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IN THE FAMILY COURT

SITTING AT ROYAL COURTS OF JUSTICE

FAMILY DIVISION

[2016] EWFC 80 (Fam)

Royal Courts of Justice

Tuesday, 13th December 2016

Case No FD16P00259

Before:

MRS. JUSTICE THEIS

(**In Private**)

B E T W E E N:

(1) B
(2) A — Applicants

- and -

(1) C
(2) D — 1st & 2nd Respondents

- AND –

H
(THROUGH HER CHILDRENS GUARDIAN ANGELA ADAMS) — 3rd Respondent

_____

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MS. FOTTRELL QC and MR. T. WILSON
(instructed by Goodman Ray Solicitors) appeared on behalf of the Applicants.

MS. H. MARKHAM QC and MS. M. ALLMAN
(instructed by Freemans Solicitors) appeared on behalf of the Respondents.

MS. P. LOGAN (Solicitor, CAFCASS Legal)
appeared on behalf of the Guardian.

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J U D G M E N T

(As approved by the Judge)

MRS. JUSTICE THEIS:

Introduction

1 I am giving this *extempore* judgment as I know all parties are anxious to know the court's decision. Whatever my decision, one thing that has shone out during this difficult case is the love each of the adults have for H. There will inevitably be a period of adjustment following this decision, but I sincerely hope each adult will recognise the role they have and the contribution they will make to H's future.

2 The court has had the enormous benefit of experienced representation from both counsel and solicitors in this case. I would like to pay particular tribute to the team that have represented C and D. Ms. Markham Q.C., Ms Allman and their solicitor Ms. Hollmann have acted pro bono and the court is particularly grateful for them for doing so.

3 What I am concerned about is the future care of H, a seven month old child, who was born as a result of a surrogacy agreement entered into between B and A, male same-sex partners, and C and D.

4 They signed a surrogacy agreement in August 2015. C and A travelled to a clinic abroad in September 2015 for the embryo transfer, using embryos created from A and B's sperm and a donor egg from a Spanish egg donor which resulted in C pregnancy with H. A DNA test later confirmed A's paternity.

5 In circumstances which are disputed, the relationship between the parties deteriorated in February 2016 to the extent that, by early March 2016, there was no communication between them. C's health had deteriorated, and she had to have surgery in January 2016.

6 At some point in late March 2016 C and D sought legal advice and decided that they were not going to hand over the child to B and A, as had been agreed between the parties as recorded in the agreement they signed in August 2015. At this time B and A were seeking to establish contact with C, but with no response.

7 C gave birth to H in April 2016. It was a difficult birth and both she and C suffered ill-health immediately afterwards. The day before H's birth, C and D's then solicitor had written to B and A to inform them that they were not

prepared to follow their surrogacy agreement and would not be giving their consent to a parental order.

8 Even though there had been some correspondence with solicitors for the ten days following H's birth, it was not until about 10th May 2016 that B and A were first informed of the birth. By that stage, C and D had registered H's birth with the name they had chosen for her rather than the name chosen by B and A. C and D's account for this delay in informing B and A that it was due to the ill-health of C and H.

9 Not surprisingly, B and A immediately issued legal proceedings following which arrangements for contact were made, those arrangements increased to a shared care arrangement which has been in existence pending this hearing to determine the future care of H.

10 The hearing was originally listed for three days in September. The parties sought to reach agreement outside court. Unfortunately, that was not possible. An issue arose regarding the disclosure of a psychotherapist's report relating to B that had been prepared in his immigration proceedings. That issue was resolved by agreement to disclose the recommendations in that report and a psychiatric report was sought regarding B's mental health from Dr S., whose report is now before the court.

11 B and A seek to be the main carers of H and propose visiting contact with C and D on six occasions a year. They had originally proposed a higher frequency of every three weeks initially proposing staying contact then changed to visiting. C and D seek to be the main carers for H and propose staying contact with B and A every three weeks, from Thursday to Monday and holiday contact in addition.

12 The court has had the benefit of hearing the oral evidence of B, A, C, D and the Children's Guardian, Ms Adams.

13 This case is another example of the complex consequences that can arise from entering into this type of arrangement. Even though C was an experienced surrogate, this case demonstrates the risks involved when parties reach agreement to conceive a child which if it goes wrong can cause huge distress to all concerned. For all the adults involved who all clearly love H, the one thing I know they will agree is that their dispute and this contested litigation has been a harrowing experience for them all. This case highlights once again the consequences of not having a properly supported and regulated framework to underpin arrangements of this kind.

The Legal Framework

14 Turning to the legal framework which will guide the decision that I reach. This case is about where H will have her main home. There are four parents with parental responsibility. What I have to decide is who are best placed to give her a stable and permanent home. In reaching that decision, H's welfare is paramount, and the court needs to consider the matters set out in the welfare checklist in s.1(3) of the Children Act 1989. As Thorpe LJ put it in the case of *Re N (a Child)* [2007] EWCA Civ. 1053 at para.12, citing the trial Judge in a case also concerning a failed surrogacy arrangement:

> "The test here is a simple one to formulate though not necessarily to answer; namely 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?"

15 Natural parenthood is but one factor in this assessment and needs to be incorporated in the court's consideration, having regard to the observations of Baroness Hale in *Re G (Children)* [2006] UKHL 43 when she said as follows:

> "…The statutory position is plain: the welfare of the child is the paramount consideration. As Lord MacDermott explained, this means that it 'rules upon or determines the course to be followed'. 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' or, as Lord MacDermott put it, the claims and wishes of parents 'can be capable of ministering to the total welfare of the child in a special way'."

16 In *Re G* Baroness Hale said of the genetic biological parent:

> "This can be of deep significance on many levels. For the parent, perhaps particularly for a father, the knowledge that this is 'his' child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child...For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may also be an important (although certainly not an essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain."

At para.35 she said the following about social and psychological parenthood:

> "…the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting. The phrase 'psychological parent' gained most currency from the influential work of Goldstein, Freud and Solnit, Beyond the Best Interests of the Child (1973), who defined it thus:
>
> > 'A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent.'"

17 Ms. Markham, in her closing submissions, relies on the observations of McFarlane LJ in *Re W (Direct Contact)* [2013] 1 FLR 494 at paras.76 and 78:

> "76.Where parental responsibility is shared by a child's parents, the statute is plain (CA 1989, s 3) that each of those parents, and both of them, share 'duties' and 'responsibilities' in relation to the child, as well as 'rights … powers … and authority'. Where all are agreed, as in the present case, that it is in the best interests of a child to have a meaningful relationship with both parents, the courts are entitled to look to each parent to use their best endeavours to deliver what their child needs, hard or burdensome or downright tough that may be. The statute places the primary responsibility for delivering a good outcome for a child upon each of his or her parents, rather than upon the courts or some other agency.
>
> 78. Parents, both those who have primary care and those who seek to spend time with their child, have a responsibility to do their best to meet their child's needs in relation to the provision of contact, just as they do in every other regard. It is not, at face value, acceptable for a parent to shirk that responsibility and simply to say 'no' to reasonable strategies designed to improve the situation in this regard."

Ms. Markham submits this case should be treated like all other cases of parental breakdown where separated parents are reminded of their duties and their need to co-operate, not as a form of punishment to one set of parents.

18 I go back to where I started in discussing the legal framework. What the court needs to consider is H's welfare. That is the paramount consideration and the court needs to consider it in the context of the matters set out in the welfare checklist. Each case, by definition, is different, different considerations apply and the court needs to analyse and carefully weigh those considerations.

The Background

19 B originates from country X. He has lived in the United Kingdom since 2006. Until 2013 he lived and worked in the United Kingdom lawfully. Following that, he has made a number of immigration applications which have been refused: first, in May 2013 and then again in September 2014. He was arrested, detained and served with a Notice of Removal in October 2014 and on the same day made an application for Judicial Review of the previous refusal.

20 In March 2015, he sought asylum. He had his asylum interview in May 2016 and his application was refused in June 2016. He appealed in June 2016 and a hearing was listed to be heard yesterday, which the court and the parties were informed yesterday was successful. As I understand it, he will be granted five years leave to remain. Thereafter, he will be entitled to apply for indefinite leave to remain.

21 A originates from country Y. He moved to the United Kingdom in 2003. In January 2009, he married a European national. They subsequently divorced. A was issued with an EEU residence card which expires in January 2017.

22 In October 2013, A sought to retain his right to reside in the United Kingdom under Regulation 10 of the Immigration (European Economic Area) Regulations 2006. In 2014, the Secretary of State for the Home Department issued A with a residence card which expires in 2019.

23 According to the expert immigration advice from Ms. Brewer, she considers on the documentary evidence provided to her that A currently "has the right to reside in the United Kingdom. He will retain this right to reside in the United Kingdom as long as he continues to be a worker, self-employed or self-sufficient. A may in fact have acquired the right to permanently reside in the United Kingdom from as early as 8th January 2014". In any event, if his self-employed status remains, by August 2018 he will acquire the right to permanent residence in the United Kingdom. Once that status is obtained, B could apply for leave to remain as the partner of A under the immigration rules, although in the light of the decision yesterday it may not be necessary.

24 B and A met in 2009. Their relationship started in earnest in early 2012 and they have been living together as a couple since then. Each of B and A's families have had difficulties in accepting their sexuality. B is estranged from his family in country X and his sexuality formed the foundation of his asylum claim and his fear if required to return to country X.

25 In relation to A, whilst his family were initially opposed, he has since spoken to them and they have become reconciled to his sexuality and have welcomed the arrival of H.

26 Due to his difficulties in his upbringing, B has had involvement with mental health services. In 2011 B sought professional input following a period of depression and anxiety.

27 In 2012 he was diagnosed with depression and prescribed Citalopram. He engaged in psychotherapy. During the currency of his asylum application, B has continued to experience anxiety for which he has sought appropriate support.

28 In March 2014, a psychotherapist, completed a report on the then-current psychological health and the impact of deportation on B. The psychotherapist confirmed that B had depression at the time he met him and that it was exacerbated by the ongoing proceedings. He recommended a further course of therapy in 2014, which B began and completed. He completed a course of psychotherapy in September 2015 and the discharge letter from his therapist notes that he had benefited considerably from the therapy that he received.

29 In relation to the investigations that were undertaken by the Guardian during the summer of this year, in her report she considered any ongoing risk from B's recurring depression as follows:

> "He has shown good insight into his illness, recognising the triggers when he is unwell. This enables him to access and make use of appropriate professional treatment in a timely way and to engage in treatment."

30 This assessment was echoed by the updating report that the court has from Dr. S, where she confirms that B does not suffer from a personality disorder and concludes as follows:

> "[B] demonstrates remarkably good insight into his difficulties. He was able to identify both longer term and short term triggers to his mental health difficulties. He was insightful about other triggers for his low

> mood and anxiety over time, such as stressful exams while studying medicine, stress in his job in the UK and the threat of deportation and immigration issues; his fear that returning to country X would not be a safe place for him."

She continues in her report to say that she did not consider that therapy was required and that "B vulnerability to depression and history of recurrent depressive order does not impact on his ability to be a good parent".

31 C and D have been married since about 1998. They have children aged between seven and twenty-four years.

32 C has previously entered into two surrogacy arrangements. Parental orders were made for each of these children.

33 According to B and A, they had discussed having children from an early stage in their relationship and, as B was not working, it was decided he was better placed to take the lead on the surrogacy arrangements. This was done via Facebook. He learned of intended fathers who had been abroad for their IVF treatment where he was told the egg donor quality was better and the treatment cost less than in the United Kingdom. One contact informed B that, as intended fathers, they had transferred two embryos to their surrogate that were created using sperm from each of them.

34 On one of the Facebook groups, B made contact with a matched surrogate. That person told him about C. They arranged an initial Skype call. in May 2015 following which they messaged daily on Facebook and they had Skype contact twice weekly. They discussed expenses and agreed that they would be capped at £12,000.

35 As B records in his statement, C was an "expert" about what needed to be done. She said she would get all the tests done and start the medication when she was on holiday. In his statement, B records as follows:

> "It was important for us to build a friendship with our surrogate. We both wanted our surrogate to be like extended family to us. As gay parents, we wanted our child to know the person who had helped us start a family and we envisaged having a long relationship with our surrogate. I believe from my conversations with C that this was something that she also wanted."

36 B said they followed the advice from the agencies in the United Kingdom which was to wait to get to know each other for at least three months before any treatment. They met for the first time in June and, according to B, they

asked C if she would agree a match with them which she did. They were aiming for an embryo transfer in September 2015. B and A visited C and D on two more occasions, staying the weekend, and they signed the surrogacy agreement on the second weekend at the end of August.

37 Ms. Logan, in her closing submissions, helpfully summarised some of the key terms of the surrogacy agreement. As she says, in that agreement the surrogate:

> "…agrees to register the birth of the child as soon as possible after birth with the full name and surname provided in writing to the surrogate by the intended fathers.
>
> At birth, both genetic father and/or intended father will assume all parental rights and responsibilities for the children from that time forward.
>
> The genetic fathers acknowledge paternity of the children/child to be conceived. The surrogate will comply with all legal actions necessary to re-issue the birth certificate with both names of the genetic fathers.
>
> Following the birth of the child, the parties will each sign documents and do whatever acts are necessary to fulfil the intent of the parties and to make the genetic fathers and/or intended father the actual and legal parent of the child.
>
> The surrogate and the surrogate's husband agree that six weeks after the child is born to institute or participate in proceedings in the United Kingdom or other requirements to terminate their respective putative parental rights via a parental order.
>
> The surrogate and surrogate's husband further agree that the genetic fathers and/or intended father shall select the name of the child and that any birth certificate issued through the medical facility in which the child is born shall reflect the names chosen by the genetic father and/or intended father."

38 As both C and D made clear in their oral evidence, the original agreement did indeed require them to register the birth but with names selected by the applicants. This was predicated on the basis that there would be a later application for a parental order when a new birth certificate would be issued. As C observed in her oral evidence, "We saw her as our daughter and that's what we did" in terms of explaining why she and D registered H's birth. She continued "Sorry we didn't consult them. We had all intentions of keeping our

daughter and we gave her the name we had chosen. It was not out of spite". She added in her oral evidence, "At the time it was not wrong for us because we wanted to raise her as our daughter. Even through surrogacy, you name her until a parental order is granted".

39 D, in his oral evidence, perhaps put the matter more bluntly as he said, "As the law stands, we're married, my name goes on the birth certificate." Clearly, for them that was not an issue because they had already, at that stage, made the decision to keep H.

40 Turning back to the chronology: In June 2015, B arranged flights and accommodation for the trip to country X. This was prior to his asylum refusal. He said in his statement that C was aware that he could not travel. That position is confirmed in texts that were exchanged between them in August 2015.

41 It seems that, certainly, by August 2015, C was aware that there were immigration applications being made by B, that they had been refused, that he was going to appeal, and that A's immigration position was more secure.

42 B had first made an enquiry with the Clinic abroad in May 2015. In June he was informed by the clinic that the law had changed, and the clinic could no longer undertake IVF for surrogacy but he had enquired before the change in the law and that they would be able to perform the IVF procedure. In the event, they did not have a donor egg that was suitable, so B sought another clinic abroad. When B spoke to him, he informed B of the change in the law but said that he would be prepared to help them "as long as we kept it private". He said C's name would have to be entered as a "partner" and then he would undertake treatment. According to B, C was kept updated about these changes and was fully aware of the position.

43 The embryos were transferred in September 2015. The pregnancy was confirmed in October 2015. Private scans took place in October and November 2015 with B and A being present. B and A stayed with C and D in October and December and they spent Christmas at C and D's home.

44 In January 2016, C had to have an operation. B and A visited C and D for the weekend in January 2016.

45. In early February 2016 B, A and C agreed a birth plan with the hospital where it was planned that she would give birth. In February 2016, B and A attended a twenty week scan with C. At the appointment with the consultant, C informed him that she had been advised by her neurologist that for her own health the birth should take place between twenty-eight to thirty-two weeks. According to B, at C's appointment

attended by A alone in February 2016, there was no discussion in front of him about the baby being born early, although he had stepped out of the room for a short period as C possibly required an intimate examination. According to A, C had told him after the appointment about the possible early birth, although it is right to record that this issue was flagged up in the birth plan that had been agreed and discussed by the parties in early February. It appears the parties' relationship broke down soon after this. B and A were worried about an early delivery and C and D were concerned about C's health. In her oral evidence, C said that she had sought legal advice by the end of March and that she and D had made the decision to keep the then unborn baby.

45 In April, solicitors instructed by C and D wrote as follows to B and A:

> "We are instructed to inform you that, due to significant concerns, our client is no longer in agreement to continuing any surrogacy arrangement; we therefore give notice of our client's withdrawal of consent in regard to the same.
>
> Our client's position is as a result of serious concerns in relation to the information you have both provided and the truthfulness of the same, particularly in relation to your situation as a couple and in regards to both your immigration positions. These concerns have meant that our client feels that it would not be in the child's best interests to be placed and instead should remain with her, the birth mother.
>
> We would ask that you respect our client's decision and to confirm, therefore, that, upon receipt of this letter, you are not to contact our client directly or indirectly, attend at her property, any address, etc. or to make any posts about her or members of her extended family on social media."

46 That letter was responded to by C and D's solicitor stating as follows:

> "Our clients are obviously very distressed and upset that your client is intending that the baby that she is carrying remains with her after her birth. They do not understand why your client has reached the conclusion that it would not be in the best interests of the baby to be brought up by their biological parent and our clients do not agree that the baby should remain with your client with whom she has no biological relationship. Our clients have always been enormously grateful to your client for helping them with their wish to start a family and do not at all seek to minimise the role that your client has played in this.
>
> Although our clients will not be the legal parents of the child at birth, as the biological parent they wish to be informed about the birth of their

daughter. Given your client's position, can you please confirm as a matter of urgency and in any event not later than 4pm on Friday 6th May whether your client would be willing to give an undertaking to our clients to inform them:

- whether there is a plan to induce labour early in view of your client's health issues;
- when she goes into labour; and
- when the baby is born.

Our clients have always had a relationship with the midwife. In the event that your client is not willing to speak to our clients, then can you confirm that she would give her agreement to them contacting the midwife for information about the birth only.

Unless we receive confirmation from you that your client is willing to give this undertaking then we will have no alternative but to advise our clients to make an application to the court. This is a course of action which our clients are loathe to take and they hope that matters can be resolved without the necessity to do so.

With regard to the arrangements for the child after birth, our clients would very much hope that it will not be necessary to attend court on an urgent basis and would wish to resolve matters amicably if at all possible."

The letter then refers to the benefits for all parties of attending mediation.

47 C and D's solicitors respond:

"We write further to your letter dated 4th May 2016.

We confirm that we have taken further instructions relating to the contents thereof

Our client is not agreeable to provide an undertaking in the terms sought by your clients.

It is of disappointment that in no way in your letter do your clients address the concerns raised by our client. She has made her position clear and the basis for the same and, therefore, at this time is not willing to provide any further information.

> We note it is suggested that your clients have a good relationship with the midwife. Our client finds this puzzling on the basis that they have only met with the midwife on one occasion and to our client's knowledge, had very little contact with her.
>
> Our client, at this time, is not willing to attend mediation. It is not suitable, due to our client's health, for her to travel.
>
> It would be suggested that your clients give some thought to the concerns raised by our client and the considerations of the court in such proceedings in relation to the child, particularly due to the serious breaches of trust that have occurred throughout our client's pregnancy and the concerning lack of clarity of both your clients' immigration and home life circumstances at this time."

They then refer to any application to the court and they advise that they will accept service.

48 Three days later, the solicitors for C and D write again:

> "We write further to the above matter and confirm that we have been instructed by our client that, over the weekend, your clients have publicly identified her online. … We have sent the links to such pages over email with this letter.
>
> It is wholly inappropriate that your clients have made this situation public at this time when the matters are being dealt with currently by solicitors and, as of yet, they have provided no substantive response in relation to our client's concerns.
>
> The contents of the petition online … contain several untruths.
>
> We would ask, as a matter of urgency, that your client removes all petitions … until these matters have been discussed and dealt with appropriately. These public pages could put our client, and the child, at risk and are wholly inappropriate considering the infancy of the legal discussions in this matter."

49 On the following day, A and B's solicitor responds as follows:

> "Firstly, we confirm that our clients have removed the … pages that were created over the weekend. They accept that this course of action was wholly inappropriate and they apologise to your client for any distress that this may have caused her. Our clients were extremely

distressed having received your letter on 6th May, but now understand that this course of action was misjudged. These pages have been removed, they have not posted anything else on the internet and will not do so.

With regard to your client's position as set out in your letter dated 6th May, as we have said above, our clients are distressed and disappointed that your client is not willing to provide them with information about the birth of their daughter. We hope this is something that your client would be willing to reconsider.

With regard to your client's concerns about our clients' untruthfulness about their home life, situation as a couple and their immigration position, our clients simply do not understand what these concerns are and would ask your client to set them out so that they can consider these.

With regard to their lifestyle and relationship, our clients are in a genuine subsisting monogamous relationship with each other.

With regard to our clients' respective immigration positions, as your client was aware before the pregnancy, A has lived in the United Kingdom for sixteen years since 1998. He is here on an EEA visa, which expires in 2019. A has the right to apply for permanent residence in December of this year, 2016, and he intends to make this application.

B has been in the United Kingdom since 2006. In 2015, he made applications for asylum and on human rights grounds. These applications were refused in June 2015. Our client has appealed the refusal decision and this appeal hearing will now take place in July 2016. We understand that your client was aware of A's immigration position before they matched and our client informed your client in June/July 2015 that his applications were refused, shortly after the match was agreed. Our client has not discussed the details of his claim for asylum with your client; he did not consider this to be necessary at the time."

The letter then notes their position in relation to mediation.

50 Later that day, the solicitor then acting for C and D writes as follows:

"….Our client wishes to advise that the child was born at 10:53am on … weighing 5lbs 5ozs. She was born prematurely by emergency C-section. Our client has been unwell since the birth. The child also initially had Necrotizing Enterocolitis infection, this is now being treated but she remains in hospital, although is now

stable. She remains in the Special Care Unit due to the fact that she was premature, but is now feeding normally…..

> Due to our client's ill-health, we would ask that your clients respect her privacy at this time and allow her to become well enough, along with the child, before making the birth known to their extended network.
>
> Any adverse publicity in relation to the child or our client would put them at risk at this time.
>
> Our client will be willing to consider mediation once she is well enough, but we would suggest this mediation would need to be undertaken in the locality … where both the child and our client currently reside."

They then ask for an undertaking not to disclose details of the birth to the media or third parties

> "Our client is willing to provide updates in relation to the child if your clients are agreeable to keeping this matter private between them whilst other issues are determined."

Following that exchange of correspondence, the applicants issued proceedings.

51 Following the issue of proceedings, the parties have filed detailed statements. B and A have filed one joint statement. B and A have each filed four statements. C and D have filed two joint statements, C two further statements and D one further statement.

52 Much of the lengthy statements are taken up with detailed accounts of concerns either have had about the care of H by the other. Much of it is now not relevant, save that it demonstrates a continual stream of undermining comments in particular about B and A's care of H. By way of example, the most recent statement from C and D at para.19 reads as follows:

> "We remain concerned about aspects of the care that H receives when she has been with B and A and we know very little about H when she is with them. On two occasions, she has returned with greasy hair and a rash on her face and smelling of cigarette smoke. Over a four week period, she had bites on her face and body. We questioned the immediate concerns which were the bites and were told by B that they were mosquito bites and then spots. We took H to the doctor for the rash. The doctor said it was a fungal infection likely to have been bought on by H not having been cleaned properly. She prescribed an antiseptic cream. By the time H went back to B and A the following

> weekend, the rash had cleared up. C passed the cream to B and A and asked them to continue using it for another two or three days to make sure the rash was not coming back. The following Sunday when H came back to us, the rash was even worse. A said that they had used the cream and handed me the tube back. We used the cream again and the rash cleared up completely within about four to five days. We attach before and after photographs to this statement to illustrate our concerns about H's presentation."

53 The impact on B and A was significant. As B said in oral evidence,

> "I think we were hurt because it was accompanied with a statement that we should wash her at least every second day. It was hurtful to us perhaps saying that we were not washing our daughter adequately. It just hurt us to say that she was smelling like smoke and we didn't care. It was really hurtful that [C] would say that, that we would use our child in that way."

54 It is not suggested that either B or A or C and D cannot provide excellent day to day care for H. The issues in this case are much more fundamental and nuanced than that. In their oral evidence, both B and A articulated why they consider they are best placed to care for H. They both spoke warmly and with genuine affection about her. B, in particular, recognised the mistakes he had made. He said as follows:

> "We are putting the past behind us. We are focusing on our daughter. It is in her best interests that she has a relationship with mummy and daddy and sisters. I do not think badly of them at this point. I think we can create a positive image because of the amazing things she has done for us."

A little later, he said:

> "I accept I should have told them about my depression and that I should have told them more about the asylum part of my application. I am sorry I didn't do that at the time."

In relation to the petition, he said:

> "My friend deactivated the petition. You are right. We lacked extreme judgement. It was wrong that we did that."

55 A, in his evidence, spoke movingly about the impact of what they saw as the undermining comments that were made in relation to their relationship. He said:

> "We compliment ourselves, I'd say. We have different personalities. I love B to bits. I could not live without him. He is the love of my life. We try to do things. I take care of the money because he's not working. Always try to squeeze as much as we can. He likes to buy things. I try to organise the money properly. We talk about things. We have conversations about that. I think it is like every relationship, it needs to have a balance. I think we balance each other in a way that we understand each other. I understand him when he is upset. He understands me the way I act. I am sometimes bubbly, sometimes sad, sometimes grumpy. He says 'Grumpy A'. But he makes me chill out. We have a very good relationship."

56 C and D feel that they are best placed to care for H. They, too, spoke lovingly about her. The obvious love, warmth and affection they have for her was tangible. They emphasised the importance of having a large family which they can offer. They retain concerns about B's immigration status in the sense that they feel he was not sufficiently open with them about what they consider was the uncertainty of his immigration position.

57 In the initial stages of these proceedings, they asserted that the surrogacy arrangement was motivated by B and A's wish to secure their immigration status. They now accept they had some knowledge of the immigration background. That, in my judgment, is patently clear from the text exchanges in August. Their position now is that, despite the advice from the specialist immigration counsel, they remain concerned about the continued uncertainty and their limited knowledge of this at the time of the surrogacy arrangement and embryo transfer.

58 A continuing feature in this case is that they seem unable to move on and, for example, accept the apology from B and the evidence that the court now has in relation to the immigration position.

59 It is right they were not made aware of the history of the previous failed applications and the fact that B was claiming asylum. That was acknowledged by him in his oral evidence, that he should have given more information about his position and he recognised that, if he had done so, the relationship may not have foundered in the way that it did.

60 The same considerations apply regarding B's mental health history. There is a reference to it in the immigration papers. C and D state the questions they

raised should have been answered. They consider it still a risk, although perhaps not recognising the somewhat duplicitous approach bearing in mind the anxiety issues that they, too, have suffered in their household.

61 H's Guardian, Ms. Adams, has been involved since the start of these proceedings. She has prepared two detailed reports. Her first in September recommended that H should live with B and A. In that report she records her discussion with B in June about his mental health background and the support he had received to deal with his own background and the impact of the immigration proceedings.

62 She details further discussions on this topic when she met him again just prior to the hearing in September. Whilst it is right that she had sought disclosure of the report from the psychotherapist as referred to in the immigration papers during August, having discussed the matter further with him and having seen the report from the therapist who discharged him in September 2015 and the circumstances of his referral and the treatment, her assessment was that no further evidence was required. As she said in her report dated 21st September 2016 at paras.57 and 58:

> "A previous diagnosis of depression, with some suicidal ideation, is a static risk factor in terms of parenting and ability to provide consistently responsive and engaged care. When present with other risk factors such as substance misuse, social isolation and abusive relationships, risks to the child increase. I have found no evidence of these exacerbating factors in my investigation. I have however found that B has a supportive relationship and a good support network, which is likely to recognise any future deterioration in his health and ensure that appropriate support is identified.
>
> I have also found evidence of dynamic factors that further mitigate the static risk posed by what B has told me about his diagnosis. He has shown good insight into his illness, recognising the triggers and when he is unwell. This enables him to access and make sue of appropriate professional treatment in a timely way, and to engage with treatment."

63 In essence, she concluded that he demonstrated he could access the appropriate support, had good insight and had a settled lifestyle. She did not consider it was necessary then for any further evidence to be obtained addressing his mental health background.

64 In that report she also flagged up her concern about the level of criticisms, mainly by C, of the care provided by the applicants and how it was undermining them. In the preparation of her report, she spent considerable

time in both homes. She did not see any evidence of an imbalance in the relationship between the applicants as described by C. She considered they communicated openly with each other and their wish to have a child had been planned and well researched. Her observations of the care provided by the applicants to H was, she recorded, very positive.

65 At the end of her report her recommendation was that she recognised that H's physical, emotional and educational needs could be met by any of the parties but she considered H's more complex emotional needs, as a child born of these circumstances, may not be fully met if she lived in the C and D's household. She considered B and A were more likely to promote C and D positively to H and their role in her life. H came into the world as a result of B and A's wish to have a child and to raise her in their loving relationship. Ms. Adams was worried about potential positive knowledge of H's early life being lost in messages about her fathers having a baby to secure their immigration position if she remained with C and D.

66 She was also concerned about C and D failing to accept B as a valid parent in H's life. They did not agree to him having parental responsibility. Their belief was that A should assert himself as the genetic father and it underlies a sense that they did not regard B as having an equal role in H's life as a non-genetic parent in a gay relationship.

67 H's background is that of a child with intended gay parents with genetic relationships with A, who is from country Y, and a Spanish egg donor. Ms. Adams was concerned about C and D's lack of appreciation of this difference. They considered her difference from an adult view point and not from the child's. She recognised that H had much to gain from being able to maintain relationships with her birth mother and the wider birth family, including her siblings. She set out the need for H to have primary attachment figures whilst maintaining familiarity with C and D's family without frequent separation from her main carers. At that stage, she suggested a frequency of visiting contact every three weeks with Skype contact in the intervening period. She did not rule out longer periods of contact once H was about two years old.

68 In her second report, the Guardian reports on her updated discussions with all the adults and her view that the report from Dr. S supported her assessment that B's history of depression posed no risk to his ability to parent well and she did not consider his past recreational drug use as a risk factor. She remained concerned about the continuation of what she saw as C and D's undermining behaviour, questioning the care given to H when with B and A, their bargaining about finding a resolution which was dependent on how much time H spent with C and D's family, which, in her view, lacked a child-focused approach.

69 Her recommendation remained the same, but she revised her position regarding the level of contact. In her second report at paras.28-30, she said as follows:

> "I now believe that the tendency of C and D to use H in the proceedings to achieve their goals, and consistently undermine the role of her genetic father and his partner in order to do the same, would result in an emotionally harmful situation for H if she were to grow up moving regularly between these two homes.
>
> In C and D's home, I fear that H would be at risk of hearing messages about B and A that would undermine the story of her birth and early life. There is a real risk that as H becomes older, information about the lifestyle of B and A and their care of her would be obtained from her directly by C and D. In that way, she would become the conduit for conflict. I would worry that H would then be likely to experience anxiety and the sense of burden that children living with conflict often experience.
>
> I therefore stand by my original recommendation that H should live with B and A, but believe that her need to know her birth family should be balanced against her needs for emotional stability. I therefore think that H should spend time with her birth family six times a year."

70 In reaching her recommendations, she recognised the emotional impact and loss this will have on C and D as well as P. At para.35, she said as follows:

> "B and A's disappointment that they are unable to have the relationship with C and D they had hoped indicates their appreciation of H's needs to have knowledge of her birth mother and her wider birth family. Their appreciation of this makes me confident that they will ensure that H has knowledge of C and D's family, and that they will facilitate her time with them as she grows older in a way led by H's needs."

71 Regarding her assessment of B and A's disappointment in not having the relationship they had hoped for with C and D, she says, indicates their appreciation of H's need to have knowledge of C and D and the wider birth family.

Discussion and Decision

72 Ms. Fottrell and Mr. Wilson in their closing submissions submit that to seek to characterise this case as being one that is analogous to one involving separated parents is unhelpful and fails to recognise the features in this case of:

(1) The a-typical family structure in which she has four parents comprised of two families cannot be overlooked.
(2) One family is a same-sex family.
(3) The genetic tie which exists with one parent only.
(4) The gestational relationship is of some significance.
(5) The respondents alone are the legal parents.
(6) A key element of the factual history of this case is the parties originally intended this to be a surrogacy arrangement.
(7) This is a group of adults who do not have a shared family experience with each other.

I agree with that analysis. This lack of a shared family history has had an impact on the parenting of H. On one level, they had and continue to have what Ms. Fottrell has described as a "faux intimacy and closeness on social media", but in a fundamental way their relationship was and is superficial. This lack of knowledge of each other was exposed with the difficulties they encountered in their relationship earlier this year. It readily exposed their limited knowledge of each other and resulted in C and D making the decision they did to keep H, taking knowing and deliberate steps to secure her place with them legally and physically before informing B and A that H had been born. In my judgment, this was a deliberate and calculated course of conduct decided on by C and D prior to and at the time of H's birth.

73 Their entrenched position that H should be with them has, to a large extent, resulted in their inability to move on in their views about some of the issues that this court has had to consider, in particular, the immigration and mental health issues.

74 They had sought legal advice and planned a course of conduct that secured their position with H whilst informing B and A that this was all done at a time when C said she was extremely ill, but obviously not so ill that she was not able to instruct her lawyers to write the letters I have just outlined.

75 From then on, in my judgment, they continued to put obstacles in the way of B and A seeking to establish their emotional and legal relationship with H. The requirements they demanded to establish contact and the way they used the grant of parental responsibility to undermine B's position and control the way A exercised it was revealing as to their true wishes and feelings. It is of note that it took until 6th June before B and A were able to have face to face contact with H, which co-incidentally was the first anniversary of them actually meeting face to face on 6th June 2015.

76 The events that took place earlier this year, as I have said, demonstrated a lack of flexibility by C and D. Once they took a position, they maintained it whatever additional information or further evidence demonstrated to the contrary. Their position about B and A being primarily motivated to enter into this arrangement to secure their immigration position in reality remains their view.

77 Despite the careful assessment by Ms. Adams which was independently supported by Dr. S's report, they could not revise their position that due to his mental health background B remained a risk as a future carer for H. When C was asked if mental health was still an issue of concern in her oral evidence, she said "I don't know if he's going to feel suicidal" without giving any recognition that some years had passed since that was an issue. When C was asked whether she accepted Dr. S's conclusions, she said she did. She was then asked whether she recognised that B would seek help, she said "No. Because not everybody gets help".

78 This characteristic was also evident in the way they viewed the Guardian's position. She questioned their position at an early stage, in the initial stages recommending more contact than they wished. In their mind that meant she was against them without being able to stand back and consider the views of an experienced professional. This modus operandi of taking a position and sticking to it is a recurring theme of the way they operate. They have limited or no capacity to resolve disputes, to negotiate their way through difficulties. Their rigidity in deciding to keep H effectively justified the position they have taken, irrespective of the way the events have developed, seriously risks them not being able to give an accurate and balanced view to H about her circumstances and background.

79 The contrast between the communication on social media and the contents of the statements is stark. In her oral evidence, C's usual refrain about dealing with any difficulties is that she states "We would sit down and discuss it", but it rang very hollow in the light of recent events. For that to work, there has to be confidence and mutual respect in the adult relationships and a willingness to recognise changing information. That has not been apparent to date, although I recognise that the parties have been immersed in what has been extremely difficult litigation.

80 A feature of this case is that when more information is asked for and provided, there is no recognition of what it provides, and it usually generates further requests for information. This is illustrated by the response to both the immigration advice and the report from Dr. S. Despite the contents of these reports, C and D's position regarding immigration and mental health issues remain. They cling on to what they see as the lack of candour at the beginning

of their relationship with B and A as continuing to justify their position to keep H in their care. The repeated assertion that they do not know who B and A are, must be evaluated and considered in the context of the speed with which all four adults entered into this agreement, in effect, within days of first speaking. As Ms. Fottrell observes, "All bear the consequences and the responsibility for that".

81 This fixed way of thinking is also evident in the aftermath of the breakdown of communication between the parties. Both C and B posted what can only be described as ill-advised posts on Facebook. B and A recognised this and apologised. B and A sought to restore communication with C and D through the sensitive texts they sent in March followed by flowers and a card in early April. The response from C and D was silence. They shut down. Even in oral evidence, they were unable to reflect on what had taken place. D, despite not being a fan of social media and preferring face to face meetings, took no initiative to try and restore contact. The reality was C and D had made their decision to keep H.

82 What was clear from the oral evidence was the impact of the criticism on B and A. As they so graphically described, they lived in fear of H being returned with a spot or rash. They felt undermined by the constant criticism of their care, the greasy hair, enquires such as "What's that on the clothes?". It got to the stage where they would always return H in what she arrived in as they feared anything they chose would be the subject of comment or criticism.

83 The undermining of B and A's position goes further. In oral evidence, C said, "The real benefit of H living with them is that she will have the benefit of living in a big extended family which will give her stability". This could be construed as conveying a message that B and A and their family are somewhat less stable. In evidence, she said, "Because we have children. Everything we have ever done or worked for has been for our children. Not saying that they're not caring parents, just feel we can offer so much more. Family. A lot of family around her". If H lived with C and D, there would be a real risk that she would pick up on this in a way that would undermine her relationship with B and A.

84 Ms. Markham in her closing submission launches a detailed critique of the Guardian's analysis. She seeks to question whether she has approached her assessment in a balanced way and her ability to be able to express views on attachment. I reject those criticisms for the following reasons: Ms. Adams is an extremely experienced Guardian. She qualified in 1995. She had ten years' experience as a probation officer, and she has considerable experience involving assessment with mental health issues. Her analysis regarding the need for children to develop secure primary attachments and the consequences

if they do not is clearly something she is well qualified to express a view on. In paras.85 and 86 of her first report, she says as follows:

> "However, I have considered H's particular attachment needs as she approaches six months old. As outlined earlier, she will soon form selective attachments. During the ages of nine to twenty-four months, children demonstrate anxiety when separated from primary attachment figures. Although they need to explore and meet other people, they are able to do this with their attachment figures nearby to act as a secure base for them to return to.
>
> I take the view that H's developmental needs require her to maintain familiarity with C and D without frequent separations from her main carers. I would suggest family days out together, or a meeting where she could spend a few hours in the care of C and D. The frequency of this would have to take into account practical considerations, but should not be less than once every three weeks."

In her second report at para.31, she says as follows:

> "I previously set out my reasons as to why I did not believe that H should stay overnight with C and D's family until she is older. I based my thoughts upon H's attachment needs. It is significant that H has now passed the age of six months with frequent changes in carer. She needs to go forward with stability to allow her to develop trusting relationships with consistent caregivers."

85 It was clear from her written reports and her oral evidence she has found reaching a decision in this case extremely difficult. As she said and when reflecting on matters before writing her first report, it would have been very easy to recommend that H stayed with C and D. She was obviously well settled there, they are experienced parents and that would have been the easy route. But in her professional judgement such a course did not accord with her assessment of H's welfare needs for the reasons that she gave, in particular, the benefit of H of living in a home which reflects H's genetic heritage, the pattern of undermining undertaken by C and D and the risks that poses to H and the ability of each set of parents to promote a positive image of the other to H.

86 In her first report at para.21, she notes as follows:

"All the adults in H's life agree that H strongly resembles her genetic father, A. He is from country Y, and she shares his skin colour and the colour of his eyes and hair, as well as having similar facial features.

A little later in the same report, she states:

> "H's background is that of a child with intended gay parents with genetic relationships with A, who is from country X, and a Spanish egg donor."

She also recognised that she had two English parents who were in a heterosexual relationship. She considers that, if H remains with C and D, H will be recognisable as being different from other members of the family and may begin to feel uncomfortable having always to account for that difference when she meets people. She would be the only non-genetic child in C and D's family.

87 Ms. Adams described in both her report and her oral evidence her concern that, when she discussed these matters with C, there was no sense that she understood the position from H's point of view. She remained focused on that, really, if she did not see it as a problem, it would not be an issue for H. Ms. Adams considered on balance H would gain more from living in a home reflective of her genetic heritage. She recognised the steps C had taken to address this issue, but she did not think it compares to what she describes as "a lived experience".

88 Ms. Adams also considered the issue of undermining had grown since her September report, which resulted in her changing her recommendation about the level of contact. There is ample evidence to support this conclusion, which I agree with. The reality is that, despite the assessment of Ms. Adams and the report of Dr. S , C and D still consider B's mental health to be a risk to H's future care, even though that is not supported by the independent evidence. If this message were conveyed to H, it would be damaging.

89 A concern of Ms. Adams, which I share, is that in the oral evidence C kept saying "we would sit down and discuss the issue". But the evidence to date has shown that simply has not been possible, particularly if it is something that C does not agree with. In D's evidence, he was still clear that he feels that they should see the psychotherapist's report. C's oral evidence was that "You can never be sure about mental health issues", which leaves the issue lingering in an unhelpful way.

90 This issue of undermining suggests or indicates impacts on where H lives and that a high frequency of contact would leave the door open to increased conflict. Ms. Adams fears that, if H remained in C and D's home, she would be at risk of hearing negative messages about B and A that would undermine the story of her birth and early life. The concerns about B and A still held by C

and D are not far below the surface and any conflict or issue would rapidly bring them to the fore. There is no sense that C and D have the capacity to change their underlying views about B and A.

91 If H lived with B and A, Ms. Adams' assessment, which I agree with, is that she did not consider they would undermine H's view of and relationship with the C and D. In her view, despite the difficult position they have been put in, they have continued to speak positively of C and D's family in the knowledge of what they mean to H in terms of her identity.

92 In my judgment, Ms. Adams' recommendations are balanced, well thought out and rationalised. She has factored into her recommendation the impact of the loss of a sibling relationship and sets out how that relationship can be maintained.

93 Having considered the competing considerations carefully, I have reached the decision that H's welfare needs - which are the court's paramount consideration - are best met by H living with B and A. I have reached that conclusion for the following reasons:

(1) That placement, in my judgment, will best meet her identity and needs. I accept the rationale set out by Ms. Adams; that is H's identity in the wider sense of her being a child of intended gay parents with a genetic relationship with A, who is from country X, and a Spanish egg donor. It would be for her a lived experience on a day to day basis which would meet her welfare needs.

(2) There is no doubt B and A can meet H's day to day physical, emotional and educational needs. A's evidence, in particular, about talking and singing to her in his native tongue was particularly poignant. His evidence showed how he was attuned to H's needs.

(3) In my judgment, B and A will best be able to promote the relationship with C and D. They have remained positive about their significance in H's life, despite the difficulties there have been in the adult relationships.

(4) I recognise H will lose the sibling relationship and C and D's' family contact, but that has to be balanced with the other considerations and their relationship will clearly be maintained through contact. I consider it unlikely that C or D will significantly change their views about B and A's care and that the undermining is likely to continue which impacts adversely on B and A's ability to provide safe, secure and stable care for H.

94 I agree that the management of the day to day parental responsibility should be as set out in para.2(iii) of the closing submissions of Ms. Fottrell. Those arrangements will give security in relation to the day to day planning and management of H's life.

95 In relation to contact, I accept the recommendation made by Ms. Adams that contact should be on six occasions a year. I agree with Ms. Adams' analysis that this will enable H's attachment to her primary carers to consolidate. Bearing in mind the history any higher frequency at this stage risks further undermining of B and A's ability to care for H which in turn puts H at risk of future emotional harm. I am satisfied B and A will promote H's relationship with C and D and their position in H's life. There should be discussions between the parties after this judgment regarding any arrangements for skype or indirect contact between contact.

96 I endorse the change of name to H. That will meet her welfare needs in terms of going forward as to where she is going to live.

97 I acknowledge that this has been an extremely difficult hearing for all concerned and I end where I started. I hope that everyone will now be able to look forward and work in a way that meets H's welfare needs, which, I am sure, with the love that they have all expressed for her, they will be able to do.