This judgment is being handed down in private on 9 October. It consists of 10 pages and has been signed and dated by the judge.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Case No: IL13P00097

Neutral Citation Number: [2013] EWHC 3570 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2013

Before:

MRS JUSTICE THEIS DBE

- -

Between:

Re W

- -
- -

Mr Hassan Khan (instructed by **Dawson Cornwall Solicitors**) for the **Applicants**
Ms Melanie Carew (instructed by **Cafcass Legal** as Advocate to the Court)

Hearing dates: 9th October 2013

- -

Judgment

Mrs Justice Theis DBE:

1. This matter concerns an application for parental orders relating to three children E, S and G all born on 8 January 2013. The applicants are KL and MW, who are the biological parents of the children. The children were carried by the Respondent DP, a married surrogate mother based in the US. The matter was listed for final hearing on 9 October 2013 when I made parental orders in favour of the applicants. I gave a brief extempore judgment on that day, with a more detailed judgment to follow. This is now set out below.

Background

2. KL was born in Singapore in 1981 and came to live in England in 2000 to study at University; she has remained living here since. Although she has indefinite leave to remain here she has retained her Singaporean nationality as Singapore does not permit its citizens to have dual nationality. MW was born in Malaysia in 1976. He grew up between Texas and London and came to live here in about 1989, when his father relocated with his company to England. He trained as a dentist and has practised here since then. He too has retained his Malaysian citizenship for the same reasons as his wife. Both applicants have indefinite leave to remain, have made England their home and intend to remain living here indefinitely. All of their assets are here and neither has any intention to return to live in their country of origin.

3. The applicants met in 2001 and married on 25 October 2003. They had great setbacks in their wish to have a family; in a period of five years they suffered five miscarriages. The medical advice was that they were genetically able to have children, but unfortunately KL had Protein C deficiency thrombophilia and low progesterone levels which caused the miscarriages.

4. The applicants decided surrogacy was the solution for them; they could be the biological parents, whilst removing the risks of further miscarriages.

5. Following their researches into the options they decided to enter into a surrogacy arrangement in the USA. They engaged the Center for Surrogate Parenting (CSP), a surrogacy agency based in California subject to Californian law which permits commercial surrogacy. Through CSP they were matched with DP, a married gestational surrogate who lived in Nevada. She had her own children and had been a surrogate before. Over time applicants have developed a very positive relationship with DP and her husband, keeping in regular contact during the pregnancy which they intend will continue.

6. This was a commercial surrogacy where, according to the applicants, the terms were non-negotiable and fixed by CSP. They involved the following payments:

(1) To CSP a total of $22,000 (for 'compensation for administrative and coordination services' $20,000 plus an additional fee for international intended parents of $2,000).

(2) To DP the total sum (other than for expenses reasonably incurred) of $38,500, paid by way of staged payments during the pregnancy with the final payments made just after the birth. There were other payments for specified expenses which are not caught by s 54 (8) Human Fertilisation and Embryology Act 2008 (HFEA 2008). For example, the monthly allowance of $200 (total $1,800), payments for housekeeping (total $2040) and counselling (total $5,375).

In addition, the applicants describe in their statement a number of one off voluntary gifts they made to DP and her family, which included a stay in a hotel, totalling $2,093. These were entirely voluntary gestures made by the applicants and are not, in the circumstances of this case, caught by s 54 (8).

The applicants were responsible for the cost of all the medical procedures.

7. Two embryos, created using the sperm of MW and the eggs of KL, were placed in DP through the IVF procedure. One embryo split and the six week scan revealed DP was carrying triplets.

8. Under the terms of the surrogacy agreement the applicants were required to ensure DP and her husband had no legal obligations in respect of the children she was carrying. The applicants were advised by their US attorney (Andrew Vorzimer) and CSP that this necessitated a court application to the Court in Nevada for a 'pre-birth order'. On 13 October 2012 the Family Division of the Ninth Judicial District Court of the State of Nevada made a pre birth order, the effect of which was the applicants were treated as the natural and legal parents in respect of the unborn children, thereby extinguishing any parental rights and obligations from DP and her husband.

9. The children were born on 8 January 2013 in Las Vegas. They required some specialist care in the NICU for the first few days and were then discharged into the applicant's care. The applicants and the children returned to this jurisdiction on 10 April 2013.

10. The applicants have a full time nanny and greatly valued support from their family and friends. Ms Jolly, the Parental Order Reporter, describes in glowing terms the high level of care provided to the children by the applicants. KL describes them as *'our little miracles'* and MW told her having the children is a *'dream come true'* after the heartache they had suffered.

11. The parental order applications were made on 3 April 2013 and came before me for directions on 11 July 2013 and I listed the matter for a final hearing on 23 September 2013. At the September hearing Mr Khan, on behalf of the applicants, correctly drew

my attention to the material put before the court in Nevada that made the pre birth order. The pre-birth order entitled 'Order establishing parental relationship and designating content of birth certificate' signed by the District Judge on 13 October 2012 contained the following, after referring to the gestational surrogacy agreement;

> *'[KL and MW] complied with Nevada law and did not 'compensate' the gestational carrier, DP. Rather, they reimbursed her for her living expenses.'*

It was clear the court in Nevada had the gestational surrogacy agreement when it made the order. The gestational agreement contained the following provision at paragraph 20 in the section 'Entitlement to Payment'

> *'..payments to Surrogate and her Husband...constitute a reasonable amount to reimburse Surrogate for all discomfort, pain, suffering and inconvenience, for pre-pregnancy and pre-birth child support expenses and post birth expenses including reasonable and necessary living expenses, and for all Surrogate and her Husband's foreseen and unforeseen losses, costs and expenses incurred in carrying out their obligations in this Agreement. It is expressly understood and agreed that Intended Parents' payment of fees and expenses...on behalf of Surrogate shall in no way be construed as a fee for termination of Surrogate's parental rights or a payment in exchange for surrender of a Child...Additionally, no payments shall be construed as compensation for services and all Parties agree that all payments are to be construed as reimbursements and/.or payments for expenses.*
> *In recognition of the Intended Parents' obligations set forth under Californian law, to support this Child from the time pregnancy is diagnosed, the Intended Parents agree to pay such sums [in the Agreement]'*

The exhibit A in the gestational surrogacy agreement listing the payments to be made to DP is entitled 'Gestational Carrier Agreement – Altruistic'. It did not include reference to the payment of sums totalling $38,500. The documents submitted to the court in Nevada by DP and her husband in support of the pre birth order confirm DP did not receive '*compensation'* for being a gestational carrier.

12. In the light of that information I directed the applicants to file a further statement setting out how they were matched with their surrogate and how they came to complete the documentation in support of the pre-birth order (including details of any advice they received). In addition, I directed the applicants to file evidence of the law in Nevada (in particular addressing the effect of the payments made to Mrs Pickens) and evidence from CSP addressing the process of selecting/matching the applicants' with their surrogate and what advice, if any, they gave to the applicants and respondents in relation to seeking a pre-birth order in Nevada.

13. I appointed Cafcass Legal as advocate to the court to assist on any issues relating to public policy. I am very grateful to Ms Carew who attended this hearing on behalf of

Cafcass Legal and for the written skeleton submitted in advance of this hearing. Ms Carew supports the parental orders being made.

14. In their statement the applicants describe having two attorneys in the US, one in California and one in Nevada. The gestational carrier agreement was drawn up by the Californian lawyer and they attach a letter from the programme administrator at CSP to DP dated 2 March 2012, together with a schedule setting out staged payments, describing them as a 'gift' that total $25,000 (with additional 'gift' payments in the event of more than one foetus or in the event of a c-section). It is these gift payments that amount to $38,500. The letter states

> *'..the laws in the state of Nevada are unclear with regards to gestational surrogacy. Your exhibit A provides for compensation that we believe is permitted under the laws of Nevada. However, [KL and MW] want to ensure you receive the same compensation as any other surrogate mother in our programme. We are unsure if the courts in Nevada will uphold additional compensation, and in an attempt to ensure that you receive the same consideration as any other surrogate mother we have attached an additional Agreement between you and your couple.....I hope the attached Agreement is acceptable to you and your attorney. We have drafted several agreements of this kind in the past for surrogate mothers that reside outside the state of California....'*

At the time the applicants did not question why the agreement had been prepared in this way. CSP had told them they had worked with surrogates in Nevada before and this was how it was arranged before.

15. Once DP was pregnant CSP gave the applicants the name of a lawyer in Reno, Nevada called Mr Stovall. Although they did not personally meet him, they recollect signing a consent form for him to act. They communicated with him by email and state he received all the necessary information either from the applicants' Californian lawyer or CSP. Mr Stovall prepared the application forms and affidavits that the applicants signed before a Notary Public in England. They said they relied entirely on the legal advice they received as to the content of the documents and only became aware there may be difficulties when discussing it with their lawyers here.

16. CSP have provided information about how they select surrogates and match intended parents with surrogates. They confirmed they only select surrogates from States where surrogacy is legally acceptable and confirmed they had had other surrogates who were based in Nevada. They said they acted on the advice from their lawyers, Vorzimer Masserman, as to which States legally accept surrogacy.

17. The evidence regarding the legal position in Nevada is provided by Kimberly Surratt, an attorney who specialises in surrogacy/gestational carrier arrangements in the State of Nevada. In her report, dated 30 September 2013, she noted that Nevada's surrogacy

law was changing the following day, 1 October 2013. The new provisions provide that a gestational agreement is enforceable even if it contains a provision that the intended parents pay the gestational carrier *'reasonable compensation'*. Under the provisions in force at the time of the surrogacy agreement in this case her opinion is the payment of compensation to a surrogate in Nevada is not a criminal offence, even though the relevant provisions called it 'unlawful'. The relevant provision is Nevada Revised Statute 126.045 which provides

> *'It is unlawful to pay or offer to pay money or anything of value to the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract'*.

Her opinion is that it does not create a criminal offence as the relevant statute does not provide for any penalties; consequently, in her opinion, it is considered to be unconstitutionally vague and as a result cannot be enforced by way of a criminal sanction.

18. Turning to the issue of the effect of compensation being paid to a surrogate, Ms Surratt states that provided the Nevada court is satisfied that the payments are not disproportionate to her reasonable expenses and the surrogate was not 'bought' in violation of public policy and that the fees are in accord with the average, then a judge in Nevada would not have any difficulty in making the pre-birth order. She states

> *'In most cases, the Court will conduct an evidentiary hearing where the Gestational Carrier is sworn in as a witness and canvassed on the record. The Court is looking to determine if there is clear and convincing evidence that the Gestational Carrier's motivation in participating in the surrogacy was not connected to the money that she received. Meaning, the money was not an inducement for her to participate in the process....In the case at hand, the additional 'gift schedule' appears to be in line with what the Nevada court's find to be proper. The gifts and the contract are not contingent upon delivery of a healthy child, handing over of a child to the Intended parents.....it is not out of the ordinary to see a monthly living expense of $2,000 a month and it is not out of the ordinary for a surrogate's monthly living expenses to increase dramatically at weeks thirty four, thirty six and upon birth...In conclusion, I am confident that a Nevada Judge would find the sums paid to the Carrier in this case were not disproportionate to her reasonable monthly living expenses. That the Surrogate was not 'bought' for lack of a better term in violation of the public policy that existed under Nevada law at that time. The fees in this case were not dissimilar to similar cases that I have been involved in, other than they are slightly lower that the average cases that we see in Nevada.'*

19. Turning to the legal effect of the pre birth order she states the order has effect unless there is an appeal or a Motion for Relief from Judgment or Order filed under the relevant rules for mistake, inadvertence, excusable neglect, newly discovered evidence or fraud. The time limit for appeal is 30 days and any party can file a motion for relief. She continues *'The pleadings in this matter do not appear to be forthright and honest with the Court. The parties do not appear to have disclosed the 'gifting schedule' to the Court or the attorney for the Intended Parents in Nevada. This can be*

construed as a fraud upon the Court. This means that if either the Carrier or the Intended Parents filed a motion with the Court, the Court could consider setting aside the judgment. The parties would have to bring the action. If they do not do so, then the Court [order] stands and its legal effect does not change. If the parties bring such a motion, the court would go through the analysis [looking at the Carriers motivation and whether it is connected to the money]....and would probably still come to the same conclusion – that the Intended Parents are still the parents of the child born of the Gestational Carrier Agreement.' She notes at the end *'I am confident that a Nevada Judge would not be pleased with the fraud on the Court and that a Nevada Judge may sanction the parties for their fraud on the court'* but the result would be the same.

Section 54 Criteria

20. I must be satisfied that the criteria set out in section 54 of the HFEA 2008 are satisfied. I can take most of them relatively shortly. The children were carried by a surrogate, DP, as the result of the placing in her of an embryo consisting of the sperm of MW and the eggs of KL. Dr Ringler has filed an affidavit confirming the surrogate became pregnant after an embryo transfer created with KL's eggs and MW's sperm. DNA tests have confirmed MW and KL are the biological father and mother (s 54 (1)). The applicants were married on 25 October 2003 (s 54 (2) (a)). The application for a parental order was made within six months of the children's birth (s 54 (3)). The applicants are over 18 years; KL is 31 years and MW 37 years (s 54 (5)). Both DP and her husband have signed a Form A101 consenting to the making of a parental order and they were signed more than six weeks after the birth of the children (s 54 (6) and (7)).

21. The children's home has been with the applicants since their discharge from hospital soon after their birth, first in the US and since 10 April 2013 here in this jurisdiction (s 54 (4) (a). I am satisfied that both the applicants domicile of choice is the UK (s 54 (4) (b)). MW has been here since 1989, was educated here and works here. He has lived most of his life here and intends to do so permanently. KL has been here since 2000, has worked here and regards her permanent home as being here. The applicants have all their assets in the UK, pay tax here and neither of them have any intention of living elsewhere or returning to live in their respective country of origin. In my judgment both applicants have discharged the burden on them of proving abandonment of domicile of origin and the acquisition of a domicile of choice. They have made their home and lives here and intend to remain here indefinitely.

22. Turning to the question of payments the court needs to consider under section 54 (8) the amounts and circumstances are set out earlier in this judgment. The court needs to consider not just payments to the surrogate but needs to consider the wider picture of payments made by the applicants (*Re PM [2013] EWHC 2328 (Fam)).* I remind myself of the factors the court should consider in exercising its discretion whether to

authorise payments, as set out by Hedley J in *Re X and Y (Foreign Surrogacy) [2009] 1 FLR 733* and *Re S (Parental Order) [2010] 1 FLR 1156,* namely

(i) Was the sum disproportionate to reasonable expenses
(ii) Were the applicants acting in good faith and without moral taint in their dealings with the surrogate mother and the payments do not overbear the will of the surrogate.
(iii) Were the applicants party to any attempt to defraud the authorities
(iv) To ensure commercial surrogacy arrangements were not used to circumvent childcare laws in this country
(v) The applicants were not involved in the simple payment of money and 'buying' children abroad

In *Re L (Commercial Surrogacy) [2010] EWHC 3146 (Fam)* Hedley J made it clear the changes introduced by SI 2010/986 the child's welfare was now the court's paramount consideration and he observed '*It must follow that it will only be in the clearest case of abuse of public policy that the court will be able to withhold an order if otherwise welfare consideration supports its making'.*

23. The payments made to CSP were permitted in the State of California and are similar to the level of payments made to this agency in other cases.

24. In relation to the payments to DP totalling $38,500 it is conceded this is a payment other than for expenses reasonably incurred and was unlawful in the state in which the surrogate lived. I have set out in some detail the concerns this court had about the information that was put before the court in Nevada when it made the pre-birth order. It appears the documents submitted to that court did not include the gift schedule setting out the detailed list of payments made by way of 'gift' to DP totalling $38,500. In the documents signed by MW and KL they each stated *'I did not give DP compensation for being a gestational carrier. I did reimburse her for her expenses.'* DP and her husband confirmed they did not receive any *'compensation'*. However, I note the documents submitted did include the gestational carrier agreement dated 20 March 2012 which included in Exhibit A to the agreement a *'non accountable expense allowance of three thousand dollars'* in the event of a caesarean section.

25. The evidence from Ms Surratt, which I accept, concludes that although the payment of compensation was unlawful it was not a criminal offence for the reasons she gave. Her experience is that the pre birth order, in the circumstances of this case, would be endorsed by the Nevada court.

26. I am entirely satisfied in this case both MW and KL have acted in good faith. They had no prior knowledge of the law in Nevada and sought and relied on the legal advice they received in California and Nevada, together with the contents of the letter from CSP to DP (together with the Gift Schedule attached) which referred to similar arrangements having been made in the past. They assumed *'everything was in order'*

and were not aware of any difficulties until the issue was more recently raised by their lawyers in this jurisdiction. It is unclear why the gift schedule was not put before the court in Nevada, but I am satisfied that MW and KL had no active part in that omission. There is no 'moral taint' in the dealings between them and DP. The evidence suggests they have had, and continue to have, a positive relationship.

27. In the circumstances of this case I do not consider the payments made to DP represented an inducement to enter into this arrangement in a way that her will may have been overborne. Whilst it is a significant sum, and clearly more than expenses reasonably incurred, it is not outside the amounts that have been paid in other similar cases involving US surrogacy arrangements. It is clear from the information provided by CSP that there is a detailed assessment process undertaken by them of potential surrogates, which is unrelated to any financial arrangements. In addition, despite the level of payments made there appeared to be was an altruistic element to DP's actions, bearing in mind the health risks in carrying triplets.

28. Although the information this court had on 23 September did raise very real concerns about whether there had been an abuse of public policy I am entirely satisfied on the information now before the court demonstrates that while some of the documents filed in the court in Nevada appear contradictory, the legal advice to the applicants was that the pre birth order would be enforceable and that the practice of the Nevada jurisdiction would accommodate the arrangements they had made. This view has been subsequently endorsed by Ms Surratt. I also note that since the 1 October the law in Nevada has changed to permit compensation to be paid. Therefore, the circumstances of this case do not amount to a clear case of the abuse of public policy where the court would exercise its discretion in refusing to retrospectively authorise the payments made by the applicants. Consequently, I do authorise the payments made by the applicants to CSP and DP under s 54 (8) and am satisfied that all the relevant criteria in that section are met in this case.

29. This case is another timely reminder of the importance for intended parents embarking on surrogacy arrangements abroad to ensure they have appropriate legal advice in the jurisdiction where the surrogacy arrangement is entered into.

Welfare

30. The court is concerned with the lifelong welfare of each of these children and is required to have regard to the considerations listed in section 1 Adoption and Children Act 2002. The court has the benefit of a detailed report from the Parental Order Reporter Ms Jolly and the written statements from the applicants. The children are the biological children of both applicants. They have never lived with anyone other than the applicants and all the evidence points to them flourishing in their care. As Ms Jolly observed they are '*contented, much loved and well cared for'* children. A parental order will give permanency and security to the day to day arrangements that

exist at the moment. Most importantly a parental order will confer joint and equal legal parenthood and parental responsibility upon both applicants. This will provide lifelong security for the children's relationship with the applicants, which is what the welfare of each child overwhelmingly demands.