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Case No: RM14P01215

Neutral Citation Number: [2015] EWHC 1059 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2015

Before :

THE HONOURABLE MRS JUSTICE THEIS DBE

Between:

A

Applicant

- and -

B

1st Respondent

- and -

C & D

2nd Respondent

(Through their Children's Guardian Mrs Lillian Odze)

Mr Edward Bennett (instructed by **Dawson Cornwell**) (both solicitors and counsel acting pro bono) for the **Applicant**

Dr Bianca Jackson (instructed by the Bar Pro Bono Unit) for the **1st Respondent**

Hearing dates: 13th and 20th March 2015

Judgment: 20th April 2015

Judgment

Mrs Justice Theis DBE:

Introduction

1. This matter concerns a fact finding hearing in the context of a parental order application made by the commissioning parents of twin girls C and D, who are now 3 years old. The commissioning parents are A and B.
2. This case is an illustration of the difficulties that can occur if commissioning parents in surrogacy arrangements do not make prompt applications for parental orders to secure their legal position in relation to any child born as a result of such an arrangement.
3. If such an order is not sought, one or both of them are not the legal parents of the child, which can have long term detrimental consequences. An obvious example is that testamentary provision for the child may be open to challenge. Another is that without any order they have no parental responsibility for the child, even though the child is in their full time care. As a matter of English law unless a parental order is made the child's legal mother will remain the surrogate mother. If she was married at the relevant time and her husband consented to the arrangement, he will be the legal father. This is irrespective of the legal position in the country where the child was born. In this case the surrogate mother and her husband, who remain in India, are the legal parents of C and D, even though they have never cared for the children.
4. Those who may maintain that a parental order is not required are not considering the best interests of the child who they care for and risk sleepwalking into future legal difficulties for the child, which can readily be avoided by a parental order being made. Such an order is specifically designed to give lifelong legal security to commissioning parents and children born following surrogacy arrangements.
5. Issues which the court is going to have to grapple with at a hearing in June include whether section 54 (4) Human Fertilisation and Embryology Act 2008 (HFEA 2008) is satisfied if A and B were separated and living in separate homes at the time that they made the parental order application. Section 54 (4) provides that at the time of the application and the making of the order '*the child's home must be with the applicants*'.
6. The discovery by A and B of the consequences of them having not made an application for a parental order has been deeply distressing for them, particularly for A.

7. This hearing was listed to consider the schedule of allegations relied upon by A. In essence she states that B:
 - was controlling of her, including allegations that he maintained her on medication for her mental ill health longer than was necessary, undermined her confidence and self esteem by maintaining she remained mentally unwell and isolated her from her family and friends
 - threatened to kill her and throw her out of the house and was physically violent to her by slapping her face
 - threatened to take the children from her care
 - threatened to assault one of the children
8. B denies this behaviour and, put simply, states much of it is explained by A's mental ill health and unpredictable behaviour.
9. Both parties have the benefit of being represented pro bono. In the case of A, both her solicitors and counsel are acting pro bono. B is represented through the Bar Pro Bono Unit. The court is extremely grateful to Mr Bennett, his instructing solicitor Mr Rogerson and Dr Jackson who have each provided their expert assistance in this difficult case.
10. I heard the oral evidence of both parties and considered their written statements and the court bundle.

The Legal Framework

11. There is no issue between the parties about this. The burden of proof is on A and she must establish any matter to the required standard, namely the balance of probabilities in accordance with the principles set out in *Re B [2008] UKHL 35*.
12. Findings of fact must be based on evidence not speculation, as Munby LJ (as he then was) observed in *Re A (Fact Finding: Disputed findings) [2011] 1 FLR 1817* at paragraph 26: "*it is an elementary position that findings of fact must be based on evidence, including inferences that can be properly drawn from evidence and not suspicion or speculation*".

Relevant Background

13. A and B are in their late forties. They married in 1992; it was an arranged marriage. They separated in 2004/2005, resumed cohabitation shortly afterwards and lived together until May 2014. Although they had been married for over twenty years, it was not an altogether happy marriage, with frequent disagreements. There were a number of stresses on the relationship, such as the couple's inability to conceive children.

14. They entered into a surrogacy arrangement with a clinic in India in early 2011. C and D were born in December 2011 and returned with A and B to this jurisdiction in March 2012.
15. The parties' relationship broke down in April 2012, although they lived separately in the same home.
16. According to A, the relationship further deteriorated. She alleged that B slapped her in late 2013 and made threats to harm her and remove the children from her care.
17. A left the family home with the children in early May 2014 and sought legal advice. The police arrested B following A's allegation of assault. A and the children returned to the family home; B has not lived there since then.
18. Following their separation in May 2014, A made an application for a non molestation injunction and child arrangements order. B cross applied for a child arrangements order, effectively seeking shared care. During the course of those proceedings A lost her legal aid, the circumstances of the children's birth came to light and the matter was transferred to be heard by a High Court Judge. A then instructed her current solicitors.
19. The children were made wards of court in September 2014 and arrangements were made for B to have supervised contact with the children.
20. Following the decision in *Re X (A Child)(Surrogacy: Time Limits)* [2014] EWHC 3135, where the court permitted an application for a parental order when the application was made more than six months after the birth of the child, A and B made an application for a parental order in November 2014.
21. Directions were made for a fact finding hearing in relation to the allegations of domestic abuse made by A against B. Both parties filed statements and the matter was set down for a four day fact finding hearing in February. At the directions hearing in January the parties agreed that B could return to the family home to collect his belongings and his contact with the children could move to being unsupervised.
22. B attended the property on 18 January to collect his belongings. By agreement, the police were present. According to A, B was angry and displayed aggressive behaviour.
23. Just prior to the fact finding hearing in February A filed a statement stating that she did not wish to pursue the schedule of findings, although she

maintained the truthfulness of the allegations she had made. Having re-considered the position at that hearing, her instructions changed; she did wish those allegations to be determined. Unfortunately that hearing could not be retained, as further evidence was required. Directions were made leading to a hearing in March.

24. The statements filed subsequently revealed that in January 2015, a few days after B had been to the home to collect his belongings, A had contacted B by text/email requesting that they meet up. They met with the children at a hotel and all stayed overnight. The following day B cared for the children whilst A went to work. A became ill and was admitted to hospital. As a result of what she informed the doctor about the history of her relationship with B, the police were contacted and the children were returned to A's care where they have remained.
25. I heard A's evidence on 13 March and B's evidence on 20 March.
26. Both Mr Bennett and Dr Jackson filed detailed written closing submissions which have been extremely helpful.

A's mental health

27. A has a history of mental ill health. In her more recent medical records, there is a document dated July 2013 completed by her current GP, which was prepared for a private referral. This document refers to her taking an overdose in 1987 (in her oral evidence A states it was earlier than that, taking place when she was still at school and involved her taking 6 paracetamol), suffering anxiety and depression 1995 – 1997 and '*was hearing voices then started on Aripiprazole before she joined our surgery in 2005*'. It describes A as being '*mentally stable*' in July 2013. The document refers to Aripiprazole last being prescribed in October 2011, when the dosage was reduced from 10mg to 5mg.
28. A accepts she suffered from depression in the past. This is the context in which she assaulted B in 1997; she attacked him with a knife causing serious injuries. There are some police records available from this time. Despite needing hospital treatment B was clear to the police that he did not want to press charges. B alleges that there were other occasions when A assaulted him, but he did not seek findings in relation to those events. A denies any further assault of B other than in 1997.
29. It has been very difficult to assess the extent and nature of A's mental health in the absence of the relevant medical records. She has only been able to obtain her medical records from 2005 due to not being able to establish what health authority holds her medical records prior to that.

30. In the most recent letter from A's GP in February 2015, it states she has been seen regularly since July 2014 and during this time she *'seemed entirely mentally well and calm, albeit stressed by the relationship problems with her children's father and the court battles. She has not been prescribed any drugs during this time'*. The letter notes that she was on Aripiprazole 10mg in 2005 (when their records begin) and was prescribed this regularly until 2011, at 2 monthly intervals, 2 months supply at a time. There was no psychiatric review during this time; repeat prescriptions were issued at intervals. In October 2011, her GP suggested a psychiatric review; it appears because she had not had one for many years rather than being due to any concerns. That review resulted in the daily dosage being reduced from 10mg to 5mg. She was referred privately to Dr Andrew Margo in October 2013, but the referral letter was not collected and she did not make that appointment. No further prescriptions for Aripiprazole were issued after October 2013. A told her GP she had not taken that medication since 2010.
31. Mr Bennett rightly reminds me of the lack of concern expressed by any third party (for example the local authority and nursery) regarding the mother's mental health. There are many references to the good day to day care that she gives to the children and other references to positive aspects of her parenting.
32. Having had the opportunity to observe both parties in the witness box it is clear the fragility of A's psychological health is likely to have affected her response to B's behaviour. She came across as being very intense and was quiet, somewhat flat in tone, in her responses. She often gave overly long, detailed responses to relatively simple questions. B is a stronger character, more forceful. He came across as being controlled in his presentation, which probably masked the reality of how he would behave in the family home.
33. The parties' relationship is undoubtedly very complex. They have remained together for many years, despite both of them recognising the long term unhappiness in their relationship together, characterised as it was by frequent arguments. It was an emotionally tense, unhappy marriage. It is acknowledged that during the arguments there was much shouting on both sides and often these arguments would have taken place in the presence of the children.

The Allegations

34. In the written submissions on behalf of B, Dr Jackson helpfully sets out each of the allegations made by A in the Scott schedule filed on her behalf. I will take them each in turn.

35. Many of the allegations are without any corroboration. This has made the task of fact finding more difficult, as they have to be viewed against the background of the parties' difficult relationship, their respective characters and A's psychological fragility.

Allegation 1 (a): The father threatened to kill the mother [May 2012 – onwards].

36. In her statement filed in support of her injunction A stated '*Approximately a year ago the Respondent threatened me by saying that if I left him, he would kill me, the children and himself*'. In her oral evidence she said these threats had happened more than once and she did take them seriously. She said she was cornered by B into silence; she feared if she spoke to anyone she would lose her daughters.
37. In the closing submissions on behalf of B, reliance is placed on a number of matters that affect the reliability of this allegation. Firstly, if it had been a constant threat, why had no mention of it been made to any third party (the police or the GP). Secondly why had this not been set out in the statement filed in support of the injunction application. That statement makes reference to a one off threat by B against A. The first time there is reference to the threat continuing is in the Scott schedule filed 6 months after proceedings started and no further detail is provided.
38. A has failed to establish this to the required standard. If it was a constant threat, as she alleges, she is likely to have mentioned it before and set it out in more detail in her statement.

Allegation 1 (b): The father once stated (approximately September 2012) to the mother that, if you try to leave me, I will kill you, the children and then myself

39. As in the previous allegation, reliance is placed on A's statement filed in support of her injunction. She stated '*Approximately a year ago the Respondent threatened me by saying that if I left him, he would kill me, the children and himself*'.
40. It is submitted on behalf of B that the children are his priority and he would not seek to harm them. A's account is not supported by the police disclosure. When A called the police on 8 March 2013 to report that B had taken C, she was specifically asked whether he had made threats to kill himself or the children; she said no.
41. A has failed to establish this to the required standard. If such a threat had been made she is more likely to have revealed that to the police when asked the specific question in March 2013.

Allegation 1 (c): The father could threaten to kill without reason or when the mother tried to resolve an issue or spoke out. He once threatened to kill someone on the train and on one occasion told the mother he was waiting at the station to die.

42. This allegation does not feature in A's statement. It is only referred to in the Scott schedule. In her oral evidence, A said that she took these threats seriously even though she accepted that there was nothing to suggest that B would carry these out.
43. B accepts that he once threatened to A that he would kill someone on the train and that on another occasion he was waiting at the station to die. He states that both comments were made flippantly and through frustration, and need to be seen in the context in which they were made. The first occasion was at a time when the mother had been sending him a number of emails in which she made hurtful comments. She refused to stop and out of a sense of frustration and hurt, B said he was *'going to kill someone'*. It is submitted on behalf of B that this was an off-hand comment made in the context of B's frustration arising from the emails.
44. The second occasion was in the context of a very frustrating journey from work by B and what he said were A's repeated requests for him to get food for the children at a particular time which he could not make. In that context he made what he termed as a flippant comment to A that he would rather be dead than sit waiting for the train.
45. A has not established these to the required standard. Whilst B accepts he made these comments, they were more likely to have been on separate occasions and need to be viewed in the context in which they were made.

Allegation 2 a): The father threatened that he would leave the former matrimonial home with the children and the mother would never see the children again. He said this often and actioned it in March 2013, when the mother reported it to the police. On one occasion the father left the former matrimonial home with C and stated would never see her again.

46. In her first statement, A said *'He has made threats of taking the children away on at least two occasions. Around six months ago, the Respondent took C to the car and said I would never see them again. This terrified me as the girls are my world. The Respondent has made constant threats about taking the children away and I believe he is capable of doing this. On this occasion I called the police'*.
47. Later in the same statement she said *'Most recently during the Easter bank holiday weekend, the Respondent made threats to take our daughters away*

and that I would never see them again. Following this I decided to take the girls out to the park, in order to get away from the Respondent for a short period of time. The Respondent knows I am not comfortable in his presence however he still insisted on accompanying us to the park. At the park, I again told the Respondent that I was not happy in the marriage. The Respondent went on a rant and proceeded to verbally abuse me. The Respondent then picked up D and walked off. I was petrified that he had run off with her. I telephoned the Respondent to find out his whereabouts. The Respondent told D to inform me that they were at home.'

48. It appears to be agreed by A and B that this was in the context of an argument between them. A said she was trying to cook dinner and deal with an ant infestation in the kitchen. According to A, B made some comments and laughed. B alleges that A hit him with a toy; A denies this. B states he tried to take both children out of this difficult situation to allow A to calm down. As he was putting them in the car, A removed C and he decided to drive off with D. A states he left with D, stating he would be back for C.
49. A agreed that when she reported the matter to the police there was no record of previous threats. She considered the police did not take the situation seriously enough.
50. I do not consider A has established this finding to the required standard. It is clear this event occurred in the context of a heated argument between the parties. B's rather heavy handed attempt to remove the children from the situation was part of the deteriorating relationship between the parties, rather than any attempt by him to remove the children from A and for her never to see them again. A over-reacted by calling the police. If B had really intended to do this it is more likely than not he would have taken more belongings and both children.

Allegation 2 (b): The father would restrain the mother from holding and comforting the children often and the frequency increased since October 2013. When the father was angry, he would pick up [C] and [D] and stomp or storm out of rooms and slam doors.

51. This allegation is not mentioned in A's statements but is referred to in the Scott schedule.
52. In her oral evidence, A stated that during arguments between, them B would storm off holding one of the children and then start shouting from where he was. That would usually stop the argument as he was as she put it '*an angry man holding my daughter. I never imagined after this blessing he would behave in such a way with the children in the house. I was in shock*'.

53. B said that if he and A were arguing, he would try to diffuse the situation and if that didn't work he would remove himself from the situation. He denied taking the children with him.
54. I do not consider that A has established to the required standard that B would restrain A from holding and comforting the children; however I do consider from October 2013 there were likely to have been occasions, during the course of arguments between A and B, and in the heat of the moment, that B did pick up one of the children and storm out of the room where the argument was taking place. This has to be seen in the context of the deteriorating relationship between the parties and the likely impact of him taking such action bringing the argument to an end for the reasons given by A.

Allegation 3: The father is verbally and physically abusive towards the mother. The father slapped the mother across the face. He said the only way to sort out Indian woman is with an Indian slap. The father slapped the mother after he smashed a glass on the floor in the dining room while the mother was bringing lunch to the table. The mother was holding C when the father stood over her, stared into her eyes, while she begged him not to hurt her and slapped her. She was unable to report this to the police being fearful of the father.

55. In her first statement A stated '*the most recent incident of violence occurred around six months ago, the Respondent and I got into an argument. The Respondent proceeded to slap me in the face. I recently reported this to the police. However, the Respondent was not charged as there was no evidence of assault.*'
56. A did not mention that she was holding C until her statement made in September 2014.
57. Further detail was provided in the Scott schedule when she refers to the incident being preceded by B breaking a glass and standing over her in a threatening way.
58. B denies slapping A and states that changes in her account undermine the reliability of what she has alleged took place. In particular, why A had not mentioned in her first account that she was holding C at the time, as that was a feature that put the children at direct risk of physical harm.
59. I do not consider that A has established this finding to the required standard. Her account of the event has varied over time, with it becoming a more serious allegation as time has gone on. A felt able to report this allegation to the police in May 2014, yet does not appear to have given them the account she now relies upon as the police took no further action. If she had reported what she now says about holding C, it is very likely the police would have made a referral to the local authority at that time.

Allegation 4(a) The father created psychological fear to control the mother. The father forced the mother to take prescription drugs and would call her insane (April 2012, Oct 2012, March 2013, August 2013, April & May 2014). He did this regularly.

60. This allegation was not referred to in the initial statement and only emerged in the later statements signed by A.
61. In her statement signed in September 2014 A states *'Around 10 years ago I suffered from acute depression. At the time, my doctor said that it was possible my depression would lead to other mental health difficulties and I was prescribed aripiprazole (15mg) which I took for approximately 1 year. When I started medication I was better in weeks. During the fertility treatment I did not take any medication. I saw numerous medical practitioners – none of them saw any mental problems. Over time my dosage was reduced and I was taken off medication all together. [B] pressurised me into taking medication even when the GP said it wasn't necessary. In August/September 2013 [B] wanted me to go to visit the GP in order to get further prescriptions. He told me I should tell my GP that I was abused as a child and that this must be noted in my medical records. My GP refused to make further prescriptions and I made no claims about abuse to my GP...I only know now that I have been the victim of domestic violence for a very long time before I was prescribed any medication. I did not realise this when I approached the doctor about depression and would have to ask if my doctor's diagnosis would be different if I had discussed the domestic violence.'*
62. In her oral evidence A accepted that one of her symptoms in 2004 had been hearing voices. Her medical records record repeat prescriptions of Aripiprazole between 2005 and 2011. She said that often the repeat prescriptions were collected by B as he said she needed to take the medication during these times. She said she didn't take it, although accepted what the medical records recorded. She said she was on medication during this period intermittently and she stopped completely in August 2013. She maintained that she had only sought repeat prescriptions as she was coerced by B to do so. She did not accept that B only suggested she keep taking the medication out of concern for her mental health.
63. It is submitted on behalf of B that A's medical records, albeit incomplete, do not support what A says about her medication. She has been prescribed Aripiprazole regularly until 2011. There is no reference in the records from 2005 that B coerced or pressurised her into taking the medication.
64. A has not proved this allegation to the required standard, although due to her vulnerability she is likely to have viewed B's concern as being some pressure.

If, as A maintains, B was pressurising her into taking medication in the way she describes there were opportunities for her to mention this to third parties (such as the GP); she didn't do so. It was not mentioned in her first statement. This has to be seen in the context of the difficult and deteriorating relationship between the parents where B was trying to establish what A's position was regarding her medication. There was the serious assault in 1997 and the difficulties that resulted in the medication being prescribed in 2004/2005. Just taking those matters alone B's concerns about A's mental health had some foundation, although he was probably not justified in the way he raised it with various third parties (for example, the local authority in July 2014). Whilst A may have misinterpreted B's concern about her mental health, it did not amount to coercion as she alleges. However due to her vulnerability and B's character it is likely, at times, to be viewed by her as pressure.

Allegation 4 (b): In May 2012 he said she was hallucinating about smelling gas in the house, although British Gas discovered there were problems with the gas pipes.

65. This appears only in the Scott schedule and is not dealt with in any detail in A's statements.
66. B accepts there had been a smell of gas since they moved to the property; it was mentioned by A's sister. It was checked out and he denies suggesting to A that she was hallucinating.
67. A has not established this allegation to the required standard. It appears there was a problem relating to the smell of gas in the home which was dealt with.

Allegation 4 (c): the father isolated the mother from her friends and family. She had no contact with several members of her family for almost 21 years. There were arguments about the dowry. The father was intrusive and expected the mother's family to discuss every personal family detail and would drive people away. He threatened her with family honour to control her.

68. In her first statement A states *'The Respondent is very controlling. The Respondent would not leave me alone. I would have friends and family over and he would insist on always being present. The only opportunity I had to be alone with my friends would be when I went to the kitchen to make tea. The Respondent's controlling behaviour has highly impacted on my support network to the effect I no longer have any friends or family that I can contact in case I am in need of assistance. I believe this is part of his controlling behaviour because the Respondent is aware that that without a support network I would be unable to turn to anyone or leave the emotionally abusive relationship.'*

69. In her second statement, A describes the family party when they returned to England with the children. Whilst she criticises B's behaviour at that event there appeared to be no impediment to her arranging the occasion.
70. In her oral evidence she said he isolated her by questioning her family and friends about personal matters so that they were made to feel uncomfortable. B denies this and states A isolated herself from her family when they disagreed about certain matters.
71. A has not proved this to the required standard. As she said in her evidence her sisters were very keen for her to have children, she phoned them when the children were born and arranged the family party to celebrate their arrival in England. This action does not bear the hallmarks of social isolation.

Allegation 5(a): The father would denigrate and demean the mother throughout the marriage. The father would tell the children that the mother was 'mental' and 'mad' and that F and the children would leave her. He did this regularly. He said this in March 2013 when he left with C and in April 2014 when he stormed off with D from the park. The father told the mother that she needs a high dosage of drugs and she will see he is perfect. The father would call the mother sick and disabled.

72. In her first statement A describes such behaviour affecting her self confidence.
73. It appears both specific occasions relied upon were in the context of arguments between the parties in the presence of the children; that is accepted by both parties. It is likely there was shouting and things are likely to have been said in the heat of the moment. B's assertion that he held back from insulting A during such arguments is unrealistic. Whilst I consider it unlikely B would say that she needs a high dosage of drugs, I do consider in the context of arguments between the parties together with the issues surrounding A's mental health it is more likely than not B did say something about A being 'mental' and 'mad'.
74. In relation to the incident in the park in April 2014 there was an argument between the parties. They continued their argument during a visit to the park and B went off with D. A said her fear for D was because B was angry. She did not call the police on this occasion, as she had in March 2013, as B did not threaten that she would not see D again. A said the only reason she raised the question of their marriage in the park was to have what she called a '*quiet conversation*' and she did not expect B to explode. Although she accepted that to raise the issue again B was likely to become angry.
75. It is more likely than not B did go off with D in the context of the continuing argument between the parties. However, I accept B's account that this was to

try and remove the child from the difficult situation between the adults and that when contacted A was informed where they were.

Allegation 5(b): The father would make the mother plead for basic commodities. The mother had to carry hot water up the stairs as the father would not turn on the hot water. He never fixed the boiler and one could not expect hot water to be available. The father preferred to sit in darkness and would not turn lights on.'

76. This is only raised in the Scott schedule and is not mentioned in A's statements.
77. In her oral evidence A said the boiler was faulty and could only be turned on manually. When asked why she didn't just switch it on, she suggested that B told her that it was working. A accepted that the parties did not have the means to get the boiler fixed.
78. This allegation is not proved to the required standard. Whilst there appears to have been some difficulty with the boiler, it is more likely than not it was not working automatically and needed to be switched on manually. The allegation regarding the lights does not suggest that A was not able to turn the lights on.

Allegation 6 (a): The father speaks and acts aggressively towards the children. The father raised his hands towards D. He restrained himself when the mother walked into the room.

79. The parents have different approaches to disciplining the children.
80. B accepts he has, on occasion, used physical discipline but only done so when the children have been in danger to themselves or each other. On each occasion he has warned them, first verbally and then if they did not heed that warning by raising his hand to suggest he might smack them. If that was not sufficient to prevent the behaviour he would 'tap' them on the leg with a flat hand. B states that after this he would comfort them and explain what they had done wrong.
81. B accepts A saw what she describes when she walked into the room, but denies that he restrained himself due to her presence. B states this was part of his process of disciplining the children.
82. It is more likely than not that A's presence in the room diffused the situation that B was disciplining the child about. This needs to be seen in the context of the difficult and tense situation in the family home. There is other evidence in the papers to suggest that B appropriately manages the children's behaviour (e.g. the contact supervisor's note for 5 October 2014) and A has agreed to unsupervised contact. It is clearly a matter of concern that the parents appear

to be using differing methods of discipline and this issue will need to be considered within the welfare hearing.

Allegation 6(b): On 27 April 2014, the mother thought C was injured when she heard screams in the toilet when the father shouted at her for soiling her nappy. The father verbally restrained the mother and stomped behind her as she went to call 111 for medical help. The father was very angry, he banged his head on the wall to stop the mother from picking up the phone. The mother was left very scared and thought he was going to beat her. The father said 'If you pick up that phone you will ruin her life, my life and everyone else's life. I'll have you.'

83. This incident is only described in the Scott schedule and not dealt with in A's statements. B maintains that C cried as he was changing her nappy as she had nappy rash. Nappy rash was confirmed when A took C to the GP the following morning.
84. In her original referral about this to Cafcass and subsequently to the local authority, A made no mention about B verbally restraining her or banging his head to prevent her picking up the telephone. This detail appears for the first time in the Scott schedule, some six months after the incident.
85. This allegation is not established to the required standard. Whilst there was likely to have been an argument between the parties at the time B was changing the nappy, the detail now relied upon by A is not supported to the required standard by the evidence. The author of the local authority report advised A to report the matter to the police if she considered anything untoward had occurred; she didn't do so.

Allegations 6 (c): The father accused the nursery of causing an injury to C

86. This allegation has not been supported by any material from the Nursery. It is not established to the required standard.

Allegation 8: On Sunday 18 January 2015, by prior arrangement, the father attended the former matrimonial home with his brother escorted by the police. The father was agitated and very angry. The father made a number of comments, including 'this is going to be over soon and I am going to kick her out of the house/throw her out of the house' which the mother found intimidating.

87. There is an issue as to precisely what was agreed at court on 14 January regarding B collecting his possessions from the former matrimonial home. B maintains it was agreed that A would not be present and that he would be able to pack up his own belongings. That is not accepted by A.
88. In his oral evidence B accepts that he shouted at the police officer present 'I hope you are going to help me the same way you are helping her, when I win

the case and kick her out of the house'. B maintains that he did not know A was in the property at the time; this is not accepted by A.

89. B states that he was emotional as this was the first time he had returned to the home since May 2014. A says she was intimidated and nervous following B's comments and stated that B's behaviour reminded her of the way that he had behaved during their relationship.

The January 2015 Texts

90. Three days after the 18 January incident, A contacted B by text, unsolicited. B produced copies of the texts during A's oral evidence. In the texts, A wanted to meet B, and suggested that he arrange a hotel room where she could come with the children. None of these texts refer to any fear of B or anxiety regarding his behaviour. These texts are not referred to in A's most recent statement other than in the most general terms.
91. The parties met as requested by A and spent the night at a hotel with the children. According to B after the children had gone to sleep he listened to A. The following morning B had the care of the children whilst A went to work. Due to A feeling unwell later that morning she was taken to St Thomas' Hospital. She sent a text to B at 12.38 stating *'Hi I'm in St Thomas hospital I was ill underground. Look after the children.'* A subsequently told the doctor at the hospital about the alleged domestic abuse and claimed that she would not get in touch with B. The doctor contacted the police.
92. It is submitted on behalf of B that this is the context in which the allegations concerning the 18 January need to be considered. A was not frightened of him; otherwise she would not have arranged to meet B and allow him to care for the children. It is submitted that A's reasons for meeting B do not stand up to close scrutiny; in her statement she said she was concerned about his health; in her oral evidence she said it was to *'keep him pleased'*, even though she accepted the request to meet up had been initiated by her.
93. B accepts on 18 January he made comments to the police officer similar to those described by A. He says he was emotional, A states he was angry. It is more likely than not he was angry, aware A was in the house and she would hear what he was saying. What was said by him was more likely than not to have been with that intention.
94. It is difficult to tie in A's subsequent actions with what happened on the 18th January. That evening, according to A in her oral evidence, she felt someone had entered her property and *'moved things around'*; she specifically referred to her printer. She did not suggest that person was B. She said the police had

attended. She had taken the children to her sister's and had then gone to visit her neighbour. When she returned home she had two glasses of wine, which she was not used to, and sent the texts to B suggesting that they meet up. She agreed in her oral evidence she could not make sense of many of the texts. She called the police after she had sent these texts. She said that they advised her to delete B's number from her phone, and they contacted A's sister. She said she went to her sister's and spent the night there.

95. The only explanation she could give for her behaviour was the impact on her of B's behaviour when he attended the home on 18 January.
96. The circumstances surrounding this meeting may need to be explored further within the welfare hearing. There is an obvious and worrying tension and inconsistency between what A states is her fear for B and her concerns regarding his behaviour towards herself and the children with her willingness to meet B in the circumstances that she did, entirely initiated by her.
97. What A's behaviour does indicate is her vulnerability to stressful situations. The texts are voluminous (said to be in excess of 250 over the course of 2 hours) and many are incoherent and rambling, most making no sense at all.
98. This aspect and the influence of B's behaviour on her will require further detailed consideration in the context of welfare decisions regarding the children.

Parental Order Application

99. The position regarding the parental order application can be summarised as follows.
100. It appears likely A and B will be able to satisfy the criteria under s 54 that
 - (i) B has a biological connection with both children (s 54 (1))
 - (ii) both children were carried by the surrogate mother (s 54 (1))
 - (iii) A and B are married (s 54 (2))
 - (iv) A and B are over 18 years (s 54 (5))
101. The more difficult areas relate to
 - (i) the application being made more than six months after the children's birth (s54 (3));
 - (ii) whether the children had their home with the applicants at the time of the application and the making of the order (s 54 (4)(a));

- (iii) whether at least one of the applicants can establish a domicile of choice in this jurisdiction (s 54 (4)(b));
- (iv) whether the surrogate mother and her husband consent to the making of a parental order or whether that consent will need to be dispensed with as they cannot reasonably be found (s 54 (6) and (7));
- (v) what payments were made other than for expenses reasonably incurred that require the court's authorisation under s 54(8)
- (vi) whether a parental order is in the lifelong welfare interests of each of these young children (s 1 Adoption and Children Act 2002).

102. The parties will need to agree a schedule of findings that accords with this judgment, the arrangements for interim contact and any further evidential directions in preparation for the next hearing.