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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2007

Before :

Mr Justice McFarlane

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Re G (Surrogacy: Foreign Domicile)

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Darren Howe (counsel for the **child's guardian ad litem)**

Hearing dates: 21st March 2007, 26th April 2007, 5th July 2007, 31st July 2007.

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FINAL JUDGMENT

Mr Justice McFarlane

Introduction

1. This judgment is being handed down following the conclusion of proceedings relating to the parentage and future upbringing of a baby girl, M, who was born on the 29th September 2006. M was conceived as a result of a surrogacy arrangement made between a married couple, Mr and Mrs G, and the surrogate mother, Mrs J. Such non-commercial surrogacy arrangements are not illegal and, whilst not frequent, form an accepted means whereby a child may be brought into being for the benefit of married couples who have encountered difficulties in conceiving a child without intervention.

2. Since 1994 the law has provided for the commissioning parents to achieve the status of full parents of a child born following such a surrogacy arrangement by obtaining a 'parental order' under Human Fertilization and Embryology Act 1990, s 30 [HFEA 1990, s 30]. A parental order, if granted, is of like effect to an adoption order with the consequence that the child is for all purposes treated in law as a child of the marriage and not a child of any other person. Since 1994 the granting of parental orders in appropriate cases has become an accepted and unremarkable aspect of the work of the family court.

3. The terms of HFEA 1990, s 30(3)(b) make it plain that one or both of the commissioning couple must be domiciled in a part of the United Kingdom or in the Channel Islands or the Isle of Man. What renders the case of young M remarkable, and justifies this detailed judgment, is that Mr and Mrs G, the commissioning parents, are Turkish nationals who are domiciled in Turkey. As a result, it is not legally possible for them to achieve the status of M's parents by means of a parental order.

4. The procedural history of this case, to which I am about to turn, is a cautionary tale which highlights the legal, emotional, and not least the financial consequences of surrogacy arrangements which are undertaken in this jurisdiction involving commissioning parents who are not domiciled in the UK. The law relating to the removal of children from the UK for adoption overseas is both complex and strict. This case has therefore involved some seven court hearings in the High Court in order to pick a way through the legal maze to achieve the most effective legal arrangement under which the commissioning parents can remove M to their home in Turkey in the hope of adopting her under Turkish law. The process has required, as a matter of law, a full social-work assessment by the relevant local authority and by a children's guardian appointed by CAFCASS. Expert legal opinion has been required as to the current state of Turkish law. I am advised that the total cost of the social work and legal input in unravelling the consequences of the arrangement that led to M's birth is just short of £35,000.00. That sum falls to be paid entirely by the British tax payer, the court being satisfied, in the circumstances of this case, that it would not be appropriate to seek to re-coup any of those costs from Mr and Mrs G, Mrs J or COTS, the surrogacy agency who assisted Mr and Mrs G in establishing the arrangement.

5. In emotional terms, the nine months that it has taken to resolve matters before the English Court will have undoubtedly caused stress and instability for Mr and Mrs G and consequently, M, at the very time when they should have been free to settle down to their new family life and devote all their emotional energies to the task of nurturing a young baby.

6. The court has been told, and accepts, that, hitherto, from time to time couples who are domiciled abroad have participated in successful surrogacy arrangements with UK surrogate mothers and have achieved a parental order with respect to the resulting child under HFEA 1990, s 30. If that is indeed the case, then such orders must have been made outside the jurisdiction of the court, which, as I have indicated, is confined to applicant parents where one or both is domiciled in the UK, Channel Islands, or Isle of Man. It is to be hoped that the publication of this judgment will see an end to such unlawful parental orders being made.

Background

7. Mr and Mrs G are both Turkish nationals who were married in 1997 in Turkey. They are domiciled in Turkey, but Mr G has from time to time worked in other Eastern European countries.

8. Following difficulties that they had encountered in conceiving a child, Mr and Mrs G approached a British surrogacy agency, COTS (Childlessness Overcome Through Surrogacy), in September 2004. As a result of that contact they were introduced to Mrs J and ultimately signed a Memorandum of Agreement with her on the 10th February 2005 under which she agreed to act as a surrogate mother for them.

9. Mrs J is a married woman. She separated from her husband, Mr PJ, in about 2004; however, the couple have not divorced and remain legally married. Some short time after the separation Mr PJ left England and took up residence in Spain. As will become apparent the position in law of Mr PJ and the potential for him to be regarded as the legal father of M has been an added difficulty in this case and has required detailed consideration by the court.

10. Following a number of unsuccessful attempts arranged through an IVF clinic, M was conceived using sperm from Mr G and an egg from Mrs J through a process of insemination carried out in Mrs J's home. M was born on 25th September 2006. Shortly before the birth Mr and Mrs G came to England and rented a flat in the locality. M was a healthy baby and when ready for discharge from the maternity hospital was given over by Mrs J to Mr and Mrs G. Since that time M has remained in the full time care of Mr and Mrs G either in England or, with the court's agreement, back in their home state of Turkey.

11. M's birth was registered at the local District Registry. Mrs J was named as the mother and Mr G was named as the father. Two days later Mr and Mrs G filed their application for a parental order under HFEA 1990, s 30. The application included the incorrect assertion that Mrs and Mrs G were domiciled in the United Kingdom.

12. Following an initial hearing before the local magistrate's court, where the international dimension of the case was appreciated, the proceedings were transferred to the county court and thereafter to the High Court. A CAFCASS officer, Mrs HC, was initially appointed as the 'parental order reporter' but was subsequently appointed as M's guardian ad litem in the proceedings under FPR 1991, rule 9.5. A solicitor was appointed to act on M's behalf on the instructions of Mrs HC. It is, at this stage, appropriate to record that the court has been very greatly assisted by the work of that solicitor and counsel in achieving an appropriate resolution of these proceedings.

Parental Order

13. The statutory basis upon which a court may make a parental order is set out in HFEA 1990, s 30(1)-(7) in the following terms:

> (1) The court may make an order providing for a child to be treated in law as the child of the parties to a marriage (referred to in this section as "the husband" and "the wife") if-
>
> (a) the child has been carried by a woman other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination,

(b) the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo, and

(c) the conditions in subsections(2) to(7) below are satisfied.

(2) The husband and the wife must apply for the order within six months of the birth of the child or, in the case of a child born before the coming into force of this Act, within six months of such coming into force.

(3) At the time of the application and of the making of the order-

(a) the child's home must be with the husband and the wife, and

(b) the husband or the wife, of both of them, must be domiciled in a part of the United Kingdom or in the Channel Islands or the Isle of Man.

(4) At the time of the making of the order both the husband and the wife must have attained the age of eighteen.

(5) The court must be satisfied that both the father of the child (including a person who is the father by virtue of section 28 of this Act), where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

(6) Subsection(5) above does not require the agreement of a person who cannot be found or is incapable of giving agreement and the agreement of the woman who carried the child is ineffective for the purposes of that subsection if given by her less than six weeks after the child's birth.

(7) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife for or in consideration of-

(a) the making of the order,

(b) any agreement required by subsection(5) above,

(c) the handing over of the child to the husband and the wife, or

(d) the making of any arrangements with a view to the making of the order,

unless authorised by the court.

14. HFEA 1990, s 30 therefore provides a number of conditions which must be met before a court has jurisdiction to make a parental order. In the present case all save two of the conditions are satisfied on the following basis:

a) This was a partial surrogacy arrangement involving an embryo created by the sperm of the commissioning husband and the egg of the surrogate mother [HFEA 1990, s30(1)(a)(b)];

b) Mrs and Mrs G applied for the order within six months of the birth of the child [HFEA 1990, s 30(2)];

c) At the time of the application the child had her home with Mr and Mrs G [s 30(3)(a)];

d) Both Mr and Mrs G were over the age of 18 [HFEA 1990, s 30(4)];

e) There was no suggestion that money had changed hands in contravention of HFEA 1990, s 30(7).

15. The first condition that required closer consideration was s 30(3)(b) regarding domicile. At an early hearing it was conceded that the very short time that Mr and Mrs G had spent staying in England in order to facilitate the surrogacy arrangement and take over the care of M could not have possibly led to the conclusion that they had become domiciled in the UK. HFEA 1990, s 30(3)(b) is in mandatory terms: 'the husband or the wife or both of them, must be domiciled in a part of the United Kingdom or in the Channel Islands of the Isle of Man.' That being the case it was impossible for Mr and Mrs G to come within s 30 and achieve a parental order in their favour.

16. The second condition that raised substantial difficulties, and might not have been satisfied, but which had not apparently been considered by Mr and Mrs G, Mrs J or COTS prior to undertaking the surrogacy process, relates to the surrogate mother's husband, Mr P J and his potential to derail the granting of a parental order if he were found to be M's father (which might well have been the case) and had failed to co-operate with the court process (which was indeed the case). I will return to this issue at a later stage.

The Role of COTS

17. It will be apparent from the exposition that I have given that the issue of Mr and Mrs G's Turkish domicile presented an insurmountable hurdle to their ability to achieve a parental order and that that fact would, or at least should, have been obvious before they embarked upon the surrogacy arrangement. The surrogacy arrangement was facilitated by COTS and it has therefore been necessary to understand more of the role of COTS and, in this regard, the court is grateful to the support worker from COTS who has attended court ('Mr Z'] and has provided an explanation of their activity in this case.

18. COTS is an organisation run on very limited resources by a group of volunteers. Their aim is to try to help childless couples to overcome childlessness through surrogacy. COTS sees itself as a supporting organisation, the role of which is to induct into its membership, on the one hand, women who wish to be surrogate mothers, and, on the other, couples who wish to have the benefit of a surrogacy arrangement. COTS arranges for a medical examination of the respective parties and undertakes a criminal records check. In the case of foreign nationals, COTS will ask the parties to cooperate

in obtaining information from their country of origin. Once these various checks are completed, COTS passes the details of couples and surrogates on to a different agency, 'Triangle', which actually puts couples in touch with surrogate parents.

19. The COTS support worker, Mr Z, explained to the court that, prior to the present case, COTS had considered that parents in the position of Mr and Mrs G would qualify for a parental order and could simply take a baby born through surrogacy back to Turkey without any difficulty. He explained that it had happened, to his knowledge, in some twenty cases, involving different countries in the past. If this account is right, and I have no reason to doubt it, then it would seem that no court in a COTS case has previously been alerted, or has alerted itself, to the domicile requirements of s 30.

20. The fact that the domicile requirement of s 30 did not feature as an issue in COTS appraisal of the case was underlined by the fact that even when the support worker came to court to explain the position at a late stage in these proceedings he did not refer to domicile in the written document that he had prepared for the court. COTS perspective was that the difficulty in this case arose from the Adoption and Children Act 2002 s 92 which creates a number of criminal offences relating to adoptions (for example, asking a person other than an adoption agency to provide a child for adoption or offering to find a child for adoption). Following the implementation of the 2002 Act in December 2005, COTS has decided no longer to provide help for overseas couples, fearing that in doing so it may render itself liable to prosecution under those provisions. Whilst COTS may be right in regarding the impact of the 2002 Act in this way, their response misses the point that for some years babies have been born for foreign commissioning parents, who by reason of their domicile are unable to achieve a parental order with respect to the child.

21. The Mr Z was keen to stress that none of the volunteers at COTS is legally qualified and that both potential surrogate mothers and commissioning parents are advised by COTS to seek their own legal advice before embarking upon any arrangement. He did not, however, believe that either party did so prior to M's conception in the present case.

22. Since concluding this case involving M and Mr and Mrs G, this court has become involved in hearing another international surrogacy case that was also facilitated by COTS. The correspondence in that case between COTS and the commissioning parents, who are Austrian nationals domiciled in Austria, provides more information as to the role of COTS, in particular:

    i) The COTS membership form has specific rates for commissioning couples who are 'living abroad'.

    ii) A COTS worker (who is a different person from the worker who assisted the court in M's case – 'Ms Y') wrote in November 2004 stating that COTS has 'helped many couples from Europe, and currently have couples from France, Greece, Norway, Belgium and Germany going through surrogacy'.

    iii) Ms Y does purport to give legal advice (in December 2004) and correctly states that the couple 'cannot apply for a Parental Order as this is only for couples domiciled in the UK'. Ms Y goes on to advise that the couple will have to apply for adoption in Austria.

iv) In May 2005 Ms Y advised that it is not unusual for surrogates to have to sign documents giving permission for the couple to take the child abroad. COTS offers to advise upon this step when the time comes.

v) In September 2006 (after the baby had been born for the Austrian couple) Mr Z took over as the COTS support worker on that case and, contrary to the advice given earlier by Ms Y, advised the couple that 'as long as you can satisfy the Parental Order Reporter that you are living in the UK when you make your application for a Parental Order, you do not need to do anything else'. He also repeats Ms Y's advice that the couple can take the baby to Austria at any time they wish, provided that they have a passport and a letter from the surrogate mother giving permission.

23. It would be easy, but to a degree unjustified, to single COTS out as being responsible for bringing about this surrogacy in circumstances that it knew, or should have known, could not possibly result in a parental order and thereby creating the situation that has required substantial court intervention and the expenditure of some £35,000 of public money. I readily accept that COTS is a well intentioned voluntary organisation whose aim is to assist couples through surrogacy. It will have been encouraged in its erroneous view of the legal requirements in foreign cases by the fact that parental orders had been successfully achieved in a number of similar cases, without any query being raised by the court. That being said, COTS must at least shoulder part of the responsibility for the very unsatisfactory outcome (in legal terms) that they assisted in creating.

24. The documents now available to this court from the Austrian case call into question what the court was told about COTS not giving legal advice and demonstrate one COTS worker giving correct advice as to the inability of foreign couples to apply for a Parental Order, whilst another worker maintained the erroneous advice that they could.

25. Of more concern is the understanding that court now has as to the scale of COTS involvement in cases where the commissioning couple are domiciled overseas. It would seem that not infrequently COTS has been involved in facilitating a situation in which children are born in this country and then taken abroad for the purposes of adoption either under a Parental Order made on erroneous grounds or on the basis that the surrogate mother has given her written consent for the child to travel abroad.

26. COTS are not correct in understanding that the implementation of the ACA 2002 made it unlawful for the first time for a child to be taken abroad for adoption. It was unlawful to do so under the previous legislation. Adoption Act 1976, s 56(1) stated:

> 'Except under the authority of an order under [AA 1976, s 55] … it shall not be lawful for any person to take or send a child who is a British subject … out of Great Britain to any place outside the United Kingdom, the Channel Islands or the Isle of Man with a view to the adoption of the child by any person, and any person who takes or sends a child out of Great Britain to any place in contravention of this subsection, or makes or takes part in any arrangements for placing a child with any person for that purpose, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding level 5 on the standard scale or to both.'

27. The traffic in young babies for adoption between one country and another is rightly now the subject of very strict control and is only authorised after proper and detailed scrutiny by the social services and other authorities. It is therefore a matter of significant concern that COTS has, albeit naively, been involved in the activities that I have described which are, and have long been, outside the law.

28. For an agency working in the surrogacy field not to be aware of one of the basic requirements needed to obtain a parental order is a matter of some real concern. For the agency to be unaware until 2006 that it was unlawful for a British child to be taken abroad to be adopted (unless the UK court had so authorised) is a matter of very grave concern indeed.

29. The court's understanding is that surrogacy agencies such as COTS are not covered by any statutory or regulatory umbrella and are therefore not required to perform to any recognised standard of competence. I am sufficiently concerned by the information uncovered in these two cases to question whether some form of inspection or authorisation should be required in order to improve the quality of advice that is given to individuals who seek to achieve the birth of a child through surrogacy. Given the importance of the issues involved when the life of a child is created in this manner, it questionable whether the role of facilitating surrogacy arrangements should be left to groups of well-meaning amateurs. To this end, a copy of this judgment is being sent to the Minister of State for Children, Young People and Families for her consideration.

Who is M's Father?

30. The foreign element was not the only complicating factor in this case. Mrs J, the surrogate mother, remains married to her estranged husband, thus raising the potential for Mr PJ to be considered in law as the father of the surrogate child.

31. The effect of HFEA 1990, s 27(1) is that the woman who has carried a child as a result of placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child. Thus Mrs J is to be treated as M's mother for all present purposes.

32. At common law only the man whose sperm fertilised the egg can be the resulting child's legal father, save where the woman is married and the presumption in favour of her husband being the father applies and is sustained. In the present case, it is established that Mr G is the genetic father and that Mr PJ played no part in the conception, thus at common law Mr G is the father of M.

33. The question of paternity in a surrogacy case does not, however, end with consideration of the common law position; the statutory provisions in HFEA 1990, s 28 displace and override the common law position. HFEA 1990, s 28(2)-(5) provides as follows:

> (2) 'If –
>
> a. at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was a party to a marriage, and

b. the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,

then, subject to subsection (5) below, the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).

(3) ….

(4) Where a person is treated as the father of the child by virtue of subsection (2) or (3) above, no other person is to be treated as the father of the child.

(5) Subsections (2) and (3) above do not apply –

a. in relation to England and Wales and Northern Ireland, to any child who, by virtue of the rules of common law, is treated as the legitimate child of the parties to a marriage,

b. … (applies to Scotland only), or

c. to any child to the extent that the child is treated by virtue of adoption as not being the man's child.'

34. Applying s 28 to the present case, Mr PJ, the estranged husband, will be treated as M's father 'unless it is shown that he did not consent to the placing in [his wife] of the embryo or the sperm and eggs or to her insemination (as the case may be)'. It has therefore been necessary for this court to investigate the issue of whether or not Mr PJ consented to these arrangements.

35. Mr PJ is now based in Spain and has failed to engage in the process of providing information to the court and the process of investigating the question of consent has therefore been protracted.

36. Mrs J's account was that Mr PJ was aware of her general intention to act as a surrogate mother and had no objection to her doing so. He was not aware of the actual surrogacy procedure that led to M's conception at the time and therefore was not in a position either to consent or not consent to the particular arrangement.

37. In the absence of any communication from Mr PJ, despite a number of requests for him to respond, and on the basis of Mrs J's evidence, at an earlier hearing I made a declaration to the effect that Mr PJ did not consent to his wife's insemination. Pursuant to s 28, the effect of that declaration was that the common law position applied and Mr G is to be treated for all purposes as M's father.

38. The approach of COTS to the issue of whether or not Mr PJ consented is based upon its procedures and those of the IVF clinic that was involved during the early, unsuccessful, attempts at conception. COTS say that, for there to be valid consent, Mr PJ would have had to be present at the 'COTS Information Meeting' and would have had to indicate that he consented to the treatment with full knowledge of the status that he would thereby have as the legal father of the child under HFEA 1990. Secondly, COTS say that under HFE Authority guidelines the IVF clinic would have

had to interview Mr PJ and obtain his written consent to the treatment. Because Mr PJ was in Spain throughout and played no part in these processes, COTS asserts that Mr PJ could not have consented to the insemination.

39. The court has not heard argument on the point and has not been expressly referred to the relevant HFEA guidelines. The submissions made by COTS on this issue, which were made at a hearing following my earlier declaration that Mr PJ did not consent, do not require determination in this case. It is however right to record that this court does not necessarily agree with the analysis suggested by COTS. Whilst the processes used at the COTS Information Meeting and at the IVF clinic may produce a situation where there is clear evidence of consent being given (where that is the case), the absence of such clear evidence does not, in my view, mean that 'it is shown that he did not consent' [HFEA 1990, s 28(2)]. The term 'consent' in s 28 is not defined in the 1990 Act and is therefore not confined to the narrow meaning argued for by COTS (express written consent given in accordance with clinic procedures and HFEA guidelines). Furthermore, in the present case the actual conception was not achieved at the IVF clinic, but as a result of a process in Mrs J's home. The wording of s 28(2) requires the court to be satisfied ('it is shown') that the husband 'did not consent'. It is therefore, in my view, necessary for the court to look more widely than simply ascertaining whether or not the husband signed a form at the clinic.

The way forward

40. The one enormously positive feature in this case is that young M is said to be an absolute delight, who is well settled in the care of Mr and Mrs G who are turning out to be fine parents. The aim of the court has therefore been to identify and establish the most effective legal structure, short of a parental order, that can facilitate Mr and Mrs G in due course adopting M in their home country.

41. In the event this was achieved by making an order under ACA 2002, s 84, but before determining upon that route the court considered the possibility of:

    a) a residence order to Mr and Mrs G with permission to take M out of the jurisdiction;

    b) a special guardianship order;

    c) a Convention Adoption Order;

    d) orders under the inherent jurisdiction.

42. In short terms it is sufficient to record that the first two of these options were rejected primarily because in each case Mrs J would remain as one of M's parents with parental responsibility for M; a status that Mrs J was keen to relinquish.

43. Mr and Mrs M's domicile and habitual residence prevent them from making an application for a domestic adoption order under English law. Consideration was, however, given to the prospect of achieving an adoption under the terms of the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption concluded in the Hague on 29th May 1993 ('the convention'). Both the UK and Turkey are member states under the convention and, under the terms of the

Adoptions with a Foreign Element Regulations 2005 (which implement the convention in English law), it might have been possible for a 'convention adoption order' to have been made by the English court that would also have been a valid adoption in all other convention countries.

44. The option of a convention adoption order was not however followed as one of the key requirements is that the child to be adopted must, at the relevant time when agreement to adoption is given, have been habitually resident in a part of the British Islands (AFER 2005, reg 50(b)). As all were agreed that it was in M's interests to be based with Mr and Mrs G in Turkey during the currency of these proceedings, the question of her habitual residence was thereby complicated. In addition the necessary reports that are quite properly required from agencies both in the UK and in Turkey before a court can make a convention adoption order, indicated that there was a potential for substantial delay.

45. Finally, in dismissing other options, the court did not consider that any orders that might be made under the inherent jurisdiction could achieve a more effective result for M than would be the case if an order were made under ACA 2002, s 84.

Order under ACA 2002, s 84

46. By ACA 2002, s 84(2) the High Court may, on an application by persons who the court is satisfied intend to adopt a child under the law of a country or territory outside the British Islands, make an order giving parental responsibility for the child to them.

47. In addition to granting parental responsibility to the proposed adopters, an order under s 84 has the effect of terminating the parental responsibility of any other person (in this case, Mrs J).

48. In order to qualify applicants for a s 84 order must be neither domiciled nor habitually resident in England and Wales and the child must have had her home with the applicants during the preceding 10 weeks. Mr and Mrs G circumstances plainly met those requirements at the time that they issued their application under s 84.

49. In accordance with Family Procedure (Adoption) Rules 2005, rule 29, before the court could consider making a s 84 order in this case it was necessary for the court to receive a report from the relevant local authority setting out in full detail the circumstances of the child and the applicants. In addition the court had the benefit of a report from the M's guardian ad litem, Mrs HC. In the event those two reports were very favourable and Mrs J continued to support the making of an order. The court requested and obtained a report from an expert in Turkish law, who confirmed that the s 84 order would be recognised in Turkey and that, in the circumstances of the case, the couple would be likely to be able to achieve an adoption order in Turkey in due course.

50. In accordance with ACA 2002, s 1, this court must afford paramount consideration to M's welfare throughout her life when considering whether or not to make a s 84 order. This judgment is concerned with procedural matters and it is thus merely necessary to record that this court had no hesitation in holding that the making an order under ACA 2002, s 84 was indeed in M's best interests and an order granting

Mr and Mrs G parental responsibility was made with the aim of facilitating M's subsequent adoption by them in Turkey.

Conclusions

51. The purpose of drawing these various matters together within this judgment is to try to ensure that lessons are learned for the future and that the needless stress and public expense that have been features of this litigation are not repeated.

52. I would suggest the following are the principle matters to be borne in mind in future:

a) Non-commercial surrogacy arrangements where neither of the commissioning couple is domiciled in the UK, whilst not illegal, are to be discouraged on the ground that it will not be open to the commissioning parents to apply for a parental order under HFEA 1990, s 30 with respect to the child;

b) Agencies involved in facilitating surrogacy arrangements, whether they are statutory or run by well motivated volunteers, must ensure that they are fully familiar with the basic requirements of the area of the law within which these arrangements are made;

c) All applications under HFEA 1990, s 30 for parental orders are required to be commenced in the Family Proceedings Court (the magistrates court) (Children (Allocation of Proceedings) Order 1991, art 3(1)(u)). The issues raised in such cases are of a similar standard of complexity and importance to those in cases of intercountry adoption. There are in my view strong grounds for any parental order application that involves an international element being transferred to one of the nominated intercountry adoption county courts or to the High Court at the first directions hearing;

d) Courts charged with determining an application under HFEA 1990, s 30 have a duty to ensure that each of the qualifying conditions required of applicants is met in a case that has, or may have, an international element;

e) Where a prospective surrogate mother is a married woman, who has separated from her husband, all reasonable attempts should be made before the surrogacy process begins to establish that the husband does <u>not</u> consent to the proposed surrogacy arrangement.

f) In the event that any agencies involved in facilitating or advising on surrogacy arrangements are approached by a couple who are not domiciled in the UK, or indeed any solicitor who may be approached by such a couple for legal advice, must advise that pursuant to rule 110 of The Family Procedure (Adoption) Rules 2005 the 'court may at any time make such orders as to costs as it thinks just'. Such orders for costs can be made against the commissioning non-domicile couple and can include payment of the legal costs of the proceedings, payment for the costs incurred by CAFCASS. Clearly, whether such costs should be

paid will depend upon the circumstances of each case given that this court takes the view that the provision for surrogacy arrangements for non UK domicile couples are to be discouraged, it follows that the legal aspects to such arrangements should not become the financial responsibility of the British taxpayer. Any court faced with an application such as that which has been considered within this Judgment should give active consideration to the making of a costs order.

Judgment Ends