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**CW v NT, TT (a child, by her guardian Joanne Farnsworth)**

Case No: NG10P01394

High Court of Justice Family Division Birmingham District Registry

21 January 2011

**[2011] EWHC 33 (Fam)**

**2011 WL 1654**

Before: The Honourable Mr Justice Baker

Date: 21/01/2011

In the Matter of TT (A Minor)

In the Matter of the [Children Act 1989](#)

Hearing dates: 15,16,17 December 2010

**Representation**

Raymond Plunkett (instructed by Messrs Young & Lee ) for the Applicant.

Ms Barbara Connolly (instructed by Messrs Langley ) for the 1st Respondent.

Christine Doughty (solicitor) for the 2nd Respondent.

**Judgment**

Mr. Justice Baker:

**Introduction**

1 In recent years the practice of surrogacy – whereby a woman gives birth to a child for others — has been accepted as a method of enabling childless couples to experience the joy and fulfilment of parenthood. But the risks of entering into a surrogacy agreement are very considerable. In particular, the natural process of carrying and giving birth to a baby creates an attachment which may be so strong that the surrogate mother finds herself unable to give up the child. Such cases call for careful and sensitive handling by the law.

2 In this country Parliament has passed a series of statutes governing surrogacy – see the [Surrogacy Arrangements Act 1985](#) , the [Human Fertilisation and Embryology Act 1990](#) and most recently the Human Fertilisation and Embryology Act 2010 . Amongst the guiding principles underpinning the legislation is the rule that no money or other benefit (other than expenses reasonably incurred) may be paid to the surrogate. Negotiating a surrogacy arrangement on a commercial basis is a criminal offence in this country. A number of agencies have been set up to facilitate surrogacy arrangements by making appropriate introductions, and providing advice and counselling to the parties. Those agencies have to be careful to ensure that the rules prohibiting commercial transactions are respected. Inevitably, however, the advent of the internet has facilitated the making of informal surrogacy arrangements between adults. In such cases, those

entering the arrangement do not have the advantage of the advice, counselling and support that the established agencies provide.

3 This application concerns a baby girl called T, born 16th July 2010 and thus now aged some five months old. In 2009, T's mother ("the mother") met a couple ("Mr. and Mrs. W") over the internet and agreed informally that the mother would be inseminated by Mr. W and after the birth of the baby hand it to Mr. and Mrs. W. Pursuant to that agreement, the mother became pregnant by Mr. W, and received several thousand pounds from Mr. and Mrs. W. During the pregnancy, however, she changed her mind, and at T's birth she refused to hand over the baby as agreed. Mr. W subsequently applied for a residence order. That application was transferred to the High Court and heard by me in Birmingham on 15th to 17th December 2010.

4 At the conclusion of the hearing, I refused Mr. W's application, and made a residence order in favour of the mother. I made an order for defined interim contact in favour of Mr. W and re-listed the case for review in February 2010.

5 This reserved judgement sets out the reasons for my decision.

## Summary of Background

6 Some important aspects of the history are in dispute, but the background can be summarised as follows.

7 The mother is aged 25 and has two older children, twin boys I and J aged 5, who live with her. Mr. W, (whom DNA testing has confirmed is T's father) is aged 44. He is a chef by training and is currently employed by a well-known international hotel group in a managerial capacity. He has a daughter aged 17 who lives with her mother and with whom he has had little contact in recent years. Mr. and Mrs. W were married in 2005. I formed the impression that they are a close couple. It is suggested on behalf of the mother that there has been violence in the Ws' relationship. That is denied by the Ws and I shall consider the evidence about this below. Mrs. W has three children of her own aged 19, 17 and 15. The youngest of these children lives with Mr and Mrs. W.

8 After Mr. and Mrs. W were married, they tried to have a baby themselves, but because Mrs. W had lost part of her womb as a result of cancer at an earlier age, their several attempts resulted in a series of miscarriages. These failures led them to consider surrogacy, but in view of the expense involved in using an agency they decided to explore the option of finding a surrogate through the internet, and subsequently registered on several surrogacy websites. They were in contact with a number of other women before they met the mother. The details of these contacts are a matter of dispute. Mr. and Mrs. W claimed in evidence that there had only been one occasion before the mother, involving a South African woman living in Wales who had disappeared after they had paid her £1000. The mother asserts, however, that she was told by the Ws that they had tried unsuccessfully to have a child by surrogacy on a number of occasions, their plans being thwarted on each occasion when the surrogate disappeared after receiving money and before any baby was born. In support of her case on this point, the mother relies inter alia on emails allegedly sent by Mrs. W. The genuineness of these emails, however, is a matter of significant dispute.

9 A further issue arising from the history prior to the Ws meeting the mother concerns the visit to their home by a woman called CL. Mrs. W asserts that she met CL via an internet chatroom and invited her to stay when CL told her that she was being assaulted by her partner. Inquiries by the Child's Guardian have revealed a different, and more concerning, story about CL, including that she has been a surrogate mother. The Ws emphatically deny that they knew that she had been a surrogate or that the website through which she contacted Mrs. W had anything to do with surrogacy. Although CL has played no direct part in this case, the evidence about the Ws' dealings with her is said to cast doubt on their suitability to have care of T.

10 It is agreed that the first contact between the mother and the Ws came on 17th July 2009 when the mother emailed Mr. W out of the blue in these terms: "hello sweetie my name is [name given] and I am a surrogate mother in the UK .... I read our [sic] ad on yedda [the surrogacy website] and I am truly interested in helping you to make your family complete. I hope you contact me back and I can tell you all about me." After receiving this, the Ws got in contact with the mother, but there is a dispute about how and when they did so. It is the Ws' case that Mrs. W

telephoned the mother and that a few days later, on about 21st July, she came to their house (which I calculate to be some one hundred miles away), accompanied by I and J, and stayed there for a period of six weeks, that is to say throughout the school summer holidays. The mother agrees that she, I and J visited during the holidays, but asserts that they only for three weeks, arriving on 10th August and departing on the 31st. In support of this, she points inter alia to the fact that her medical records show that she attended a medical appointment in her home town on 3rd August when her intrauterine coil was removed.

11 During this visit, the parties agreed that the mother would act as a surrogate for the Ws, using Mr. W's sperm. It was agreed that the baby would be handed over to the Ws after birth, and that thereafter there would be some limited contact with the mother and her sons. It was further agreed that the Ws would pay a sum of money to the mother by instalments during the pregnancy, and would pay further sums to cover expenses. The agreement was not, however, reduced to writing. It is agreed that during the visit, at least one attempt was made to impregnate the mother. There is a conflict of evidence about how many times this was attempted – a conflict in fact between Mr. W, who says it was a number of times over two periods of about three days when it was considered that the mother was ovulating, and Mrs. W, who says that it happened only once during each such period. The method adopted was that Mr. W would ejaculate into a beaker, and Mrs. W would draw the ejaculate into a syringe which she would then pass to the mother who would insert it into her vagina. It seems that, on at least one occasion, Mrs. W herself performed this latter task upon the mother.

12 It is agreed that these attempts (however many they were) in the Ws' home were unsuccessful, but when the Ws visited the mother a few weeks later and repeated the procedure, she became pregnant.

13 Thereafter, the Ws visited the mother on a number of occasions, and attended some of her medical appointments. The number of appointments attended by the Ws is in dispute, the mother asserting that it was far fewer than alleged by the Ws. In addition, pursuant to their agreement, the Ws paid sums of money to the mother, (one payment of £2,000 and a further sum of £2,500) and also bought her maternity clothes and other items. The parties communicated regularly by text and MSN. Some of those messages have been exhibited to the statements filed in these proceedings, but as explained later in this judgment the reliability of this evidence is highly questionable.

14 At some point during the pregnancy, however, relations between the parties deteriorated. It seems that one source of argument was whether or not the mother should undergo an amniocentesis to establish whether the baby was suffering from Downs syndrome. A blood test had established that there was a high risk, and the mother wanted to have the further test. The Ws objected, fearing that the test would jeopardise the baby's health, but the mother proceeded to have it carried out. (The test was negative, and the baby came to no harm.) The deterioration in relations between the parties is documented in a series of text messages passing between them. Again, however, the reliability of the evidence about these messages is very uncertain.

15 In April 2010, the mother was admitted to her local hospital for a gallstones operation. There is a dispute between the parties as to how often Mrs. W visited the mother during her 10-day stay in hospital. What is not in dispute, however, is that during her stay, a friend of the mother's telephoned Mrs. W and told her that the mother had changed her mind and wanted to keep the baby. Further texting followed, but yet again the reliability about the evidence of those messages is to my mind highly questionable. It is unclear whether the mother had finally made up her mind about what to do by this stage. Her evidence was that, over the next few weeks she indeed reached a firm conclusion that she did not want to proceed with the surrogacy arrangement. Whether or not she wanted to keep the baby, however, is a further matter of dispute. The Ws challenge her assertion that she had decided to keep the baby, and point to the fact that, around this time, another friend of the mother's called MC posted messages on Facebook stating that the mother had agreed to give her the baby. The mother denies that she ever agreed to do this.

16 In June 2010, Mrs. W received an email through the surrogacy website from a woman purporting to be called Samantha Woodfield, and thereafter exchanged a number of emails, from which it appeared that "Samantha Woodfield" was in contact with the mother. The Ws came to suspect that "Samantha Woodfield" was in fact the mother herself, and in her statement filed in these proceedings the mother has accepted that this is indeed the case. She says that she used this subterfuge because the Ws were threatening that her children would be removed from her

care, and that she would be “done for fraud”, that Mrs. W had stopped communicating with her, and that she therefore posed as “Samantha Woodfield” in an attempt to find out what the Ws were really planning to do.

17 The baby was due at the beginning of August but in the event she was born on 16th July. Prior to the birth, there had been some resumption of communication, and the Ws hoped that the mother might agree to go through with the surrogacy. Mrs. W attended the hospital, but says that she was made to feel unwelcome by the mother's friends and family members. She returned home, and a few days later received a text from the mother saying inter alia: “I wish you well in the future if u eva wanna chat just email”.

18 On 23rd July, when T was only seven days old, Mr. W filed an application for a residence order under the [Children Act 1989](#). The mother filed a response opposing the application and seeking a residence order in her own name. On 26th August, HH Judge Butler QC directed DNA testing to establish T's paternity. As stated above, those tests duly confirmed that Mr. W was the father. At a further hearing on 13th October, Judge Butler gave further directions inter alia transferring the matter to the High Court; making T a party to the proceedings and appointing Joanne Farnsworth of CAFCASS as her guardian under FPR rule 9.5; and making an order prohibiting the mother allowing contact between T and MC. At a Family Division hearing in Birmingham on 19th October, McFarlane J listed the matter for a final hearing before me on 15th December, gave further directions for the filing of evidence, and by consent made a parental responsibility order in favour of Mr. W.

19 Up to that point, no contact had taken place between Mr. W and T. The guardian, however, indicated that there should be an introduction, and McFarlane J's order recited that contact would thereafter take place as advised by the guardian with the mother in close attendance during the first two sessions. In the event, five sessions of contact took place prior to the start of the hearing before me, the first two lasting for two hours, and thereafter for gradually longer periods, the last being for five hours. At the initial sessions, the mother stayed in the vicinity and was called in on occasions to help settle T. On the last occasion, the Ws successfully fed T via a bottle.

20 At the date of the hearing before me, T was 5 months old. The evidence from the Guardian is that she is thriving in her mother's care. In her oral evidence, the Guardian described how she had seen evidence of a good attachment between T and the mother, with good eye contact and evidence that the mother was caring for her appropriately. The mother herself spoke of how well she was doing, describing her as “a little character” who was always smiling and wanting to be played with. She described how she had become attached to the mother's two sons, I and J, in particular J.

## **The Hearing**

21 The hearing took place over three days in December 2010. The written evidence consisted of two statements from Mr. W, one statement respectively from Mrs. W, her daughter N and the mother, plus a report from the guardian dated 1st December. All five of those persons duly gave oral evidence before me.

22 I regret to say that I have considerable concerns about the reliability of some of the oral evidence I heard. Specifically, I do not believe that Mr. or Mrs. W or the mother has told me the whole truth about a number of matters. I will in due course focus on each of them and indicate where I found their evidence unacceptable. The fact that none of the three principal witnesses has been entirely frank with the court has made my task significantly more difficult. Having said that, I should also note that it was striking that, when asked to talk about T, each of the three principals – Mr W, Mrs W and the mother – each demonstrated clear affection for the child. Despite the criticisms of the mother and Mr. and Mrs W that follow, it is right to record my clear impression that each of them is devoted to T. I hope that this devotion will be channelled appropriately to her advantage.

## **The Mother**

23 The mother said in evidence that she had suffered a stillbirth earlier in her life and thought that surrogacy would be a way of helping mothers who were unlucky and had not had children and

that in this way she could make someone happy. Her case is that it was her genuine intention at the outset of her pregnancy to comply with the agreement, although she asserts that she made it clear to the Ws that there was always a chance that she might find it impossible to do so. She says that she gradually came to realise during her pregnancy that she did not wish to give up her baby, and finding it hard to break the news to the Ws did so initially through a friend. She emphatically denies that she did anything to encourage her friend MC to believe that she should be taking over the baby, but accepts that she contacted Mrs. W using a false name, "Samantha Woodfield", to try to find out what the Ws were planning to do about the situation. She relies on emails which she says demonstrates that the Ws had made many previous attempts to obtain a baby using surrogacy, insisting that the emails she has exhibited to her statement are genuine. She says that, if granted a residence order, she will allow Mr. W contact with T because she believes that it is important for any child to grow up with a relationship with both parents. Her sons I and J do not have any contact with their father and she does not want T to suffer from the same disadvantage.

24 Before turning to those aspects of her evidence that cause me concern, I should summarise the guardian's evidence about the outcome of her investigations into the mother's position. It is the guardian's opinion that the mother has met T's basic needs to a good enough standard since birth and that she has the capacity to parent her in the long term. The mother has breast fed T since birth, and the guardian's evidence is that there is a clear attachment between mother and child. The guardian adds that within the assessment the mother came across as sincere and was able to discuss her life and relationships.

25 In the course of her investigation, the guardian spoke to the teacher at the school attended by I and J, who told her that both boys have communication difficulties which she, the teacher, felt were minimised by the mother. J has also demonstrated behavioural difficulties which have led the school to give the mother guidelines about how to manage his behaviour, although the school has some concern as to whether she is following them. When she visited the home, the guardian observed that the mother did set boundaries to which the boys responded, but observed that they were very excitable and J in particular was over-familiar towards her.

26 There are four issues in the mother's evidence about which I have particular concern.

27 First, I am concerned that, on her own admission, she adopted a false persona, "Samantha Woodfield", to elicit information from the Ws. On this point, she has frankly admitted that she acted deceitfully, saying that she did so because she was concerned that the Ws might take steps to remove the child, and wanted to find out what they were planning. I see no reason to doubt that this was her intention, and find that on this point she is now telling the truth, but it is concerning that she felt it appropriate to act in this deceitful way. I ask myself whether her capacity to deceive suggests a deficiency in her character which might impinge upon T were she to remain in her care.

28 Secondly, I find that she has deceived the court about at least one email she says she received from Mrs. W. A number of emails and text messages are exhibited to the statements filed in the proceedings, but it is accepted that I do not have the full record. The parties were in the habit of communicating by text and email on a regular basis during the pregnancy, but only a fraction of those exchanges have been disclosed, and the court must therefore be extremely careful about drawing any firm conclusions from the limited extracts that have been disclosed.

29 In one instance, however, I am satisfied that an email has been significantly altered prior to being disclosed in the proceedings, so as to give a very different meaning to the document. The email in question was apparently sent on 22nd July 2009 by Mrs. W to the mother. A version of this email (which I shall call "version A") is appended to the mother's statement, and appears at page C78 in the court bundle. In the course of the hearing, however, it emerged that there were serious discrepancies between this version and the version in the email inbox on the mother's computer ("version B"). For example, the first line of version B reads: "hi there my husband said you had sent him an email, i would just like to say thank you for that." In version A, however, the sentence continues with the following words that do not appear in version B: "as we have been searching for quite a few years and had a lot of bad luck with failed surrogates". A few lines later the following phrase appears in version A: "it is not nice at all noing [sic] that my husband's babies are with someone else that we trusted in". In version B, however, this phrase appears as follows: "it is not nice at all noing that my husband's baby is with someone else that we trusted in". Towards the end of the email in version B there appears the phrase: "also we need to no [sic]

how much you are asking?” but in version A the question mark is not present and instead there appear these words which are absent from version B: “but because of being let down so many times you would have to use your money and we would reimburse you that way nobody gets coned [sic].”

30 There are other discrepancies between the two versions but it unnecessary to recite them – the examples quoted above give a clear indication of the extent of the alterations. The mother's case is that she “cut and pasted” the email from Mrs. W into another email which she sent to her solicitor. She adamantly denies making any other amendment. Very properly, however, her legal representatives have disclosed all copies of the emails, and it is clear that the version sent to her solicitor in August 2010 is the same as appears appended to her statement. It is manifestly obvious that the email was altered between the date it was received by the mother, and the date she sent it to her solicitor. The only person who could have made these amendments is the mother herself, and the only reasonable inference to draw is that she did so with a view to bolster her case against Mr. W. I completely reject her feeble explanation that the changes must have occurred during the process of “cutting and pasting”. All the changes quoted above must have been carried out deliberately. It may be that the mother was adding things to the email that she had been told by the Ws, but that is no excuse. I find that she has falsified this document and lied to the court about this. In other words, she has behaved in an even more deceitful way than she did when pretending to be “Samantha Woodfield”. This is stronger evidence of a serious character flaw that has given me very great cause for concern as to whether she can be trusted both as a witness and, more importantly, as a mother.

31 The third aspect of the mother's evidence about which I have concern is the issue of MC. On 24th May 2010, MC left a message on Mrs. W's Facebook page stating inter alia: “I am wanting to adopt [the mother]'s baby. i know you may find this selfish but when you cannot have children you grab onto every chance you can, you may not understand that as you are lucky enough to already have 3 children. i am sorry that things did not work out with you and [the mother] but i have been a friend of hers for the last 2 and a half years and because of this and because i do not have children i think it is fair that [she] puts me before you in choice of adopting her baby and now that she has agreed i am spending all my time with her getting to know my baby ....” Similar comments appeared on MC's own Facebook page. The mother emphatically denies that she said anything to MC to lead her to think that she could ever take over care of the baby. On behalf of Mr. W, it is submitted that this is implausible, that the mother must have encouraged MC in some way, and that it suggests that the mother does not genuinely wish to continue caring for T.

32 In view of the mother's other deceitful conduct, I am slow to accept that she is telling me the truth about this matter. But for whatever reason neither party has chosen to call MC as a witness, so I do not have her own account of why these messages were posted. Having listened to the mother's oral evidence carefully, I conclude that the reason why she decided not to go through with the surrogacy agreement was that she changed her mind and decided to keep the baby, not because she decided to give the baby to someone else. In the circumstances, whilst I am not satisfied that the mother has told me the whole truth about this matter, I do not find on balance that she ever made any promise to MC that she could adopt the baby.

33 The final aspect of the mother's evidence about which I have particular concern is a more general point. It is clear to me that she, like Mrs. W and many other people, is a heavy user of the internet. She is familiar with the various surrogacy sites. In one chatroom, she has chosen to use the soubriquet: “Thongs, G-Strings, French Knickers, IT'S ALL GUD”. I am concerned that she is at risk of exposing herself to malign and possibly dangerous influences via the internet which could in turn affect the children. For the sake of her children, I advise her to adopt greater restraint in the use of the internet.

34 Despite the criticisms and findings about the mother set out above, I acquit her of the charge that she deliberately set out to deceive the Ws from the outset. Having listened carefully to her evidence, I do not believe that she entered the surrogacy arrangement with the fixed intention of keeping the baby. I accept her evidence that she changed her mind about this matter during the course of the pregnancy.

## **Mr and Mrs W**

35 Mr. and Mrs W invite me to make a residence order so as to permit them to take over care of

T with immediate effect. They propose that there should be regular contact between T and her mother, but that initially after she moves to live with them there should be no contact at all to enable T to form an attachment with them. They submit that they are better equipped than the mother to offer T a stable home. They point to the fact that Mrs. W's children are now older and that as a result they have more time to devote to T's care, in contrast to the mother who is not only a single carer but also has twin boys aged five who have some problems of their own.

36 In her report, the Guardian described the Ws as a loving and caring couple with respect for one another. She had the opportunity to observe them with T, and noticed that they demonstrated good eye contact and appropriate physical contact with her despite her being asleep.

37 I now turn to consider the evidence given by the Ws. Again, that evidence has given me very considerable concern.

38 First, and following on from an anxiety I have voiced about the mother's evidence, I am concerned about the dangerous and murky waters into which they, and particularly Mrs. W, have strayed via the internet. In particular, I am concerned about the evidence I have heard about their involvement with a woman known to them initially as "D" but known more widely, including to the police and social services in Scotland, as "CL".

39 Mrs. W's account is that she came across CL via an internet chatroom. CL told her that she was a victim of domestic violence. Mrs. W has been a victim of similar violence in the past (though not, she insists, at the hands of Mr. W – as to which see below) and therefore felt sympathy for CL and offered her refuge for a few weeks. CL duly arrived at the Ws' home where she stayed for about a fortnight. The Ws describe her as being bruised and having the appearance of someone who had been subjected to violence. It is alleged that CL has a tattoo across her chest reading "Porn Princess", but the Ws were clear in evidence that they did not notice this. At some point during her stay, social services visited the home looking for CL, and it was at this point that her true identity was revealed. Shortly afterwards, she left the property.

40 The guardian has made some inquiries about CL with social services in England and Scotland and unearthed a rather different picture. It is said that CL is a prostitute, with seven children in care in Scotland. It is alleged that she is known on the internet as a surrogate parent and has claimed (to whom and in what terms is unclear) that she had 13 children. She left Edinburgh when pregnant with her sixth child and went to stay with the Ws in England, claiming that Mrs. W was her sister. When social workers visited the Ws' home, Mrs. W told her that the woman she knew as D was someone she had met over the internet. The social workers were concerned that the Ws might have arranged to take over the baby that CL was carrying. The Scottish social worker told the Guardian that CL had met the Ws on an internet surrogacy site and was going to sell her baby to the Ws. The Guardian concludes this part of her report by observing: "it is of concern that Mr. and Mrs. W did not appear to disclose their full involvement in respect of CL ... neither is it fully documented within their statements."

41 In their oral evidence, Mr. and Mrs. W emphatically denied that there was any intention to buy or take over the care of CL's baby. They insisted that the only reason they invited her to stay was to provide her with protection from domestic violence. Mrs. W denied that the website on which she had met CL was a surrogacy site, and said that she did not know about her history of prostitution and the number of children she had had. She said that CL "sounded a genuine person" but she, Mrs. W, had not been happy when she discovered that she had given them a false identity.

42 I was unconvinced by the Ws' evidence about CL. I do not believe Mrs. W's denial that she met her through a surrogacy website. Given the shared interest in surrogacy, I think it probable that it was this, rather than domestic violence, that brought them together. I have not heard evidence from CL herself, nor directly from the social workers who have dealt with her case. In those circumstances, I do not go so far as to find that the Ws were intending to buy or take over the care of her baby. But I do find that the Ws have not told me the whole truth about this matter, and their lack of frankness causes me concern. In particular, I find that they have misled the court about how they got in touch with CL. I find that Mrs. W came across her via a surrogacy website.

43 In addition, I was struck by their inability to appreciate the risks that arose by inviting a person like CL into their house. When I put the point directly to Mrs. W, she said that she had not given



any thought to the possibility that CL might be a risk to her children. It cannot be said too strongly that it is extremely unwise to invite someone into your home whom you have only met over the internet. If the information obtained by the Guardian is correct, CL may pose a serious risk to children. It was wholly irresponsible of the Ws to invite her into their home, and the fact that they have no awareness of this risk is alarming.

44 I was further unconvinced by the Ws' assertion that they had only had one experience of surrogacy prior to coming into contact with the mother. I find that they were frequent visitors to surrogacy websites – as indicated above, that is (I find) how they came across CL – and that they told the mother about their experiences. This is another issue about which they have been less than frank with the court.

45 The next issue arising from the Ws' evidence concerns domestic violence. The mother alleges that Mrs. W told her that Mr. W had been violent to her, and in support exhibited to her statement an extract from an exchange over the MSN message service in which the mother referred to an earlier conversation in which (she claimed) Mrs. W had said that Mr. W had tried to strangle her, and in reply Mrs. W said: "yes it was true he grabbed [sic] the seat belt and put it round my neck in the car and when I got home I ran upstairs to hide in the shower". In their oral evidence, Mr. and Mrs. W denied that there had been any violence between them, and each said that Mrs. W had been referring to an incident when Mr. W had been forced to brake suddenly while driving and had put his arm across Mrs. W and inadvertently grabbed her seat belt. Both Mr. and Mrs. W gave a detailed account of this incident. In her oral evidence, Mrs. W said that her husband had not wrapped the belt round her neck. Asked why she had said that he had in the MSN message she replied: "I don't know why I said it".

46 I found the evidence given by Mr. and Mrs. W on this point to be completely implausible. The words used by Mrs. W in the MSN message are unambiguous. The explanation given by them in evidence was obviously untrue. There may have been an occasion when Mr. W put his arm across Mrs. W when he braked suddenly, but manifestly that was not the incident to which Mrs. W referring in the MSN message. I find that Mrs. W told the mother that Mr. W had been violent to her by trying to strangle her, and that both Mr. and Mrs. W have concealed the truth about the incident to the court. There is no other evidence to suggest that Mr. W has been violent, so I am unable to gauge whether or not there is any likelihood of violence in the home. But the fact that they have been prepared to lie about this matter gives rise to further concern about their credibility as witnesses as a whole, and to their suitability as carers for T.

47 It is, however, the third aspect of their evidence that gives me the greatest concern. During their oral evidence, they demonstrated a startling lack of insight as to T's needs, and the difficulties that might arise were she to be placed in their care in the way they propose.

48 The Ws' proposal was that T should move to their care immediately at the end of the hearing, and then have no contact whatsoever for several weeks to allow her to form a bond with them. Given the clear evidence of an attachment between T and her mother, and the fact that she was still being breastfed, and that the Ws had only seen T for a few occasions prior to the hearing, this proposal seemed to me to be wholly unrealistic and lacking in any appreciation of T's needs. Mr. W at least was able to acknowledge that there was an attachment between T and her mother, but it was his view that moving her in the way proposed "would not be that harsh". Mrs. W's view, however, was more extreme. She said that she did not think that separating T from her mother would be difficult for T. She did not think that there was an attachment between mother and daughter. Her justification for this view was her observation that the mother was "not like a mummy" and was "cold, not loving" towards T.

49 In his evidence, Mr. W said that he had "absolutely no doubt that the mother does not want the child – that's what I believe". Mrs. W said that the mother had "never bothered with the child during the pregnancy" and, at another point in her evidence, that "she didn't give a monkey's about the baby". Mrs. W added that, were T to be placed in their care, she would tell her the truth (as she saw it) about her mother, namely that her mother had not bothered with her.

50 I bear in mind that Mr. and Mrs. W feel understandably bitter towards the mother for her failure to adhere to the agreement. Even making these allowances, however, I conclude that they both, and especially Mrs. W, displayed a depressing lack of insight and understanding as to T's needs. Their low opinion of the mother's attitude to T is not shared by the Guardian, who describes the mother's warmth towards the baby. I unhesitatingly accept the Guardian's assessment on this

point.

51 This was not the only point at which Mrs. W displayed an alarming lack of insight and judgment. I have already referred to her account of CL's visit. In addition, she spoke at one point of her dealings with her niece, who had a baby aged 16. When it was suggested to her that the young girl might have been too young to have a baby, Mrs. W disagreed, saying: "if she's old enough to drop her knickers, she's old enough to look after a child."

52 There were a number of other issues of fact, most of which need not be resolved for the purposes of my decision. I should, however, refer to the odd disagreement between the parties as to the length of the visit made by the mother and her sons to the Ws' house in the Summer 2009. The Ws say it lasted for the full six weeks of the school holidays. The mother insists, however, that it was a shorter period, pointing to the fact, apparently supported by the medical records, that she had a medical appointment in her home town at the beginning of August. She also points to an email (at C27 in the bundle) dated 22nd July from which it can be inferred that the parties had not yet met nor made any arrangement for a meeting. I remind myself that all documentary evidence of emails and text messages in this case must be treated with very great caution. Mrs. W's older daughter N also gave brief evidence in which she said that the visit had lasted for the whole of the holidays, although in cross-examination she modified her evidence saying that it had lasted for a period approaching six weeks and definitely longer than three weeks. I do not consider this to be a major issue, although it may assist in the overall assessment of credibility. Having heard the parties, I find that the mother and her sons stayed for several weeks during that Summer but not for the full six weeks alleged by the Ws.

## The Welfare Checklist

53 Having considered aspects of the evidence, I turn to the legal principles which govern this application.

54 When considering an application for a residence order, the court must apply the principles set out in [s. 1 of the Children Act 1989](#). The court's paramount consideration is T's welfare, and I must have regard in particular to the factors listed in [s.1 \(3\)](#) – the so-called "welfare checklist". I also bear in mind the principles of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – the right to respect for family life.

55 I shall consider the various factors in the checklist in turn. Before doing so I should refer to one previous case cited by Mr. Plunkett on behalf of the father, namely the decision of Coleridge J in [Re P \(Surrogacy: Residence\) \[2008\] 1 FLR 177](#). As the headnote of that report makes clear, the case concerned a mother who had five children, each by a different father. The last two children were born as a result of surrogacy arrangements. The first of these children was conceived after **artificial insemination**, but during the pregnancy the mother informed the biological father of the child and his wife that she had miscarried. Instead of honouring the surrogacy agreement the mother and her husband raised the fourth child as their own. After a few more years the mother re-registered with the surrogacy agency and signed another surrogacy agreement. Once again she became pregnant through **artificial insemination**, and once again falsely informed the biological father and his wife that she had miscarried. However, before the birth of the fifth child the mother's eldest daughter telephoned the surrogacy agency to inform them of the mother's deceptions. A few days after the fifth child was born, the biological father of that child issued residence proceedings; within a few months the biological father of the fourth child applied for contact. Both fathers claimed that the mother had tricked them, with the knowledge and consent of her husband, having never had any intention of fulfilling the surrogacy agreements. The mother denied this. By the date of the consolidated hearing, the biological father of the fourth child had reached an agreement with the mother that the child, now nearly 6 years old, would be told of her true paternity at an appropriate time in the near future and that there would subsequently be contact between father and child. The hearing therefore focused on the residence application by the father of the fifth child, with a view to adoption of the child, now 18 months old. Given the established relationship, the father of the fifth child and his wife were proposing ongoing contact with the mother and her husband. Having been very opposed to any recognition of the true paternity of either child, the mother was now apparently willing to provide contact to both biological fathers, but expert evidence suggested that she could not be relied upon to sustain such contact. It was acknowledged that the mother and husband were providing

both the fourth and fifth children with a good level of care, and that both children had formed good attachments to the mother, her husband and their siblings.

56 After a contested hearing, Coleridge J. made a residence order in respect of the youngest child in favour of the father. He applied the principle that the test when choosing between two competing residential parental regimes was in which home was the child most likely to mature into a happy and balanced adult and to achieve his fullest potential as a human. The learned judge made it clear that the mother's conduct in relation to the surrogacy was only relevant to the issue of credibility or suitability for the parental role; the case had nothing whatever to do with penalising the mother for breaking her agreement or for her prolonged deception. He found that the mother and her husband had set out to deceive both the couples with whom they had reached a surrogacy agreement because of a desperate desire to parent more children by any means. He found that there were grave doubts as to the mother's capacity to facilitate good-quality contact with the father, were she to be granted residence. He therefore granted residence to the father and his wife with regular contact to the mother.

57 As one would expect from such a wise and experienced tribunal, this authority provides important guidance which I bear carefully in mind. I propose to adopt the same approach and ask myself in which home is T most likely to mature into a happy and balanced adult and to achieve her fullest potential as a human. I note also the approach adopted by Coleridge J to the issue of deceitfulness on the part of the mother in that case. It is, however, important to stress that cases of this sort ultimately turn on their own facts. One crucial distinction between Re P and the current case is that, unlike Coleridge J., I have not found that the mother set out with the deliberate intention of hoodwinking Mr. W into providing her with a baby. On the contrary, I find that she entered the surrogacy agreement in good faith. Thus, although she has behaved in a deceitful way in a number of respects, which is something I shall take into account, the level of deception practised by this mother was less significant than that of the mother in Re P .

58 I therefore turn to consider the application of the factors in the welfare checklist to the facts of this case.

#### *Ascertainable wishes and feelings —*

59 Plainly, T is too young to express any opinion as to with whom she would wish to live. I am quite satisfied, however, that she had formed an attachment to her mother, and is dependent on her.

#### *Physical, emotional and educational needs —*

60 T is utterly dependent on her principal carer to meet her immediate physical needs. She is still being breast fed. In the medium and long term she will have the physical, emotional and educational needs that all children have.

#### *Likely effect of any change of circumstances —*

61 In my judgment, Mrs W is gravely mistaken in saying that T would not be harmed by being moved from her mother. In my judgment, there would undoubtedly be a risk of emotional harm to break the attachment, although I agree with the Guardian that the impact would be less at this relatively young age than if she were removed at a later stage.

#### *Age, sex, background and relevant characteristics —*

62 Clearly, T is very young and wholly dependent on her mother.

63 Of course, the unusual feature of this case is that T was conceived as a result of a surrogacy agreement. Plainly that is part of the background to the case, and a relevant characteristic. But in my judgment, the court should not attach undue weight to the fact that the mother originally promised to give up the baby. In some cases, such a promise may indicate a lack of commitment to the child so as to call into question the mother's capacity to care for her. In my judgment, the situation in the present case is very different. I am satisfied that the mother has genuinely changed her mind, I do not agree with the father who said in evidence that he had absolutely no doubt that the mother does not want the child. I think he is completely wrong about that. In my judgment, she has come to realise that she does want the child.

*Any risk of harm –*

64 Contrary to the opinion expressed by Mrs. W, I am sure that moving T from her mother at this stage would cause her emotional harm. The Guardian expressed the opinion in oral evidence (cross-examined by Miss Connolly) that moving T now would be “an enormous step” although she added that it would be less of an upheaval at this stage (i.e. at 5 months) than it would be if she were older. She agreed with Miss Connolly that moving T could have a serious impact on her if not managed satisfactorily.

65 As I have indicated above, there are a number of aspects of the evidence given by all three of the adults in this case that have given me concern. The deceitfulness displayed by all of them has led me to consider carefully whether they can be trusted to care for T. I am also concerned that their close involvement with the internet may inadvertently lead them to introduce their children to risk. In the case of Mr. and Mrs. W, I believe this has already happened with the introduction of CL into their household. I urge all of them to think carefully about these dangers.

66 I note, however, that the Guardian does not consider that her investigations unearthed any specific child protection issues. In all the circumstances, I do not consider the question of risk to be decisive in this case.

*The parents' capacity to meet T's needs —*

67 Ultimately, as in most cases, this case turns, in my judgment, on the court's assessment of the respective capacity of the parties to meet the child's needs.

68 I have no doubt that the Ws would be able to meet T's physical needs. Mrs. W has three older children about whom there are apparently no concerns. I assume therefore that she has been a competent carer for those children. Mr. W has no extensive experience of bringing up a child, apart from his experience since his marriage to Mrs. W, but I do not doubt his determination to do his best by his daughter. Both Mr. and Mrs W say that they value education, and would, I think, ensure that T grew up with all the opportunities she needs.

69 I have considerable doubt, however, whether they would meet all of her emotional needs. I noted the clear evidence of affection when they – particularly Mr. W – spoke of T. But their alarming lack of insight, in particular as to the importance of her relationship with her mother, leads me to question whether they would make the right judgments about her emotional needs.

70 The mother as a single carer will undoubtedly find it harder in some ways to meet T's needs, particularly as she also has to look after her sons who present challenges. She seemed in some ways to me to be a somewhat vulnerable young woman who may need help and guidance to assist her in caring for her children. But overall, despite my concerns about her deceitfulness, I conclude that she is better able to meet T's emotional needs, certainly at this stage and, on balance, in the long term as well. I accept that she has demonstrated that she has successfully established a close bond with T which, in all the circumstances, it would be wrong to break. I find that she is genuine when she says that she is committed to contact between T and the father. Thus, whereas in *Re P Coleridge J* found that the father was more committed to contact than the mother, on the facts of this case I reach the opposite conclusion.

*Range of powers available to the court —*

71 At times in the course of the hearing, I have wondered whether the level of concern might justify bringing in the local authority to carry out a [s. 37](#) report, or alternatively to make a family assistance order. Ultimately, I was persuaded by the Guardian that neither option was an appropriate step to take at this stage. I indicated in the course of the hearing, however, that I was minded to make a residence order with an interim order for contact, and arrange a review hearing in February 2011, to see how things had progressed since the hearing and make further orders as to contact. In this way, the Guardian's appointment would continue, and she can oversee the potentially difficult first few weeks after the decision as to T's future residence. The Guardian indicated that she was attracted to this proposal, and I am grateful to her for the work that I know she will do to facilitate contact prior to the review hearing.

72 I shall, however, give leave to the Guardian to disclose this judgment to the local authority for the area in which the mother and T live, and direct her to inform me at the next hearing of any

response or comment from the authority to the judgment and my findings.

## Conclusion

73 On balance, I have reached the clear conclusion that T's welfare requires her to remain with her mother. In my judgment, there is a clear attachment between mother and daughter. To remove her from her mother's care would cause a measure of harm. It is the mother who, I find, is better able to meet T's needs, in particular her emotional needs. I am satisfied that the mother would foster contact and a close relationship between T and her father. I am less confident that Mr. and Mrs W would respect the relationship between T and her mother were they to be granted residence.

74 I therefore order that T shall reside with her mother.

75 There will be interim visiting contact between T and her father until the hearing in February, to be arranged by the guardian. At that hearing, I will review progress and make whatever orders are necessary for T's long-term future, including future contact.

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