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Mr G v Mrs G.

NG11P00811

High Court of Justice Swansea District Registry Family Division Sitting at Cardiff

11 May 2012

[2012] EWHC 1979 (Fam)

2012 WL 3062595

Before: The Honourable Mr Justice Hedley

11th May 2012

Representation

Mr J. Furness QC and Mr G. Jones appeared for the Applicant.

Miss A. Russell QC appeared for the Respondent.

Judgment

The Honourable Mr Justice Hedley:

1 D was born on 28th January 2011 as a result of a surrogacy agreement between on the one hand Mr. and Mrs G the commissioning parents and SK as the surrogate. The child was handed over at birth and has effectively been in the care of the commissioning couple ever since. They have, however, separated as of September of last year, since when the child has been in the primary care of Mrs G with contact to Mr. G.

2 The legal status of D at birth was this. His mother for all purposes was SK. That comes about by virtue of the operation of Sections 33(1) and 48(1) of the Human Fertilisation & Embryology Act 2008 , which I shall refer to as the 2008 Act.

3 Mr. G is the biological father and he holds parental responsibility by virtue of Section 4(1) of the Children Act 1989 . Mrs G had neither legal nor biological status in relation to D, save insofar as she obtained permission to make an application for an order under Section 8 , which in the circumstances it was not necessary to have done. Thus there was a demonstrable need for the obtaining of a parental order pursuant to Section 54 of the 2008 Act, and an application, albeit undated, was duly made, presumably in November of last year.

4 A parental order was apparently made on 6th May 2011 and was amended insofar as it related to the father's name on 26th July 2011. It is important to remember that proceedings for a parental order are entirely statutory in origin; they are governed by Section 54 of the 2008 Act, and by Part 13 of the Family Procedure Rules 2010 . It is apparent that the proceedings which resulted in this order were in many respects gravely flawed, and thus it is important that they are examined in some detail.

5 The Family Procedure Rules deal with surrogacy applications in Part 13 , and by Part 13 Rule 5(1) it is provided: “As soon as practicable after the issue of the proceedings: (a) the court will …” and I interpolate to stress the mandatory “… (i) if Section 48(1) of the 2002 Act applies, consider whether it is proper to hear the application; (ii) subject to paragraph (2), set a date for the first directions hearing; (iii) appoint a parental reporter; and (iv) set a date for the hearing of the application.”

6 A directions hearing was duly set for 6th May 2011. It appears that a parental reporter was appointed from CAFCASS but no report had been received, as one would not have expected it to

have been by the date of the first directions hearing. On 6th May 2011 Mr. and Mrs G attended before the circuit judge at the County Court, and this court has been provided with a transcript of those proceedings. The hearing was, as would not be surprising in those circumstances, attended by Mr. and Mrs G in person and was relatively brief. The profoundly surprising aspect of it is that the judge purported to make a final order on that occasion. The evidence she had of the surrogate mother's consent was comprised in the acknowledgement of service. She had no parental reporter's report, indeed I do not think the case had by that stage been allocated to an individual worker. There was no analysis of the requirements of Section 58(4) , although it appears that at least some £10,000 had changed hands. There was no consideration of welfare issues so far as D was concerned and, although it is apparent that the application was made under the correct Act and the judge was considering it under the correct Act, the order as drawn was drawn under the repealed Statute of 1990.

7 In due course a CAFCASS report was filed on 29th June 2011 against what at least the officer had been given as a filing date of 12th July. There is no evidence that this report was ever considered by the judge. Although the amending order postdates the CAFCASS report, it appeared simply to be a correction under the slip rule in relation to the father's name. The report contains no consideration of the matters required under Section 54(8) other than an acknowledgement of the sum of money that changed hands and an assertion that it was reasonable expenses, and the report considers the checklist under the Children Act 1989 , whereas the proper statutory checklist is the Adoption & Children Act 2002 .

8 Part 13 Rule 9 of the Family Procedure Rules specifies what is to be done at the first directions hearing, that is to say for fixing a timetable, giving directions in relation to a parental order reporter and other evidence, considering parties' status and, finally, giving directions about the final hearing. None of those things happened at the first directions hearing and, of course, no final hearing was ever set, let alone took place.

9 It has to be said that it is difficult to imagine that a hearing could go more awry than this one did, but in fairness one must also observe this. First, circuit judges will very rarely encounter applications under the 2008 Act because those that are wholly straightforward are invariably dealt with in the Family Proceedings Court and those that have a significant difficulty in them are almost always referred to the High Court. It is apparent from a reading of the transcript that the learned judge did not appreciate fully that she was dealing with a radical change of status in terms of the making of the order, but of course it also has to be said that she met with no opposition at all from Mr. and Mrs G, nor would one have expected her to, they were no doubt delighted that matters were being concluded in so simple and speedy a manner. But for reasons which will appear in a moment, the parties' positions as of now are radically different, and it is Mr. G's contention that those proceedings were so flawed that they must for that reason alone be set aside and, of course, it is said that the application can be re-heard because, of course, the six month time limit applies only to the filing of the application. The setting aside of an order does not affect the validity of the application.

10 It is important to observe, however, that the motive for this application to set aside the order is not principally founded on the procedural flaws. Mr. G made an application dated 9th November 2011. It is important to remember that this emerged in the context of Section 8 proceedings over contact and residence, as one will shortly observe, and also it emerged in the context of a contested fact-finding which culminated in a judgment given by Mr. Recorder Fox on 16th November 2011. The essence of the actual application to set aside relates to an allegation that Mrs G concealed her true intentions at the time the order was made, that is to say an intention formed by then to separate from Mr. G and to live with the child as a lone parent. Mr. G contends that had those matters been known at the time, first Mr. G himself would not have continued as an applicant, although of course that would have been subject to the permission of the court and, secondly, that SK would not have consented to the making of the order. By reason of Section 54 subsections (2)(a), (4)(a) and (6) , the reality is that the order could not then have been made in any circumstances, whatever the merits otherwise may have been of the application.

11 The court at this hearing is confronted by an application to set aside the order of 6th May on two quite separate but nevertheless interconnected bases. First, that the order was wrongly made on 6th May by reason of the numerous procedural defects and, secondly, it was obtained by a concealment which, if known, would have resulted in no order being made. This is the case that is listed before me this week. The Section 8 proceedings, to which I have referred, proceed separately in the County Court, and an agreed order in relation to how those are to be dealt with

will be produced by the parties.

12 I need now to deal with some of the procedural matters that were raised by Miss Alison Russell QC in her submissions on behalf of Mrs G. First of all it was said that this case should have been dealt with by way of an appeal and not by way of an originating application. One has to respond first that there are considerable merits in that submission, but one also has to recognise that in this case it has been necessary to investigate the evidence, including hearing some oral evidence and, for reasons that I will explain a little more fully, it would not be practicable in this case for the Court of Appeal to remit the case for a re-hearing should it have thought that the order should have been set aside. For those reasons I have decided to exercise original jurisdiction and hear this application on its merits.

13 The second procedural matter raised was in relation to the position of SK the surrogate mother. She has twice been refused permission to intervene in the proceedings. Her position is, of course, radically altered if this order were set aside, and accordingly her rights and her position will have to be kept in mind by the court as it considers the proper outcome of this application.

14 Thirdly, Miss Russell also raised the question as to whether D himself should be separately represented because, of course, the application goes to a fundamental question of status on which his interests should be independently promoted.

15 Once again there is clear force in those submissions and they are matters which the court must keep closely in mind. I indicated that I intended to keep these matters in mind, but since time had been set aside and everyone was available I would, nevertheless, proceed to hear the case and, if necessary, adjourn it part-heard.

16 Let me now turn to the factual issues which underpin the allegation of deceit. When we were considering the evidence to be heard, the parties indicated that they had six witnesses. However, it was agreed that only two of those witnesses were relevant to the key issue, namely the actual intentions of Mrs G, both at the date of the application in November 2010 and at the date of the hearing on 6th May 2011. Those witnesses are, of course, Mrs G herself and an erstwhile friend called T. Much of the evidence relevant to these issues is, for present purposes, uncontroversial, even if it is not, as it were, formally agreed between the parties. Mrs G had had a previous marriage and previous relationships. It is clear that she had always longed to have a child but had never been able to conceive. She had had children placed with her for adoption in her first marriage, but the marriage floundered and the children were removed. Having a child was clearly a high priority for Mrs G when she married Mr. G in July 2006, and there is a history of IVF treatment before recourse was had to surrogacy.

17 Mr. G is a Sergeant in the British Army. Mrs G works for the Defence Medical Welfare Service. For both of them their occupations have involved some travel and some separation. It is the fact that they did not conceive a child, either naturally or by IVF and in due course investigated and then embarked on a surrogacy agreement with SK, the result of which, as we know, was the birth of D.

18 It is apparent from the judgment of Mr. Recorder Fox that both parties recognised that there had been difficulties throughout the marriage. The key passage is to be found between paragraphs 7 and 9 of his judgment given in the fact-finding proceedings, and I intend to quote and incorporate into this judgment two passages:

> “I accept from the evidence that I have heard that at times father did treat mother with a lack of empathy and sympathy and that he could on occasions be selfish and patronising, all of these being a form of emotional abuse. She, on the other hand, told me by nature she does not let things go and no doubt there were times when she challenged her husband about his behaviour. For me one paragraph of her letter written to him when she left the matrimonial home in September 2011 probably sums up the situation between them. She said this: ‘I do not want to go into the past, you know yourself how horrid you were to me. I'm not perfect I know, but I never treated you with the disrespect or disregard that you did. The fact is I am unhappy. I don't love you anymore and for all our sakes it is the best thing for me to leave. You may say I am a coward but think about it, you've asked me for a divorce twice now because deep down you know we're not happy but you choose to ignore it. I am facing it but will not do it to your face for fear of your reactions, your temper and threats you've made in the past. I

> don't feel safe and I have nowhere to run up there'. That I believe does sum up the wife's feelings and having heard the evidence I think it sums up the reasons for the breakdown of the marriage."

19 The second quotation, paragraph 9:

> "Miss Edmonson for the father has suggested that mother is manipulative and overreacts hysterically when she is not in control of a situation. My belief is that from time to time her exasperation with her husband did boil over, for example her admitted assault on him after the summer ball, an incident which I will deal with subsequently. My finding, though, is that this aggression on this occasion and any others was the result of her frustration and feeling that she is ignored and undervalued by her husband."

20 Those, of course, are matters of which both parties would have been aware at the relevant times in these proceedings so far as the surrogacy was concerned. There is, however, nothing in the parental reporter's report which would give a clue as to any such difficulties, indeed that report ends with positive recommendations in paragraph 37: "I would respectfully suggest to the court that it should make a parental report in favour of the applicants and that it is in D's best interests for the court to do so because D has made his home with the applicants and has lived there since he was born. The applicants are committed to and able to comprehensively meet his needs. There is no-one else seeking to care for him. D needs a sense of security and permanency and to maintain his attachments to his carers. All the criteria set out in Section 30 of the Human Fertilisation and Embryology Act appear to be satisfied." That was, of course, a reference to the wrong Act, but, as the technical criteria are the same in both, nothing turns on that.

21 It follows that I must conclude that none of the matters to which the learned Recorder drew attention, whether by way of complaint from Mr. or Mrs G, was divulged to the parental order reporter, and one must conclude that both of them at that time strongly desired that a parental order should be made in respect of themselves and of D.

22 There is, however, more to it than that. In the early part of 2010, whilst the conception process was underway Mrs G was deployed to Afghanistan. While she was there she had a full blown affair with an American serviceman. It was physical for some two to three months. It continued thereafter by email for another three or four months before Mrs G brought it to an end in about October of 2010. It is common ground that Mr. G knew nothing of this until after the separation in September 2011. Email correspondence has come to light through the offices of T between Mrs G and her lover. Mr. John Furness QC for Mr. G relies on this and I take a stark example to which he referred, which is found at B103 of the bundle, and is an email of the 9th September 2010 from Mrs G to this man. Again I quote and incorporate it into this judgment:

> "Hi E my dream, I guess I have so much going on in my mind at the moment. Work is busy. There is all the things to arrange with the baby. There is so much to do with court case and paperwork and flights arrangements, appointments, etc etc. I am also researching and finding out about myself. What will happen when I leave, where will I go, how to best secure my assets, what financial help will I get etc etc? The list goes on and I have to start thinking now so that there are certain things that are out of my name well before I leave. I am also finding things difficult to maintain life here. Although A is away I still have to pretend. I have never done this and uncomfortable with it, although there is nothing I can do about it unless I lose my baby. My feelings for A have gone, they were bad before but now there is nothing and it's making things hard for me, even with his family who are an interfering lot."

23 That, contends Mr. Furness, is clear evidence that Mrs G all the while during the surrogacy proceedings was planning to leave Mr. G so soon as ever she could. Mrs G, who is heartily ashamed of this affair, maintains that this was all fantasy material, and whilst no-one knew better than she the difficulties in the marriage, she was at all material times determined to make her marriage work.

24 The relationship between Mrs G and T was at one time one of close friendship, soul sisters almost. It was because of that closeness that Mrs G had confided the email correspondence with her lover to T, indeed at T's request. There is a further aspect; Mr. and Mrs G were living in the Midlands at this time, whilst Mrs G comes from South Wales and owned a property there. This she let, presumably on an assured shorthold tenancy, to T. In August 2011 Mrs G informed T of her desire to have the property and followed that up with a formal letter and an effusive reference, which did not altogether square with her experience of the T family as tenants. It seemed that it was this experience that infuriated T and the house when vacated bore signs of more than casual damage. The essence of T's evidence was to support Mr. G's assertion that Mrs G had decided before or during the surrogacy proceedings to leave Mr. G and take the child.

25 I listened carefully to the evidence of both women. Both were honest witnesses in the sense that neither told me anything which they believed to be untrue when they said it. However, both were affected by deep and raw emotion. In the case of Mrs G in the struggle to keep both her status as a mother and what presently remains her child. In the case of T it is something that has gone from anger to something near vengeance. In those circumstances I approached the evidence of both with considerable caution, looking for pointers in the uncontroversial evidence and in the inherent probabilities of the case.

26 It is quite clear to me that at the material time Mr. G was an enthusiastic applicant for a parental order and that SK gave unconditional agreement to the making of the order. However, what is now said is that had they known at the time the evidence that T gave, as I say, Mr. G would not have continued with his application and SK would not have given her consent. That is the second basis on which it is sought to set aside the parental order of 6th May.

27 Let me say something about SK's position. Were she to have withheld her consent that would have been fatal to the application for by Section 54(6) it is a true veto and the court, unlike in adoption proceedings, has no dispensing power. That provision no doubt exists in conformity with the policy objective of the 2008 Act, that whilst gratuitous surrogacy is not unlawful, a surrogacy agreement is unenforceable. In those circumstances she would be, and remain for life, D's mother for all purposes, including presumably Child Support Agency obligations, although she has never sought anything more than occasional contact.

28 I am informed, and I think must accept (a) that that remains her position, she would refuse consent because consent was given on the basis of a functional family, and (b) that she has received legal advice. It was because of this that I indicated that re-hearing by another court, if ordered, would be impracticable because the outcome would be inevitable. To set aside this order is, in effect, to dismiss the application.

29 The position of Mr. G would be less but still significantly affected. Under the parental order he is in the position of an adopted or married parent with lifelong status and inalienable parental responsibility. If set aside he is in the position of a putative father with parental responsibility to age 18, vulnerable always to an order under Section 4(2)(a) of the 1989 Act, however unlikely such an application may actually be.

30 Mr. Furness suggested adoption by a sole parent, but even were residence transferred the child would retain a bond with Mrs G and such an application would appear profoundly unpromising. It is, of course, Mrs G who would be most affected. Under the parental order she has lifelong status as the mother and inalienable parental responsibility. If the order is discharged she would be a legal stranger to the child and dependent on obtaining leave under Section 10 of the 1989 Act, and subsequently an order under Section 8 , which would have the effect of conferring parental responsibility on her for so long as the child lived with her. Her prospects of adoption, even were the child to have lived with her for the requisite period, would appear no more promising than those of Mr. G.

31 Let me return to make my findings about the factual matrix in which this application is to be considered. There was a marriage that was at all times in trouble and that was known to both partners. How much it was in trouble was, of course, better known by Mrs G since Mr. G knew nothing of her affair. This was a surrogacy that both wanted, though Mrs G's feelings were perhaps more raw and more intense than were those of Mr G. Both knew that the marriage might not survive and both hoped, however forlornly, that the child would help the marriage. As I say, I am satisfied that Mrs G was more pessimistic about the marriage than was her partner. I am not able for certain to say what his stance would have been had he known of the affair, though I

accept that he now believes he would have withdrawn from the surrogacy. However that would, for reasons already apparent from this judgment, have resulted in all sorts of complications. At the least, however, it must be reasonably possible that he would have withdrawn. Again, I cannot say what SK position would have been, but must accept that, notwithstanding the ensuing complications, it must have been at least reasonably possible that she would have refused her consent.

32 I am satisfied that Mrs G contemplated separation as a real possibility, perhaps even the most likely outcome, for the reasons set out in the judgment of Mr. Recorder Fox. However, I do not accept that separation was a settled purpose between November 2010 and May 2011. By August it had indeed become probable and no doubt a little earlier than that. I do not accept that Mrs G said anything to T, before her conversation in August 2011 and after the ending of the affair in October 2010, to evince a settled intention to leave Mr. G. She felt guilty and ashamed about the affair, which she withheld from Mr. G, SK and the court. I am satisfied that she had not given up on the marriage at that stage. By the same token, however, she knew what trouble the marriage was in and she should have disclosed that to the CAFCASS officer, and in failing to do so would have misled the court had a judge ever read that report, but of course there is no evidence that a judge did.

33 That then is the context in which this application must be considered. I pause to say that one can readily understand why Mr. G is aggrieved. True it is that he knew the marriage was in difficulty, and true it is that he did not disclose that to CAFCASS or the court. However, he took the view that it was salvageable and he could participate as a co-parent in his child's life. Now that he finds himself not only cuckolded but struggling even to get staying contact, his anger and frustration are all too easily comprehensible. However, the adoption authorities show that the feelings of an injured party are not germane necessarily to consideration of an application to set aside. The hurt of the applicants in both *Re B (Adoption: Jurisdiction to set aside) [1995] 2 FLR 1* and *Webster v Norfolk County Council [2009] 1 FLR 1378* , was immeasurably greater than here and it availed them nothing. But why should the court be making reference to these two cases? Both leading counsel in this case, Mr. Furness and Miss Russell, for whose assistance I acknowledge a profound indebtedness, conclude from their researches that there is no known case of an attempt to set aside a parental order. There is certainly no statutory power to do so, that is confined simply to the revocation of a direction given to the Registrar General (see Family Procedure Rules 13.22 and paragraph (4) of schedule 1 of the 2002 Act). In that the law parallels adoption law, and unsurprisingly so, since like an adoption a parental order both confers lifelong status on the applicant and deprives those who until then had parental status of that status on a lifelong basis. Thus it seemed that such guidance as could be found in the determination of this application was likely to be found in authorities concerning attempts to set aside adoption orders. The two authorities cited make it very plain that to achieve revocation is no small task.

34 In the case of Re B Sir Thomas Bingham, as he then was, said this at page 11 of the report:

> “An adoption order is not immune from any challenge. A party to the proceedings can appeal against the order in the usual way. The authorities show, I am sure correctly, that where there has been a failure of natural justice, and a party with a right to be heard on the application for the adoption order has not been notified of the hearing or has not for some other reason been heard, the court has jurisdiction to set aside the order and so make good the failure of natural justice. I would also have little hesitation in holding that the court could set aside an adoption order which was shown to have been obtained by fraud.”

35 Indeed, there are cases where orders have been set aside on the grounds of breach of natural justice or, as would now be argued, breach of Article 6 of the European Convention of Human Rights and an example can be found in *Re K (Adoption and Wardship) [1997] 2 FLR 221* where an order was indeed set aside because an overseas guardian who could have been found was not involved. This case, of course, is not like that.

36 However, there is a case in which an order was set aside and which has been subsequently accepted as having been correctly decided, namely *Re M (Minors) (Adoption) [1991] 1 FLR 458* . I think it is important to note the facts of this case and they are set out in the headnote accurately as follows:

> "Following the divorce of their parents in 1981 two girls now aged 12 and 11 lived with their mother and stepfather and later were adopted by them with the agreement of their natural father who was leaving the country to work in America. He signed a consent form and the adoption orders were made in February 1988. Unknown to the father the mother was suffering from terminal cancer at the time and died three months later. The stepfather found difficulty in looking after the girls, who went to their paternal grandparents. Meanwhile the father had remarried in America. The girls visited him and his new wife and wished to make their home with them. The stepmother welcomed the idea and the stepfather agreed that it was the best course for the children. The natural father appealed against the adoption orders on the ground that his agreement had been given in ignorance of his wife's condition."

37 It is then important to observe the following comment of Lord Justice Glidewell, comments which were clearly the view of the whole constitution of the court. He said this:

> "In my view this is, as Lady Justice Butler-Sloss said during the course of argument, a classic case of mistake. It is quite clear that the present appellant was wholly ignorant of his former wife's condition and had he known of it he obviously would not have consented to the adoption. That ignorance vitiates his consent and means that it was of no effect. In the absence of that consent it is very doubtful whether the adoption order would have been made. Since it is clearly in the best interests of the children that the adoption order should be set aside, for those reasons I will extend the time for both these appeals because formally they are separate appeals and allow both appeals. I should say as a postscript that this is, if not unique, at the very least a wholly exceptional case. I say that because I do not want the setting aside of this adoption order in these circumstances to be thought of as some precedent for any related set of facts in another case."

I think it would be fair to say that this case marks the high water mark in law of the case advanced on behalf of Mr. G.

38 That seems to me the guidance that can be derived from the authorities. It seems to me that the court is bound to consider what impact the knowledge and stance of Mrs G, as the court has found it to be, would have had on the Applicant, on SK, and on the court, and then to consider the impact of any such order on the welfare of the child. In 1990, at the time Re M was decided, the governing statutory code was Section 6 of the Adoption Act 1975 . The effect of the Human Fertilisation & Embryology Regulations is to import into Section 54 of the 2008 Act Section 1 of the 2002 Act and it seems to me that this application does indeed come within Section 1(1) of this Act and would therefore read: "This section applies whenever a court is coming to a decision relating to a parental order in respect of a child." At the same time, in my judgment, the court must also have regard to the grave procedural failings in this case and consider whether they, alone or together with other matters, so impugn the integrity of the process that the order cannot stand. I have already found that it was reasonably possible, but I put it no higher, that if in possession of all the information SK would at that stage have refused consent and/or Mr. Giles would have declined to proceed. The reason I put it no higher is because on calm reflection SK, who wanted only a very limited role, may have declined full maternal status for life, even though the family were not as stable as she had hoped, and because on calm reflection, and before any residence or contact issue had erupted, Mr. G may have decided that he would have preferred in any event the status conferred on him by a parental order.

39 I have considered with care the position of the court in two respects: first on the information made available whether an order would still have been made had the proper procedure been followed; and secondly, whether the position would have been different had all that was known to Mrs G in fact been disclosed to the court. As to the first position, I am satisfied that a parental order would have been made on a final hearing in, say, July 2011. There was nothing in the CAFCASS report to suggest that the criteria were not met, nor is there any basis for thinking that SK's views would have been different since she gave a formal written consent to the CAFCASS officer. Whilst the learned judge on 6th May was entitled in law to make a finding about consent, she was wrong to have done so until it was formally confirmed in the CAFCASS report in the conventional manner, it being observed that the CAFCASS report is, in a Section 54 application,

effectively mandatory. The balance of welfare demands would have outweighed any anxieties as to whether the monies paid were indeed limited to reasonable expenses (see for example Re L (Minor) [2010] EWHC 3146 (Fam)) approved and followed by the President in Re X (Children) [2011] EWHC 3147 (Fam)).

40 Would the court have made a different order had it known all that Mrs G in fact knew? Clearly this is both somewhat speculative and less certain. It must be considered on the basis that Mr. G would have continued as an Applicant and SK as a consenting Respondent, without that there would have been nothing for the court to consider and I have recognised the reasonable possibility of that indeed being the case. On that basis, however, I think it far more likely than not that the court would still have made the order because the welfare of the child would still so require. All were seeking that Mr. and Mrs G should have the status of lifelong parents, even if they were likely to separate, and it would clarify for the child who in law his parents were to be. Thus on those grounds I think it more likely than not that an order would have been made.

41 I turn then to the welfare considerations that arise in the event of revocation of this order or a refusal to revoke it. If the order is left untouched, then, subject to a determination of the current Childr proceedings, the child will remain with Mrs G, with whom of course he has lived all his life, and she will in all respects be his legal mother just as Mr. G will be his legal father. They alone will hold parental responsibility and will be able to make all relevant decisions, including the degree of contact, if any, that he should have with SK. If the order were to be set aside two consequences would follow. First, there would have to be a re-hearing of the application. Were SK to decline to agree that would be an end of the matter. Were she to agree there would still be the issue of living apart. Whilst that legally would be feasible since living together relates to the date of application (see A v P [2011] EWHC 1738 (Fam) per Mrs Justice Theis) real problems would nevertheless exist were Mr. G to oppose the application. On the evidence that I presently have I think I must conclude that on a re-hearing, as I have indicated, an order would inevitably be refused. That, as previously indicated, would result from the child's point of view in a wholly artificial state of affairs. In short, it cannot be said here, as it was in Re M , that a setting aside would clearly promote the welfare of the child; if anything quite the opposite. That, however, is not the end of the matter. The court must consider issues of natural justice as discussed both in Re M and Re K , and the further issue as to protecting the integrity of the court process, which has been signally violated in this case.

42 I pause simply to observe that the fact that the order was expressed under the wrong Act can, in my judgment, easily be cured under the slip rule. The application was made under the correct Act and the judge clearly had the correct Act in mind by her reference to Section 54 .

43 I think that I have now set out all the matters which the court is bound to consider and I have given all these matters my closest and most anxious attention. In the end I have concluded that I should refuse this application. I have done so for four principal reasons. First, given that the parental order is like an adoption order, an order conferring status, there should, so far as is possible, be certainty and clarity and therefore the court in considering such an application should be guided by the authorities on revoking adoption orders. There is no statutory power to do so nor any inherent power other than in the sort of circumstances raised in Re M and Re K . The bar is set very high. Secondly, although the court, Mr. G and SK, were undoubtedly misled by Mrs G in her silence, both as to the affair and her pessimistic perception of the marriage, that, in my judgment, comes nowhere near the circumstances that existed in Re M , which in any event was said should not be used as a precedent on its facts, or in Re K . Thirdly, I do not believe that a revocation of this order is consistent with D's welfare, indeed if anything it conduces against it. This is in sharp contra-distinction to Re M . Mrs G is the only mother that he has known and his welfare will be undermined if she is deposed from that role. Fourthly, I am satisfied that the court would have reached the same decision as it did, even if all the matters revealed in the CAFCASS report had been considered properly by the judge, and I think it more likely than not that such an order would have been made had all the information been disclosed, provided, of course, SK's consent and Mr. G's application had continued.

44 I have also concluded that I should not set aside this order for the purposes of protecting the integrity of the court process. My reasons are essentially the third and fourth reasons above, namely welfare and the same outcome. I am also influenced by the fact that on the present position of SK there could not be an effective re-hearing of this case on its merits. It follows that whilst I concluded that I have original jurisdiction to entertain this application to revoke a parental order, both on the basis of deception and the seriously flawed process, I have concluded, for the

reasons given, that I should refuse the application. In those circumstances I have not thought it necessary to re-involve SK, whose position is not affected by my order. Moreover, I have not thought it necessary to adjourn these proceedings to have D separately represented, though I might well have done so after hearing the case if I had been minded to accede to the application, just as a similar view may be taken were this case to go further.

45 It is now necessary to add three final comments. First, a copy of this judgment must be sent to the designated family judge at the county court where the parental order was made. Although I have expressed blunt criticism of the procedure there, I recognise that, whilst I have become familiar with the law relating to surrogacy, few, if any, circuit judges will have encountered it and when, as here, they do,they are likely to find, as here, that it appears entirely consensual with not a lawyer in sight. The message that I would wish to send is that an application for a parental order should be treated with the same care and caution that attends every application for an adoption order. Both Section 54 and Family Proceedings Rules Part 13 are in mandatory form; they must be observed and care taken.

46 Secondly, this case must now be returned to the County Court for the Children Act 1989 proceedings to continue. I do not, of course, seek to express any view about their outcome, but I do seek to make two points. First, the parental order was undoubtedly made with a view to Mr. and Mrs G co-parenting D, and any idea that one parent should be, or even appear to be, marginalised in his life would be intolerable in the light of those original agreements.

47 Thirdly, in any dispute about residence my experience is that a highly material factor is the capacity of each parent actually to ensure that D has a proper relationship with the other parent. It seems to me that much thought still needs to be given as to how this is to be resolved.

48 Finally, I would be disposed, if asked, to grant permission to appeal in this case, not because I have doubts about my judgment, but because, being wholly novel, this is an area which would, in my judgment, benefit from appellate consideration. The developing law of surrogacy is almost entirely made up of first instance decisions, and in my view it is in the public interest for this to be considered at appellate level, should Mr. G so wish, by the Court of Appeal. However, at present, and for the reasons that I have given, the application stands dismissed.