the child she was

carrying and none over the child when he was born. Throughout these proceedings as can be seen from their reaction to the guardian's recommendations about contact and other matters concerning Z's care both the applicants struggled to accept X as Z's mother; the woman who carried and gave birth to him. It was not until they gave oral evidence that there was, reluctantly, an emerging acceptance of the importance of that role in Z's life.

77. The evidence supports this conclusion. Up until February 2016 neither A or B referred to X as Z's 'mummy'. Of the two applicants this reluctance to accept what was the actuality of the child's existence was more marked in A, who accepted in his oral evidence that he has been calling X *"[X]… and not 'Mummy'"*. In the guardian's second report she reported that "*[X] reported to me that she had felt hurt that at no time during the two days [of contact in November] did [A] acknowledge her as the baby's "Mummy" whereas she had made comments such as "Go to Daddy now." When I spoke to [A] and asked him about this, he felt he could not give me an answer. He was concerned that I would record any answer he gave at a time when he was feeling tired after the long drive…"* A's attitude has not changed and he has not begun to refer to X as Z's "mummy".

78. Although more recently B has referred to X as mummy, as he has been largely involved in the handovers for contact he has had more direct contact with X herself; he has persisted in calling Z by another name (the one that A and B would have chosen had they registered the birth). This, notwithstanding the fact that when this was raised at court, before me on 7th December 2015, I had said that for the child's sake that he should not be known by two different names. I am bound to accept the submission made on behalf of the child that this betrays the sense that the applicants continue to see Z as their child only. Despite setting great store in sending cards (they rely on it as a reason for terminating their relationship with V) they did not send X a Mother's Day card; in contrast to P who gave X a Mother's Day card from both their own little boy and from Z. Unsurprisingly, as X told me about the card in her oral evidence when cross-examined, she drew the conclusion that they did not *"wish"* her a happy Mother's Day.

79. To return to the narrative immediately after the birth the applicants' solicitor (who no longer acts for them as they are represented through direct access) directly contacted X in person. Even had there not been a considerable financial and intellectual imbalance between the adults it is likely that X would have found it a confusing and intimidating experience. In his oral evidence P told me that it caused anxiety and distress to the family and that it had led to him and his family pressuring X to hand over the baby. P accepted this had been wrong of him and told me he very much regretted doing it, which I accept.

80. The proceedings went ahead as I have set out above.

81. Z has continued to live with X, P and their child in their family home. There has been regular contact for Z with A and B. X has been travelling to stay with her partner's sister, as it is nearer to where the applicants live; they have contributed by paying the rail fares. Contact has not been without its difficulties, I have already referred to the dispute as to what Z should be called, but there have also been difficulties over the baby's clothing, where he wears what and the applicants sharing information with X. X has found A difficult to deal with and closed in his dealings with her. There have

been disputes over what has or has not happened when A accompanied X on medical appointments for Z.

82. The applicants have expressed their discontent, and more, about the approach and conduct of the guardian in this case. I shall return to this below. At least some of their discontent may be attributable to the guardian feeling unable to support the extension of contact that had been agreed between the parties in December 2015, but their complaints go further than that, as they see her as biased in her approach. This seems to have stemmed from the applicants' first meeting with her in July 2015 when she told them that it was not her role to redress any perceived sense of injustice on their part. Indeed her recommendations should not be based on sympathy for the applicants or for X, but solely on her professional assessment of X's welfare. The applicants' complaints of bias have to be seen as part of their own interpretation that they had behaved "*impeccably*" towards X and thus anyone else involved in this case should take their part.

83. In part because of the poor communication between the applicants and X, as she felt unable to approach them to discuss it, she complained to social services when Z returned from contact with two bruises on his face in January 2016. This led to a s.47 investigation. Apparently Z had been on the floor with some toys and had rolled over on to a toy truck which caused bruises to his face. The applicants had written this in the "contact book" but they did not speak to X about it or tell her about the minor injury the baby had received whilst in their care. It is hard to understand why they did not see fit to explain to X, directly and without delay, what had happened and so put her mind at rest. As it was it led to a social worker investigating bruising to a non-ambient child and a full skeletal survey, CT scan, eye examination and blood tests being endured by Z, as well as an examination by a consultant paediatrician. No further action was taken; and this incident does not inform my conclusions except as an illustration of the inability of A and B to communicate with X and how that inability led to unnecessary and intrusive examinations of the baby.

Legal framework

84. The HFEA s56 (6) provides that a parental order can be made if the court is satisfied that the woman who carried the child (X) has freely, and with full understanding of what was involved, agreed unconditionally to the making of the order. I have to say that, in this case, even if X had given her consent I would not be satisfied that she had done so with a full understanding of what was involved. X does not consent freely or unconditionally so neither limb of s54 (6) has been met and there is no question of a parental order ever being made.

85. There is no substantial disagreement as to the law which applies in this case which will be decided on the basis of the child's welfare and where and with whom it is in his best interests to live. The court is faced with two competing options: that Z lives with X or with the applicants and I shall follow the approach as set out by Lord Hope in *In Re B (A child)* [2010] 1 FLR 551; "*All consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child's best interests. That is the paramount consideration. It is only a contributor to the child's welfare that parenthood assumes any significance. In common with all other factors bearing on what is in the best interest of the child, it must be examined for its potential to fulfil that aim. There are*

various ways in which it may do so, some of which were explored by Baroness Hale in Re G, but the essential task of the court is always the same."

86. And as to the words of Baroness Hale in in *Re G (Children)* [2006] UKHL 43 they are that *"The statutory position is plain: welfare of the child is the paramount consideration. . . . There is no question of a parental right. As the Law Commission explained "the welfare test itself is well able to encompass any special contribution which natural parents can make to the emotional needs of their child . . ."*

87. The Court of Appeal has, in the words of Lord Justice Ryder in *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882, at [30], reiterated the need to make a welfare analysis of any proposal before it; *"Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary. That is neither a new approach nor is it an option. A welfare analysis is a requirement in any decision about a child's upbringing"*

88. As this court said in *In H v S (Disputed Surrogacy Agreement)* [2015] EWFC 36, a case I heard previously in which a dispute had arisen after a surrogate birth, the court has to scrutinise the competing options presented before it; *"I have been referred to numerous cases including that of* Re N (A Child) *[2007] EWCA Civ 1053, [2008] 1 FLR 198, 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 (para [12]):*

> *'... 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?'"*

Welfare: evidence

89. The guardian. In reaching a decision about the welfare and future arrangements for this child I have been assisted by his representatives and his guardian. Mrs Sivills is a member of the Cafcass High Court Team and is a highly experienced and respected guardian. I must make clear at this point that I do not accept that there has been anything in her conduct or approach to this case which would support any suggestion of bias. On the contrary, she has been assiduous in ensuring that she approached the applicants fairly, to the extent that she involved a senior enhanced practitioner in her visit to see Z with the applicants in late February 2016 to observe her on the visit. She has been equally assiduous in contacting other professionals and people directly connected with Z and with both the applicants and X to get their views; in other words she has carried out a most thorough and wide-ranging investigation and assessment speaking, amongst others, to the social worker, the head-teacher of the school which X and P's little boy attends, the health visitor and family members.

90. While it is understandable that the applicants challenge Mrs Sivills' recommendations their criticism of her does not bear close scrutiny, rather it serves to illustrate their own sense of grievance, as when A suggested that the guardian

"condemned" his and B's reaction to the miscarriage as bereavement when all she had done was to directly quote what their GP had told her; and, to say as A did "*The Children's Guardian also emphasized the midwife's disquiet also… involved the handing over of a baby to two "men"*. Yet on further inspection the report simply read that the midwife *"was very concerned about the vulnerability of the mother and her indication that she would hand the baby over to the two men with whom she had entered a surrogacy arrangement. Earlier in the pregnancy the midwife had sought information through the mother about the intended fathers."* There is no such emphasis or hint of disparagement about the fact they were two men. I accept the submission made by counsel for Z that the applicants see, and take, offence where none exists.

91. The guardian is criticized by them for speaking to B's mother about the fact that he is not Z's biological father; yet they had not told her this was not to be a matter to be discussed as they wished to keep it from B's mother. I do not know why they had chosen to keep this a secret from B's mother, they may have had good reason to do so, but it is unreasonable of them to expect that the guardian would have known that they did not want B's mother to be aware of the true situation regarding Z's parentage. This criticism is wholly unjustified as she could not have known and, indeed, she has kept other matters confidential at their request. As is the criticism that she was setting them up to fail, knowing that she wanted to observe them managing all three children in October, by leaving it to them to judge whether it was sensible for them to arrange a visitor to take the twins out; the manner in which they chose to care for the twins when visited by the guardian must be a proper subject of any guardian's observation and comment. There is no basis for the criticism that she was not even-handed in her investigations; she has met them five times observing them with all three children on three occasions. She visited X over two days at the end of August 2015 and observed her with Z at the end of October 2015. I cannot see any evidence before me that supports their claim.

92. I have concluded that it would seem that the applicants took against this guardian after she filed her first report which did recommend that Z remain with X and which voiced some concerns about their behaviour; such as failing to tell the POR the truth about their relationship with V in previous proceedings. From then on they stopped initiating any contact with the guardian; it would seem likely that they were aggrieved that she did not share their views about their *"impeccable behaviour"*. In contrast to this, and although the guardian raised questions about her conduct (such as deceiving the applicants), X was always open with the guardian and kept up a high level of communication with her. It was inevitable that the guardian considered that she had a greater understanding and knowledge of X's circumstances than of the applicants'. They did not communicate their many grievances about her, to her, so that the guardian became aware of them only when she read their statements and was thus never able to deal with them "on the ground".

93. The sense of victimhood and grievance, evident in their oral evidence, extended to the guardian and it was only when pressed during their oral evidence that the applicants even began to acknowledge that their conduct towards X was not beyond criticism. I accept the force of the submission of counsel for the child that there is a significant risk that once proceedings are concluded, were Z placed with the applicants, their

feelings for X and their personal sense of grievance would prevent them from promoting and supporting Z in having a positive relationship with his mother.

94. There is little evidence that they have the ability to put their grievances and negative view of X behind them, for the applicants have had the opportunity of two adjournments and the passage of six months since the guardian's first report to respond positively to concerns she raised and they have singularly failed to do so, choosing instead to focus their energies on avoiding responding to her queries and to challenging her opinions. This is in stark contrast to X who has been able to move on as observed in the independent evidence of Dr Willemsen.

95. Dr Willemsen. I have already quoted from Dr Willemsen's report; he spent six hours with X and read through all the papers including the whole of correspondence/electronic messaging bundle at section G. It was his view, and one with which I agree, that X does not seem more capable in superficial conversation (the guardian picked up her confusion and difficulties almost immediately) and he concluded, having reviewed the social media messages, X's learning difficulty was clear whenever there was any exchange over technical matters; the example he gave to illustrate was when she said the contract that she signed with the fathers was *"fine"* but nowhere was there anything approaching a critical appraisal of the document she was to sign. Instead she responded to and followed the conversation that was being led by the applicants and did not herself enter into any complex discussion.

96. I do not intend to repeat evidence that I have already set out above but Dr Willemsen considered X to be clearly vulnerable and he described her as having a tendency to withdraw into herself as a way of creating a space where she can generate something good about herself; after she had been taken to Cyprus by A she gradually began to develop an awareness of the situation she found herself in, namely that her body was being used to produce a baby. It is clear that she began to recognise the reality of the situation she was in only when the physical signs of pregnancy developed. She began to feel used but at the same that she came to relate to and began to love the baby she was carrying.

97. It was Dr Willemsen's opinion that X wanted out of the situation in which she found herself and saw W as presenting as the most plausible way to end her communication with the applicants. He believed, and I accept this explanation as being more likely than not, that she was quite frightened and chose this option as the one that was the least confrontational. As Dr Willemsen said, the deception she undertook needed to be considered in the context of the case as a whole, including the motivation of the applicants themselves and their behaviour, not considering X in isolation. As he said in evidence – "*I do think she feels very angry – she feels quite used – I do not think it is helpful to put her forward as a deceiving person – I think she wanted out and she was left with this feeling of being used by them"*

98. Dr Willemsen's evidence was that X had been relieved that the deception did not continue; *"She spoke a great deal about there was a father and this father was important in the life of the child… so this is coming out of what was going on…it was a relief to her when her pregnancy was discovered – she was walking around with a secret – it was relief the fathers found out – she was able to give them a place in her life and in the life of her son .. This father and his partner were very important … that anger and resentment was not there… of course she had [Z] to look after and I think*

she had moved on and put the interest of the child of her baby before this conflict that had taken place."

99. Specifically as regards her parenting abilities Dr Willemsen refuted the suggestion that X would be unable to parent Z because of her own learning difficulties. He said to me *"X is very available for the child… it is what I have seen … this raises in her a concern for this child and she will take actions for her child…the Guardian's report is clear, she is not always perfect [particularly] at speaking up and she needs some help [such as] and going to groups where she is not the only person with these doubts …with prompting she can change and I hope that continues …it is important [Z] can be with the parent who can form the best attachment … if there is a strong bond and a concern then she will act on it"*

100. In respect of Z Dr Willemsen's evidence was that the place of Z's mother in his life is crucial to his sense of identity. Z will need to see a "functioning relationship" between his parents so as to help him in making sense of his conception; and that there will come a point when Z will have questions in respect of his identity when it will be vitally important for the adults in his life to work together. Dr Willemsen pointed out that due to the complex nature of his conception it may well be that his mother or father may not be in a position to give a full answer but should reassure him that it is something they will discuss with him and they may need guidance from professionals in how best to approach these difficult issues.

Welfare: evidence and analysis

101. I turn now to look at the abilities of both X (and P) and A (and B) to provide a secure, loving and safe home in which Z can best " *mature into a happy and balanced adult and to achieve his fullest potential as a human*" . As the guardian has said in her final report she has accumulated considerable information about the parenting styles of the respective parties; but although I rely on her report I do not do so in isolation as I have read the statements filed on behalf of the parties and seen them give evidence along with P and his sister. I have the evidence and opinion of Dr Willemsen and I have read the documents filed in this case and do not intend to rehearse all of that evidence here, nor is it necessary for me to do so. It is the guardian's view that both parties are capable of meeting Z's basic needs but that his future welfare *"depends on the ability of the parties to be flexible, positive and co-operative"*. As she said in her final report *"although there are differences in culture and lifestyle, the essential physical needs of [Z] would be met in both homes."* I accept her analysis in respect of the ability of both the applicants to provide for Z's physical needs.

102. The 1st Respondent. X's parenting ability has been thoroughly investigated by the guardian who found her to be forthcoming and transparent. I found, as did the guardian, that X has accepted deficits in her parenting and acted on them showing a willingness to take advice from the guardian and others; she did so regarding her little boy's school attendance and it has improved considerably as has his behaviour at school and at home. Indeed she has been described (along with P) as ideal to work with because they acted on advice when given. The need of his main-caregiver to be able to do so with Z who may have difficulties of his own, as yet undiagnosed, is an important factor in any decision the court takes.

103. I do not dismiss the difficulties that X had previously with her son and his school attendance but I must also recognise that the circumstances improved once he had a diagnosis of ASD and that both X and P have worked well with the head teacher. The guardian has had significant direct contact with the school and was impressed with mother's improved engagement. In addition to which there are several alternative sources of support which limit the possibility of a repetition of poor school attendance including P's sister, who I found an impressive witness and an engaging and obviously capable individual. She has attended appointments with X and is committed to doing so in the future. It is the professional assessment of the guardian and the observation of the HV that X is caring well for Z. The applicants do not seem to be able to acknowledge this.

104. X has demonstrated commitment, willingness and an ability to ensure that Z has the necessary medical help and that she has the necessary advice in respect of Z. She has made appointments, kept to them and followed advice. Their focus on X's ability to meet Z's medical needs in the face of her demonstrable ability to do so betrayed a lack of respect for X on the part of the applicants and a seemingly deliberate unwillingness to recognize that she is caring for Z at more than an acceptable level.

105. A appeared to be particularly unwilling or unable to move on during the hearing as far as X was concerned; at times during his oral evidence and sitting in the well of the court he visibly struggled to acknowledge her as Z's mother. A singular example of this took place in March shortly before the hearing when they both attended a hospital appointment; he told X to leave a consultation with the consultant because, he said, he wanted to explain that he had parental responsibility and was entitled to information. There is no reason he could not have done so in front of X, she is Z's mother; in fact she was left feeling excluded. In her final statement X described being confused by the applicants' constant questioning about medical appointments which made her feel undermined and disbelieved. Unlike the applicants, X has said little by way of criticism of the parenting of the fathers. She accepted the analysis of their parenting as presented by the guardian.

106. I found P to be an honest, almost blunt, and a clear witness. He accepted, in his oral evidence, matters that could be damaging to him and to X, such as that he had pressured X to hand Z over and that he knew she had planned to register P as the father although he did not agree with it. He was clearly committed to Z and his little boy and spoke very warmly, openly and affectionately about both the children and about X. He very obviously loves his family and considers that Z is part of that family. P told me that he shared X's *"wish to bring up [Z] within our family"* and he wanted to be *"stepping up to the plate"* for Z and his son. He told me that his mother had told him he should and that he knew he should. I accepted his evidence and I have no doubt of his commitment to Z.

107. It was, as submitted by counsel for X, striking that P and X are apparently able to have adjusted to the idea and have accepted that Z has four parents. X said that this was not unusual to her as both her parents had remarried and she herself had four parents. Again this open acceptance was in contrast to the applicants as they seem to maintain some kind of a hierarchy between the parents. The reality is that Z does have two families and four parents, and, three brothers, although it is absolutely the case that two of them are full biological brothers, P and X's little boy is very much his

psychological sibling. The focus on hierarchies which is so evident in the applicants' case could be reduced if PW is included in any order and granted PR.

108. The applicants. The applicants' case is that Z should live with them; as they are better able to care for Z; X cannot be trusted because of her past behaviour and there is a genetic tie between A, the twins and Z. There is no evidence that they are better able to physically care for Z; and therefore I have to consider where he would be better placed.

109. There have been persistent difficulties in communication between the applicants and X which they have shown little appetite to improve and which along with calling Z by a different name when he is with them, give me cause to doubt their ability to be flexible and open with Z as he grows up. In contrast X regularly texts and communicates with the applicants and sends pictures frequently while they have sent a few pictures; within weeks of the final hearing. Again, in contrast, there is a willingness of X, as she told the guardian, for Z to take the applicants' family names and to recognise the genetic link. Both X and P in their oral evidence volunteered that they were willing and could foresee circumstances in which all the adults would spend time with each other. X spoke positively about B and honestly acknowledged that she did not know A well enough; although that is largely a matter of his own choosing. P said he was willing to spend time with the applicants and accepted the importance of their role in Z's life.

110. Z's primary attachment is to X and it is the guardian's view that she is better able to meet *all* his needs [my emphasis], emotionally as well as physically. She has formed a strong bond and attachment with him, and he with her. The guardian told me that she had no doubt that there is "*a strong bond*" between X and Z and that X will act to address and meet his educational needs; this latter was based on her discussion not only with X and P, but also with the head-teacher of their little boy's school.

111. The "*strong bond*" was evidenced in the guardian's analyses and assessments "*She has an intuitive ability to sense his needs and to comfort him*" [December 2015 report]; *"The strength of her position would seem to be her loving nature, her open manner, her commitment to sharing [Z] with the father and his partner"* [December report] and X provides "*more overtly loving attention . . Her home has a more relaxed, good-humoured atmosphere"* and *"It is noticeable how [X] is spontaneously affectionate to [Z], both in her behaviour to him and how she writes and refers to him. It is evident she greatly enjoys giving him comfort and cuddles*" [December report]; she has a "*strong maternal instinct. Whatever the reasons she went into such a problematic surrogacy arrangement, it is reassuring to me to see the way in which she has made Z feel special and this will have been to his benefit. The warm regard, praise and encouragement given to [Z] by his mother* . . [December report].

112. In her second report the guardian wrote *"I am not confident that if [Z] lives with his father and [B] contact with the mother will be given the priority that will be required for Z's best interests, especially his identity."* In her final report she wrote; "*In my view the main risk to Z's lifelong welfare is around his identity needs. I am not confident that his father will fully recognize the importance and significance of Z's continuing relationship with his mother."* There was nothing in their evidence that changed the guardian's view and I share her pessimism.

113. In their evidence and in the submissions to this court the applicants, particularly A, continued to struggle to accept X as Z's mother, some 9 months after his birth and despite the concerns being raised in the guardian's reports. In their evidence they did not give any recognition of the warmth and of the attachment that is there in the bond that Z has with the woman who carried and gave birth to him. I can only conclude that should Z live with them X's role in his life is more likely to be devalued and diminished which will be damaging to his welfare, emotional needs and development.

114. <u>The genetic tie.</u> The relevance of the genetic tie is something which must be considered; Z is a full genetic sibling of the twins, he is genetically related to A, but not to B. Z has lived with X and has a bond with her as his de facto and gestational parent; she has provided him with loving, gentle and careful care and they are undoubtedly strongly attached to one and other. The relevance of the genetic tie is factual as well as legal but it is only one factor which has to be balanced against others in the decision making process, it is not a "trump card" which defeats all other considerations. The paramount consideration remains Z's welfare and there is little doubt that separation from X would impact on him to his detriment. Such a detrimental move from what is his warm, happy and loving home cannot be justified or driven by the fact of the genetic relationship with his biological siblings which does not have primacy; and, in any case, Z will know and have an opportunity to share his life with his genetic father and siblings, both now and in the future.

Conclusion

115. I have adopted the guardian's analysis, and have done so based on the evidence before me, which I have endeavoured to set out above. In considering the two options there is little or nothing between them in respect of the physical surroundings or physical care in the shape of shelter, food and clothing and warmth, except that the applicants have greater financial resources. The warmth of each family itself is where the real difference lies, not just within the home itself but in the warmth that extends beyond four walls to others. I was struck by the openness and straightforward attitude of X, P and his sister, but mostly by their real affection and love for each other and for Z. I can readily accept the guardian's oral evidence that she had seen joy in their home.

116. The guardian misgivings about the ability of A and B to deal with the needs of three small children which would have involved B giving up work for a year (although there was no evidence before me from his employers approving leave of this length since it was deployed as an argument for granting B parental responsibility prior to the final hearing) were based on what she had observed at the two homes of theirs that she visited. The applicants seemed to have their hands full with the twins and Ms Sivills observed A, in particular, to be at times over anxious and restricting of the twins' need to explore and develop. Even taking into account the fact that the applicants found her presence intrusive and inhibiting the picture she painted was of children who were not being encouraged to express themselves freely and their home did not appear particularly child-friendly. The fact that the applicants could not overcome their antipathy towards the guardian and could not relax in her company is, I find, further evidence of their tendency towards insularity. More than that it betrays an inability to put Z first as they should have been able to put it to one side for Z's sake, and not only when he was actually with them. Their difficulties in parenting the twins was also observed by a relative of A's who had been put forward, by the applicants, as someone who would support their case.

117. I have concluded for the reasons set out in the discussion above that it is in Z's best interests to remain living with X as she is better placed to meet his emotional needs. She is, quite apparently, more emotionally available and has a greater instinctive understanding of his emotional needs. Over and above this she is the parent who is much more likely and able to be able to treat both the applicants in an open and generous way and to enable Z to develop a good relationship with A, B and his siblings and so to allow him to develop a wider and a more positive sense of his own identity.

Contact

118. The guardian has recommended that the current child arrangements be varied so that until he is 24 to 30 months old, Z will spend one weekend out of every eight weeks with his non-residential parent, visiting on a Saturday and a Sunday but without an overnight stay and that this weekend should alternate between the areas in which the two parties live. Her proposals for child arrangements are focused on Z's needs and the reality that his parents live a significant distance apart and travelling those distances for contact is part of the disruption he has already experienced. The applicants themselves have recognised this by supporting a reduction of contact to once per month whether Z lives with them or not.

119. The guardian has had concerns about the level of contact that has been taking place since July 2015 and in December she said as Z was then just 5 months old and the first 12 months of his life are critical in terms of attachment formation. Her opinion was based on her observations of Z and her experience, and the research and literature that she had kept herself up to date with; it is currently accepted that children's ability to form strong and stable attachments throughout their lives is affected by the stability and consistency of the attachment they form with primary care-givers in very early infancy. There was, as she said, no real dispute that his primary care-giver was (and is) X who the guardian considered to be well attuned to Z's needs; she was in the guardian's view his "*secure base"*.

120. The guardian remained concerned that this secure base would have been significantly disrupted if Z had gone to the applicants on the extended pattern proposed and agreed between the parents; this disturbance of attachment on a regular basis for the next four months (between the hearings in December and April 2016) would have been likely to be harmful to Z's emotional development. She was, and remained, unconfident that Z would be able to adjust to long and regular periods away from his primary care-giver and the risk that he would not be able to adjust is not one the guardian believed should be taken, when balanced against any purported benefits to Z of this arrangement. She questioned the purpose of the proposed child arrangements, for although she could see advantages for the applicants of the proposed arrangement she could not see the advantages for Z, still a baby, for whom repeated (albeit temporary) loss of secure base with his primary carer/attachment figure is likely to be distressing and stressful, damagingly so.

121. This is clearly an issue to which the guardian has given considerable thought and attention and I was convinced by her analysis as the points that she makes have all the more force in this case when I am already aware that Z is a vulnerable child albeit we are not yet informed of the extent of that vulnerability.

122. It is her view that although all of the early months of a child's life are critical for attachment, the time between 9 months and 2 years is the most critical period for attachment to form and Z is just entering this critical phase. Were there to be monthly contact with Z being separated from his primary carer and travelling to and from the applicants' home then the guardian considers this as a risk to the formation of his attachment. It is a risk that should not be taken with this child who has his own particular needs and vulnerabilities. The child arrangements proposed by Mrs Sivills are those she considers to be for Z's benefit, and not for the benefit of either parent, and they are deliberately time-limited to achieve a particular purpose but they do not prevent him from developing a relationship with his father, with B or with the twins.

123. I accept the guardian's recommendations which are well considered and based on child-centred reasoning and make an order in the terms outlined by Ms Sivills; that is that contact will take place one weekend every eight weeks with the applicants, visiting on a Saturday and a Sunday without overnight stays and that these arrangements will alternate between the area in which X lives and where the applicants live. The guardian has thought a great deal contact and I have considered her recommendations with similar care. The proposals for child arrangements are focused on what his guardian identified as Z's needs, the reality that his parents live a significant distance apart and that travelling that distance for contact is part of the disruption he has already experienced. This was recognized by the applicants themselves who had found the travel and expense onerous and disruptive in their lives with their twins and who, as I have already said, supported a reduction in the frequency of Z's visits to once a month.

124. These child arrangements are for Z's benefit, and not for the benefit of either X or A and are time-limited to achieve the particular purpose of enabling him to build the most secure foundation emotionally and psychologically, on which all his future development will be based: they do not prevent him from developing a relationship with his A, with B or with his twin siblings.

125. The eight weekly frequency will continue until Z is two years old, again I take into account his vulnerability, the extent of which, as I have said, remains unknown. There will be no additional visits at this stage; X remains vulnerable too, and there must not be any order in place which would encourage, even obliquely, attempts to increase the level of contact by agreement.

Parental Responsibility Orders

126. As Z will be living with X and P they will both need parental responsibility (X has it already of course) P is very likely to have to look after Z from time to time; he may have to take him to the doctor if X cannot, and will have communication with his school in due course. P has told me, and I accept, that he has realised that he has to take a much more active role in his little boy's schooling and has proved that he has done so as it is because of him that the boy's attendance at school has markedly improved. I am reassured by his oral evidence that he will take on a similar role for X.

127. I consider that it is necessary for P to have parental responsibility as it is in the interests of Z's welfare on this practical level, but it is also in Z's best interests, and it will be in the interests of his welfare and present and future emotional development, that the man with whom he will be living is recognised as his parent; P is, and will

continue to be a psychological parent to Z; but, in addition, this will recognise the supportive role which P has in respect of Z's mother. The history of the case has shown that X is at her most vulnerable when she is on her own and much more susceptible to pressure being put on her by the applicants. Z needs to live in a family which provides support for his mother, which, in turn, provides support for him.

128. A will continue to have parental responsibility, as he is Z's biological father and the twins share that significant biological link with Z. He will be able to exercise that parental responsibility, if it is needed, when Z is visiting now and in the future. There is no need for B to share parental responsibility. His role in Z's live as his father's partner is, of course, a significant one but it will not be the same as for P with whom he will be living all the time. I do not consider such an order to be necessary or in the best interests of Z. As Z's father A is entitled to be kept informed of all significant event and decisions that concern Z, but A will need to develop a better and more open way of communicating with X; she has shown that she has been more than content to keep both he and B fully informed about Z; but there has been a dearth of information flowing in the other direction; as was evidenced by the incident over the bruise Z got on his cheek. There have been instances where A has proved himself to be insensitive and lacking in emotional intelligence in his dealings with X, particularly when there are professionals present. I have in mind the incident in the hospital when he told X to leave the room so that he could tell the doctor he has parental responsibility. It was, at the very least, discourteous, and naturally left X feeling excluded as she had done in the clinic in Cyprus. As P will have parental responsibility he can attend such appointments with X in future which will provide her with support and, I hope, ensure that there is no repetition of this kind of incident.

Name by which Z will be known.

129. There is some agreement about this issue as X has agreed that Z should have the surname of A (his biological father) added to the name on his birth certificate. Z will continue to be known as Z which is what he is most used to, as it is what he has heard himself called for most of the time. He will be known as Z A X. This recognises, in law, the importance of the link between Z and A and their relationship with each other. I make an order to that effect.

130. This is my judgement.