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Having regard to the law in your jurisdiction, how would you advise 1) Samson and 2) Delia in relation to:

1. a) whether they are treated as the legal parents of Eliza by virtue of the Californian birth order in their country of habitual residence.

For this case study, it is assumed that Delia and Samson are citizens of and habitually resident in England and Wales ('E&W').

Delia

A legal "mother" is the woman who carried the child following the placing in her an embryo or sperm and eggs.¹ Jemimah carried Eliza following the placing of an embryo in her. Delia should therefore be advised that the default position under English law is that Jemimah is Eliza's legal mother. After all, '*no other woman*' can be treated as the child's legal mother² besides the woman who carried the child. Consequently, the Californian birth order, which recognises Delia as a legal parent under US law, is irrelevant.

Samson

Samson should be advised that the husband³ or wife⁴ (or civil partner) of the woman who carried the child is treated as the child's father or second legal parent. However, as Jemimah is divorced, this provision does not apply.

¹ Human Fertilisation and Embryology Act 2008, s33(1).

² *ibid*.

³ Human Fertilisation and Embryology Act 2008, s35(1).

⁴ Human Fertilisation and Embryology Act 2008, s42(1).

In E&W, a child cannot have more than two legal parents.⁵ Thus, as sections 35 and 42 of the HFEA do not apply, Samson could instead be treated as Eliza's legal father by way of genetic link.⁶ Samson's sperm was used to create Eliza so this requirement is met.

1. b) if not - how they can apply (separately and/or jointly) to acquire legal parentage of Eliza in your jurisdiction?

Delia

In E&W, Delia may apply for a single parental order ('PO')⁷ to be recognised as Eliza's legal mother. This would be a PO and not an adoption order as Delia is genetically linked to Eliza.⁸

Requirements

To apply for a PO, first, the child must have been carried by a woman who is not the applicant from placing in her an embryo.⁹ As Jemimah carried Eliza from the placing of an embryo in her womb, this requirement is met. It is irrelevant that this occurred in California rather than E&W.¹⁰ Second, the gametes of the applicant must have been used to bring about the creation of the embryo.¹¹ As Delia's egg was used, this requirement is satisfied.

⁵ eg *Re X (No 2: Application for contact by the biological father)* [2016] Fam Law 155.

⁶ Gov.uk, 'Surrogacy Information for Foreign Agencies on UK Law' <<https://www.gov.uk/government/publications/surrogacy-information-for-foreign-agencies-uk-law-on-surrogacy/information-for-foreign-agencies-united-kingdom-law-on-surrogacy>> 2.2.2, accessed 25 May 2025.

⁷ Human Fertilisation and Embryology Act 2008, s54A.

⁸ Adoption and Children Act 2002, s51.

⁹ Human Fertilisation and Embryology Act 2008, s54A(1)(a).

¹⁰ Human Fertilisation and Embryology Act 2008, s54A(10).

¹¹ Human Fertilisation and Embryology Act 2008, s54A(1)(b).

There are a further "sub-conditions" which must be satisfied for a PO to be granted by the Court.¹² These are:

i) Timings

An application must be submitted within 6 months of the child being born.¹³ Eliza was born on 27 October 2024. It is currently May 2025. This is just over 6 months from Eliza's birthdate. However, the Court loosely applies this condition. In *Re X*, Munby LJ granted an application that was made 26 months after the child was born. He said it would be '*non-sensical*' to deny a PO made one day after the deadline.¹⁴ As such, Delia should be advised that her application is unlikely to be rejected based on *just* being out of time. She should, however, apply promptly.

ii) Child's Home

At the time of the application and granting of the order, the child's home must be with the applicant.¹⁵ As Eliza is currently living with Delia at her mother's in Australia, this requirement is satisfied.

iii) Domicile

The applicant must be domiciled in the UK.¹⁶ There is uncertainty over Delia's domicile as she is currently in Australia. However, the Court has interpreted "domicile" in favour of the UK in applications where the applicant is abroad, but has strong connections to the UK.¹⁷ Delia is a

¹² Human Fertilisation and Embryology Act 2008, s54A(1)(c).

¹³ Human Fertilisation and Embryology Act 2008, s54A(2).

¹⁴ *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam).

¹⁵ Human Fertilisation and Embryology Act 2008, s54A(3)(a).

¹⁶ Human Fertilisation and Embryology Act 2008, s54A(3)(b).

¹⁷ eg. *CC & DD* [2014] EWHC 1307 (Fam).

UK citizen, and there was an intention to raise Eliza in the UK. This suggests that Delia's domicile is the UK.¹⁸ We would need to ascertain more about Delia's connections to the UK versus Australia. However, based on the given facts, there is nothing which indicates that Delia intends to resident in Australia permanently, or that she has a strong connection to Australia beyond her mother living there. She may be merely staying with her mother as she processes her marital breakdown. Consequently, it is likely that Delia is domiciled in the UK.

iv) Age

The applicant must be over 18 at the time of the making the PO.¹⁹ Delia is 32 so this is met.

v) Consent

The Court must be satisfied that the woman carrying the child, and any other legal parent, have freely agreed to the order.²⁰ Whilst a surrogate's lack of consent is fatal to an application,²¹ there is nothing presented which suggests that Jemimah would refuse to consent, or that her consent is conditional on anything else²² (e.g. further compensation). Jemimah already has three healthy children of her own, and appears solely motivated by the financial reward of surrogacy. Jemimah is presumably based in California, and has already renounced her legal parenthood in the US. On this basis, it would be illogical if she refused to Delia being recognised as Eliza's legal mother under English law. It is, therefore, likely that Jemimah will consent to the order in Delia's favour.

¹⁸ eg. *X & Anor v Z & Ors* [2023] EWFC 41.

¹⁹ Human Fertilisation and Embryology Act 2008, s54A(4).

²⁰ Human Fertilisation and Embryology Act 2008, s54A(5).

²¹ eg. *Re A and B (Surrogacy Consent)* [2016] EWHC 2643 (Fam).

²² *Re C (Surrogacy: Consent)* [2023] EWCA Civ 16.

Samson is recognised as Eliza's legal father in English law, meaning he will also need to consent to the order.²³ Given that Delia has taken Eliza to Australia without his permission, he is unlikely to agree to the PO. As such, Delia's application is likely to fail here.

vi) *Expenses*

No money or benefit (except for reasonable expenses) can be given by the applicant as consideration for the surrogacy arrangement.²⁴ Any compensatory payment is often treated as beyond reasonable expenses.²⁵ The US\$45,000 "compensation" paid to Jemimah is, therefore, likely to be an excessive benefit. This is corroborated by the fact that Jemimah can use the money to build a college fund for her children. Similarly, in *Re X & Y*, the surrogate was able to put down a property deposit. This was beyond reasonable expenses.²⁶ Whilst payment for loss of earnings is "reasonable",²⁷ Jemimah is a homemaker so has presumably not lost any income. That said, whilst these payments are above reasonable expenses, the Court has always prioritised the welfare of the child above reasonable expenses.²⁸ As Eliza likely identifies Delia as her primary caregiver, the Court will not reject Delia's application based on Jemimah's compensation.

Conclusion

Whilst Delia meets most elements for a successful PO application, she is unlikely to obtain Samson's consent for the application to succeed.

²³ Human Fertilisation and Embryology Act 2008, s54A(5).

²⁴ Human Fertilisation and Embryology Act 2008, s54A(8).

²⁵ eg. *Re L (A Minor)* [2010] EWHC 3146 (Fam) [7].

²⁶ *Re X & another (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam) [4].

²⁷ *ibid* [4].

²⁸ eg. *Re A & B (Parental Order) Domicile* [2013] EWHC 426 (Fam); *D and L (Surrogacy)* [2012] EWHC 2631 (Fam).

Samson

Whilst Samson is already recognised as Eliza's legal father in English law, he should be strongly advised to also apply for a PO. This is because he does not currently have parental responsibility ('PR') for Eliza,²⁹ so does not have the power to be involved in making key decisions relating to Eliza's upbringing.³⁰ A PO would allow for the issuing of a UK birth certificate which would confer PR on Samson for Eliza.³¹

Samson and Delia could apply for a joint PO,³² but this is unlikely to happen given the breakdown of their relationship. Furthermore, their separation raises questions about whether they have a relationship of close proximity for a joint application.³³

If Samson makes a sole PO application, the analysis is similar to Delia. There are no concerns about Samson being domiciled in the UK as it appears his permanent home.³⁴ He presumably works in the UK, and there is no indication that he has any ties to another jurisdiction.

The main hurdle Samson would face is that the child's home needs to be with the applicant.³⁵ The Court, however, takes a '*broad and purposive interpretation*' of the "concept" of home, and often looks past an individual not physically living with the child when they have the intention to care for them.³⁶ Delia took Eliza to Australia without Samson's consent. The Court, therefore, is likely to be sympathetic to Samson and construe this wide meaning of "home". As such, this should not be a barrier for Samson's PO application.

²⁹ Children Act 1989, s2.

³⁰ Children Act 1989, s2(1).

³¹ Children Act 1989, s4(1).

³² Human Fertilisation and Embryology Act 2008, s54.

³³ Human Fertilisation and Embryology Act 2008, s54(2).

³⁴ Human Fertilisation and Embryology Act 2008, s54A(3)(b).

³⁵ Human Fertilisation and Embryology Act 2008, S54(4)(a)

³⁶ *AB (Foreign Surrogacy – Children Out of the Jurisdiction)* [2019] EWFC 22, [49].

Samson would only need the consent of Jemimah as she is Eliza's other legal parent.³⁷ This does not appear to be an issue. As such, a PO in favour of Samson is likely to be granted.

2. What, if any, remedy does have Samson have to secure the return of Eliza to your country of habitual residence?

Samson has various options to secure the return of Eliza to E&W:

i) Specific Issue Order

Samson may make a specific issue application to ask the Court to determine the issue as to whether Eliza should live in E&W.³⁸ A legal parent is automatically entitled to apply for such an Order.³⁹

Likelihood of Success

The child's welfare is the paramount consideration in granting such order.⁴⁰ It is likely be confusing to Eliza, as a newborn, to be in another new environment in a matter of months. This suggests that Eliza's removal from E&W, by Delia who is not currently her legal parent, is not in Eliza's best interest. Likewise, the Court is alive to scenarios whereby a child is removed from their "home" country, and there is a legitimate concern that they will be prevented from returning.⁴¹ This appears to be a risk given that Delia may be motivated to remain in Australia with Eliza to "punish" Samson.

³⁷ Human Fertilisation and Embryology Act 2008, s54A(5).

³⁸ Children Act 1989, s8(1).

³⁹ Children Act 1989, s10(4)(a).

⁴⁰ Children Act 1989, s1(1).

⁴¹ *Re A (Prohibited Steps Order)* [2013] EWCA Civ 1115.

An order can only be made if doing so is better for the child than not making an order.⁴² It is likely better for Eliza to reside in E&W with her legal father because of the increased stability this will bring. There is uncertainty as to whether Delia will be granted a PO under English law, whether she plans to permanently reside in Australia, and where she will live going forwards. On this basis, it is likely the Court would grant a Specific Issue Order in Samson's favour.

Enforcement

This Order could be enforced through the Hague Convention 1996 which both the UK and Australia have ratified.⁴³ Measures taken in one contracting state are typically recognised in other contracting states.⁴⁴ As such, providing that E&W have jurisdiction to grant a specific issue order,⁴⁵ Samson can likely enforce the order in Australia. Jurisdiction depends upon where Eliza is habitually resident.⁴⁶ Under the Convention, Eliza cannot be habitually resident in Australia if it is shown that she was removed there unlawfully.⁴⁷ As such, Eliza is either habitually resident in England or the USA. Given her father is habitually resident in England, it is likely the Court will determine that Eliza is also (as discussed further under iv. below).

ii) Child Abduction

Delia may have committed a S2 offence under the Child Abduction Act 1984.⁴⁸ This is when an individual takes a child out of the UK so as to remove them from the lawful control of any

⁴² Children Act 1989, s1(5).

⁴³ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996.

⁴⁴ *ibid*, Article 23.

⁴⁵ Family Law Act 1986, s2(1)(a).

⁴⁶ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996, Article 5.

⁴⁷ *ibid*, Article 7.

⁴⁸ Child Abduction Act 1984.

person with lawful control of the child.⁴⁹ When the child's mother and father are not married, the only "person" for the purpose of the Act is the child's mother.⁵⁰ As Samson and Jemimah (Eliza's legal parents) are not married, it is only relevant if Delia removed Eliza from the lawful control of Jemimah.

Arguably, Eliza arguably did not remove Eliza from the "lawful control" of Jemimah by taking her from the UK to Australia – although this nuance would need to be litigated. However, it is clear that child abduction cases are designed to act as a '*deterrent*'.⁵¹ On this logic, it is likely that the Court would want to avoid a situation whereby a commissioning parent (Delia) can remove a child (Eliza) from the jurisdiction before being legally recognised as a parent without criminal sanctions. Either way, Samson should explain to Delia that she may have committed a child abduction offence. This may be enough of a warning that Delia returns Eliza to the UK.

Samson could also report the potential child abduction to the police.

iii) Hague Convention 1980

Both the UK and Australia have ratified this Convention. This seeks to ensure the prompt return of a child wrongfully removed to any Contracting State.⁵² "Wrongful removal" is when there is a breach of the rights of custody attributed to a person in the state the child was habitually resident in immediately before the removal.⁵³ Samson faces two primary issues with this remedy.

⁴⁹ Child Abduction Act 1984, s2.

⁵⁰ Child Abduction Act 1984, s2(b).

⁵¹ *R v Kayani; R v Solliman* [2011] EWCA Crim 2871 [53].

⁵² Convention on the Civil Aspects of International Child Abduction (25 October 1980), Article 1.

⁵³ Convention on the Civil Aspects of International Child Abduction (25 October 1980), Article 2.

First, "rights of custody" are defined as including the power to determine the child's residence.⁵⁴ Without PR,⁵⁵ Samson arguably cannot exercise this Convention right. Samson could enter into a PO agreement with Eliza's mother, Jemimah, to confer PR in his favour.⁵⁶ This would likely be quicker than waiting for a PO to be Court-approved. However, first, a PO agreement was unlikely to be part of Jemimah's surrogacy terms. Second, even if Jemimah does sign a PO agreement, there is a risk that her making key decisions about who has PR for Eliza could be construed as Jemimah implicitly wishing to be involved in Eliza's upbringing. This could be a barrier to Jemimah's consent being unconditionally given under Samson's PO application.⁵⁷

The Court has, conversely, recognised "inchoate" custody rights. This is when an individual does not have formal custody rights, but it is in the best interests of a child that they are treated as having these.⁵⁸ This could potentially apply in Samson's case to allow him to swiftly lodge an application under the Hague Convention.

Alternatively, to overcome the hurdle of Samson not having formal PR, a stay in Convention proceedings pending Samson's PO application could occur. The Court has discretion to do this under its interim powers.⁵⁹ The test is whether there is the risk of injustice if a stay is granted or refused,⁶⁰ and is typically only used to afford time to settle matters.⁶¹ As Samson is genetically linked to Eliza, and he has merely not had the opportunity to obtain a PO, there would be injustice if he is not granted a stay to obtain PR for Eliza. Any delay, however, in obtaining a PO could be confusing for Eliza as she becomes accustomed to Australia. As such,

⁵⁴ Convention on the Civil Aspects of International Child Abduction (25 October 1980), Article 5(a).

⁵⁵ Children Act 1989, s3(1).

⁵⁶ Children Act 1989, s4(1)(b).

⁵⁷ Human Fertilisation and Embryology Act 2008, s54A(5).

⁵⁸ K Beever, 'Child Abduction: Inchoate Rights of Custody and the Unmarried Father' [2006] Child and Family Law Quarterly 499.

⁵⁹ Child Abduction and Custody Act 1985, s5.

⁶⁰ *Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065.

⁶¹ *E v Q* [2019] EWHC 3939 (Fam).

Samson should be advised to ask the Court to expediate his PO application,⁶² and make a parallel application under the Hague Convention for Eliza's return.

Second, Eliza's habitual residence may be a barrier to a successful application under the Hague Convention. However, Lady Hale, in *Re A (Children)*, stipulated that a child's habitual residence encapsulates where the child is most integrated and cannot be temporary.⁶³ It again reflects what is in the best interests of the child.⁶⁴ As the intention was that Samson and Delia would together build a life for Eliza in England, the Court is likely to be sympathetic to this, and consider Eliza's habitual residence to be in E&W where her welfare is best served.

Samson should be advised that this could be a quick remedy as applications must be heard within six weeks of lodging⁶⁵ - although Court backlogs can delay this.

iv) Wardship

An alternative is for Samson to request that Eliza becomes a ward of the Court.⁶⁶ However, wardship proceedings can only be made in exceptional circumstances where the Children Act will not assist.⁶⁷ Samson is Eliza's legal parent, and as such can make a specific order application under the Children Act for Eliza to reside in E&W.⁶⁸ This means that a wardship application cannot be granted.

v) Australian Law

⁶² Gov.uk, 'Make an Application to the Court: Application Notice: Form N244' <<https://www.gov.uk/government/publications/form-n244-application-notice>> accessed 25 May 2025.

⁶³ *Re A (Children) (AP)* [2013] UKSC 60.

⁶⁴ *Mercredi v Chaffe*, C-497/10 PPU.

⁶⁵ Family Procedure 2010, Practice Direction 12F, paragraph 2.14.

⁶⁶ Family Procedure Rules Direction 12D.

⁶⁷ Family Procedure Rules Practice Direction 12D, 1.1.

⁶⁸ Children Act 1989, s8.

Samson should seek advice from Australian lawyer(s) specialising in child abduction, surrogacy and immigration. Understanding the Australian position may give weight to negotiations with Delia for Eliza's return to E&W (e.g. if it transpires that Delia has breached Australian immigration laws bringing Eliza into the country).

Conclusion

Samson should warn Delia of her potential criminal conduct (ii.) and obtain Australian legal advice (v.) to help secure Eliza's return to E&W. Samson could also potentially bring parallel proceedings through both a specific issue order (i.) and under the Hague Convention 1980 (iii.) whilst simultaneously applying for a PO. Samson should request urgent consideration of these applications given the potential disruption to Eliza should there not be a swift resolution.

3. If Samson cannot secure the return of Eliza what if anything can he do to ensure he has some form of contact with her?

i) Parenting Plan

Samson could liaise with Delia to come to an agreement regarding contact with Eliza. However, Delia does not have PR for Eliza as she is not currently recognised as Eliza's legal mother.⁶⁹ This means that Delia does not have the requisite powers⁷⁰ to make decisions about who Eliza spends time with, and such agreement could not be given legal force. Furthermore, this would not be practically feasible given that Delia does not want Samson involved in Eliza's life.

⁶⁹ Children Act 1989, s1(3).

⁷⁰ Children Act 1989, s2(1).

ii) Child Arrangement Order

Alternatively, Samson could apply for a child arrangement order.⁷¹ Samson has jurisdiction to do so given Eliza is likely habitually resident in E&W (as previously discussed)⁷² and he can automatically apply as Eliza's legal father.⁷³ Arguably, it is in Eliza's best interest to have contact with her legal father given these are a formative years,⁷⁴ and there is the presumption in favour of parental involvement in a child's life furthering their welfare.⁷⁵ Direct contact is typically only refused when there are proven serious allegations of harm against the child or another parent.⁷⁶ There is nothing which indicates that Eliza is at risk of harm from Samson. His affair does not meet this threshold.

The Court will apply the welfare checklist to determine whether a child arrangement order should be granted.⁷⁷ Of particular relevance is the harm that Eliza may suffer⁷⁸ should she remain in Australia – with a potentially precarious immigration status, and with someone who is not recognised as her legal mother. Likewise, the Court will consider Eliza's emotional and educational needs.⁷⁹ It does not appear that Delia has a plan as to where she and Eliza will live long term, nor where Eliza will be educated. Samson's ability to care for Eliza will also be considered.⁸⁰ Samson's time will, on one hand, be more limited going forwards because of the need to soon care for another child in the UK. However, this is likely to be balanced with the emphasis the Court places on ensuring that children know their extended family – including

⁷¹ Children Act 1989, s8(1).

⁷² Family Law Act 1986, s2(1)(a).

⁷³ Children Act 1989, s10(4)(a).

⁷⁴ Children Act 1989, s1(1).

⁷⁵ Children Act 1989, s2A.

⁷⁶ eg. *Griffiths v Kniveton and another* [2024] EWHC 199 (Fam).

⁷⁷ Children Act 1989, s1(3).

⁷⁸ Children Act 1989, s3(e).

⁷⁹ Children Act 1989, s3(b).

⁸⁰ Children Act 1989, s3(f).

half siblings.⁸¹ In short, this order is almost certainly to be granted to allow direct contact between Samson and Eliza.

Again, this Order could be enforced in Australia under the Hague Convention 1996 providing that Eliza is habitually resident in E&W.⁸²

iii) Australian Law

Samson should consult with an Australian child lawyer to ascertain the position under Australian law with regards contact with Eliza given he is her legal father of according to E&W and US laws.

Conclusion

If Samson failed to secure the return of Eliza from Australia to the UK (which is unlikely), a Child Arrangement Order could allow for Samson to have contact with Eliza.

⁸¹ *Re H (Children)* [2010] EWCA Civ 1200.

⁸² Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996, Article 5.