



Neutral Citation Number: [2024] EWFC 20

Case No: PE22P30135

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2024

Before :

MRS JUSTICE THEIS DBE

Between :

	X	<u>1st Applicant</u>
	- and -	
	Y	<u>2nd Applicant</u>
	- and -	
	G	<u>1st Respondent</u>
	- and -	
	A Local Authority	<u>2nd Respondent</u>
	- and -	
	Z (by his Children’s Guardian Ms Pulbere)	<u>3rd Respondent</u>

Ms Ruth Cabeza and Ms Mavis Amonoo-Acquah (instructed by **Burgess Mee Family Law**)
for the **1st and 2nd Applicants**

Ms Janet Bazley KC, Ms Olivia Magennis and Ms Melissa Elsworth (instructed by **Goodman Ray**)
for the **1st Respondent**

Ms Artis Kakonge and Ms Nisha Bambhra (instructed by **A Local Authority**) for the **2nd Respondent**

Ms Taryn Lee KC, Ms Alison Moore and Mr Luke Eaton (instructed by **David Wilson Solicitors**)
for the **3rd Respondent**

Hearing dates: 23-30 November and 1 December 2023

Judgment: 30 January 2024

Approved Judgment

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MRS JUSTICE THEIS DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the child and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE :

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Introduction

1. The court is dealing with two applications made by X and Y in relation to a child, Z, age 3. The applications are, first, to vary or discharge a child arrangements order made on 11 August 2021 ('August 2021 order'), and, second, for a step-parent adoption in favour of X. Both applications are opposed by Z's mother, G, and supported by the local authority and Z's Children's Guardian.
2. Z was born as a result of a traditional surrogacy agreement in this jurisdiction, entered into between X and Y, a same-sex male couple, and G in 2019. Z's biological parents are G and Y. Z has been in the care of X and Y since soon after his birth in September 2020. After Z's birth G felt unable to consent to a parental order, due to differences between the parties as to the level of contact she would have with Z. Subsequently, an order was made in August 2021 for a parental order at the same time as a consent child arrangements order, providing for G to have contact with Z every six weeks.
3. Following difficulties in that contact taking place in accordance with the August 2021 order, it was suspended by X and Y in January 2022 and they issued an application on 30 January 2022 for variation or discharge of the August 2021 child arrangements order. In May 2022 G was given permission to appeal the parental order. That appeal was successful and the parental order was set aside by the Court of Appeal in January 2023 (see *Re C (Surrogacy: Consent) [2023] EWCA Civ 16*).
4. The application for discharge/variation of the August 2021 order had been stayed pending the appeal, it was restored and X's application for a step-parent adoption was made in June 2023.
5. The hearing of both these applications was listed from 23 November to 1 December 2023. In addition to the court bundles and the recording of the exchanges between the parties on 13 February 2022, the court heard oral evidence from the jointly instructed expert Dr Willemsen (clinical psychologist), X, Y, G, Ms Harvey (local authority social worker who completed the Annex A report) and Ms Pulbere (Children's Guardian).

6. Despite the agreed hearing template leaving sufficient time for judgment writing that did not take place. Late service of research papers to Dr Willemsen on the eve of him giving evidence delayed the start of his evidence. Such practice is to be deprecated. His reports had all been filed by 14 November 2023. It meant he had to return to complete his evidence on the second day, requiring him to re-schedule his other commitments. The court is very grateful that Dr Willemsen was able to make those arrangements. In future it may assist to have a deadline direction for all updating documents, including any research papers, to be sent to any expert in good time before the hearing commences.

Relevant background

7. X, age 43, and Y, age 36, met in 2012. They started living together in 2013 and married in December 2019.
8. X and Y wished to have a family of their own and decided to do so via a surrogacy arrangement in this jurisdiction. They were introduced to a surrogate but, in the end, did not proceed with her.
9. X and Y were introduced to G in 2018 via her sister, who was X and Y's friend. G, age 36, understood X and Y wished to have a child, that they had been unsuccessful in finding a surrogate and she offered to carry a child for them. G has an older child, B, age 15 years, who G has an equal shared care arrangement with B's father that has worked well for 13 years. It is an informal arrangement agreed between G and B's father and they have never needed to apply to court regarding this arrangement.
10. Following a series of meetings the parties decided to proceed, initially agreeing to use embryos that existed which had been created with Y's gametes and a donor egg. X and Y paid for legal advice for G in April 2019. The surrogacy agreement was signed in May 2019.
11. The embryo transfer was unsuccessful in June 2019. In September 2019, following the parties attending a surrogacy conference, G offered to use her own eggs and they decided to vary the agreement to reflect that G's own eggs were used.
12. Home insemination took place in November 2019 and the pregnancy was confirmed in December 2019. X and Y attended the 12 and 16 week scan and a birth plan had been agreed in May 2020. That plan was varied in June 2020 to enable G to hand over the child in accordance with her wishes and was finalised with the hospital in July 2020.
13. Z was born in September 2020 and handed over to X and Y about 7 hours after his birth.
14. The parties communicated by WhatsApp after the birth and G visited Z ten days after his birth. A Family Album app was created and the parties jointly registered Z's birth in late September 2020.
15. G saw Z in late October 2020, just prior to the second Covid 19 lockdown.
16. In early November 2020 X and Y informed G via WhatsApp that their solicitor would be lodging the parental order application soon and would be in touch.

17. On 27 November 2020 the parental order application was issued and initial directions were made on 18 December 2020, including appointing a parental order reporter and listing the matter for directions/final hearing on 16 March 2021.
18. On 24 December 2020 G received notice of the application for a parental order. G informed the applicants she was feeling vulnerable and requested photos of Z. X and Y respond with photos.
19. 25 December 2020 the parties exchange messages and X and Y send photos of Z.
20. G wrote to X and Y on 27 December 2020 setting out in detail how she was struggling with her feelings and that she intended to seek legal advice before she would consent to the parental order. X and Y describe feeling devastated when they read this letter.
21. On 30 December 2020 the parties agreed to mediate. On 4 January 2021 G filed an acknowledgment of service indicating that she did not consent to the making of a parental order.
22. Arrangements were agreed for G to see Z on 9 January 2021.
23. On 7 March 2021 the court adjourned the hearing on 16 March 2021 to enable the parties to continue with mediation and family therapy. The application was re-listed on 8 June 2021.
24. G indicated to X and Y on 18 April 2021 that she no longer wishes to attend group counselling.
25. According to X and Y, G assured them on the phone in late April 2021 that she would consent to the making of a parental order, she asked to be removed from the family photo album and said she did not wish to see them or Z at that time.
26. Following her meeting with the parental order reporter G informed X and Y on 13 May 2021 that she would not consent to the making of a parental order. Two days later, on 15 May 2021 she requested contact with Z. X and Y refused stating they were seeking legal advice before discussing contact arrangements further.
27. The parental order reporter, Ms Chapman, filed her report on 7 June 2021 confirming that G did not consent to a parental order due to *'wanting to keep her parental responsibility to allow her to have legal rights to spend time with [Z]'* and G had been clear that *'she does not intend to take on a parenting role of [Z] as that would cause him confusion and would not be in his best interests, but does want to spend time with him. I am aware the parties are discussing a Spend Time with application being made, so [G] is reassured she will have time with [Z].'*
28. An order was made by the magistrates on 8 June 2021 directing G to file a statement addressing the circumstances that led to the birth of Z, whether she consents to the making of a parental order and if not the reasons, any issues regarding her mental health and what orders she seeks. X and Y were directed to file a statement in response addressing the background, the criteria under s 54 Human Fertilisation and Embryology Act 2008 ('HFEA 2008') and any response to G's statement. The application was listed before HHJ Gordon-Saker on 11 August 2021.

29. In her statement G confirms she has had no mental health difficulties and will consent to a parental order on condition that there is a child arrangements order made in her favour for monthly direct contact and a prohibited steps order prohibiting relocation by X and Y.
30. The parties agreed for G to have contact with Z on 11 July 2021.
31. The parties attended further mediation in July 2021 and a Memorandum was produced dated 19 July 2021, which sets out their agreement. That document was produced during this hearing. It was followed by correspondence between the parties about the terms of any order in the lead up to the hearing on 11 August 2021.
32. At the hearing on 11 August 2021, following discussions in and outside court, HHJ Gordon Saker made a parental order and, by consent, a child arrangements order providing that Z lives with X and Y and spends time with G, once every six weeks for the day on either a Saturday or Sunday from 10am to 5pm, with G to collect/return Z from his home with X and Y. The order also provides for additional time for a day close to Z's birthday and in the Christmas period. It further provides that the parties shall spend the first two hours of every alternate contact session all together with Z. There was a schedule attached to the order with agreed dates until February 2022. At the hearing X and Y were represented by counsel, G was unrepresented and the parental order reporter was present. There were a number of recitals to the consent child arrangements order:

And Upon the parties agreeing that given [Z's] very young age, all parties will be flexible and responsive to [Z's] needs both now and in the future when he grows up;

AND UPON it being agreed that [Z's] routine will be communicated between the parties prior to each contact sessions and sensible arrangements made to ensure that his routine is adhered to as far as possible during contact;

AND UPON it being recorded that the applicant does not seek to parent [Z] but looks to be a presence in his life, and the first and second respondents agreeing that it is important for [Z] to know the applicant
33. The day after the hearing, G sent an email to X and Y's solicitor indicating that she felt under pressure at the hearing and the consent she provided was conditional.
34. G had contact with Z on 28 August 2021, with X and Y present. G states this did not accord with the August 2021 order. X and Y state these arrangements were agreed between the parties whilst Z is so young and G had some alone time with Z during the contact.
35. In early September 2021 when G requested photos of Z's birthday she said she was directed to those posted on Facebook. X and Y state G started putting messages anonymously online that they felt were homophobic and anti-surrogacy.
36. In mid-September 2021 G had contact with Z when the parties went to a safari park. G states this did not comply with the August 2021 order, as it was meant to be an 'alone' session. X and Y maintain the parties agreed joint contact whilst Z was young.

37. Following further email exchanges between the parties regarding G's role in Z's life, G saw Z again on 9 October 2021. X and Y were present throughout and the parties agree there was a tense atmosphere.
38. A further visit between G and Z took place on 21 November 2021 with X and Y present. Whilst the parties disagree as to the reasons, they agree it was not a positive experience.
39. On 18 December 2021 G spent time with Z, together with X and Y. The parties had an argument in the presence of Z. X and Y state this caused Z to be unsettled for the rest of the day.
40. On 2 January 2022 contact did not take place due to Z being unwell. The parties were unable to agree further mediation due to funding issues.
41. On 30 January 2022 X and Y filed a C100 application seeking a discharge or variation of the August 2021 child arrangements order.
42. On 9 February 2022 X and Y notified G of the application by email and stated they were terminating all direct contact with immediate effect.
43. G's solicitor responded stating G did not agree variation of the child arrangements order. X and Y replied stating they would not facilitate contact on 13 February 2022, but that email was sent at 11pm on the Friday before the next scheduled contact and not seen by G.
44. G attended X and Y's home for contact on 13 February 2022 and recorded the exchanges between X and Y and G, without X and Y knowing. Contact did not take place.
45. On 11 March 2022 DJ Falvey made directions. The order records that G had informed the court of her intention to seek permission to appeal the parental order dated 11 August 2021, making it clear that she did not seek the care of Z or to vary the child arrangements order made on the same day. The order made clear the August child arrangements order remained in place, made directions about X and Y notifying G if they intended to move, directed transcripts and listed the matter for a First Hearing Dispute Resolution Appointment ('FHDRA') on 31 March 2022. The court also made a prohibited steps order preventing X and Y from removing Z from the jurisdiction and causing Z not to live at any other address without first notifying the court and G.
46. On 15 March 2022 the Cafcass safeguarding letter recommended a s 7 report, suspension of the child arrangements order and the suitability of mediation to be considered as part of the s7 report.
47. At the FHDRA on 31 March 2022 DJ Falvey suspended interim direct contact and made directions for indirect contact by way of monthly videos, discharged the prohibited steps order that prevented travel abroad (on the basis of a recital that in the event X and Y seek to travel outside the jurisdiction for a holiday during the course of the proceedings they will notify G of their intention) and made directions for statements and a section 7 report leading to a Dispute Resolution Appointment ('DRA') on 8 August 2022. The prohibited steps order preventing Z from living at any other address

in this jurisdiction without notifying the court and G remains in place. G sought permission to appeal this order, this was refused by the District Judge.

48. On 7 April 2022 G sought permission to appeal the suspension of direct contact.
49. On 14 July 2022 I refused permission to appeal the suspension of direct contact and granted permission to appeal the parental order and re-allocated the appeal to be heard by the Court of Appeal.
50. On 27 October 2022 DJ Falvey made a consent order joining Z as a party to the proceedings and staying the proceedings until the outcome of G's appeal.
51. On 3 November 2022 the hearing of G's appeal took place with the judgment being handed down on 16 January 2023. G's appeal was allowed and the parental order dated 11 August 2021 was set aside.
52. In February 2023 G made an application to have the proceedings re-allocated to High Court Judge level.
53. On 30 March 2023 X gave notice of intention to apply for a step parent adoption to the local authority.
54. On 4 April 2023 Newton J refused the application for re-allocation of the proceedings to High Court Judge level.
55. On 28 April 2023 HHJ Chaudhuri made directions. The order recites the three month period after notification to the local authority of the intention to apply for a step parent adoption expires on 22 June 2023. G renewed the application for re-allocation of the proceedings and directions were made regarding the prospective adoption application.
56. On 4 May 2023 I directed a hearing on 16 May 2023, which was subsequently re-listed by consent on 26 May 2023.
57. Detailed directions made on 26 May 2023 provided for the filing of further evidence, the joint instruction of Dr Willemsen, directions regarding the anticipated application by X for a step parent adoption, with the next hearing as an Issues Resolution Hearing/Pre Trial Review to take place on 16 October 2023, and a 7 day hearing on 23 November 2023.
58. X's step parent adoption application is dated 20 June 2023. I made further directions regarding the instruction of Dr Willemsen on the papers on 6 July 2023 and at a further hearing on 26 July 2023. The solicitor for the child was directed to take the lead in the instruction of Dr Willemsen.
59. G deleted her twitter account in August 2023.
60. Dr Willemsen met with X and Y on 16, 23 and 25 August 2023 and with G on 22 and 23 August 2023. Dr Willemsen observed Z having contact with G in the presence of Y on 31 August 2023.
61. On 12 September 2023 Dr Willemsen filed his report. He recommended contact in accordance with the order dated 11 August 2021, whether or not an adoption order was

made. The parties asked further questions on 2 October 2023, which Dr Willemsen responded to on 9 October 2023.

62. The local authority Annex A report prepared by Ms Harvey is dated 21 September 2023. It recommends an adoption order in favour of X and that Z spends time with G twice a year in the presence of both X and Y, with indirect contact twice per year by way of photos/videos. It did not recommend such contact was part of a court order as Ms Harvey considers X and Y will support Z's relationship with G and raised the issue of an order under s91(14) CA 1989.
63. The Children's Guardian met with X and Y on 26 September 2023, and with G the following day. Her report, dated 13 October 2023, recommends discharge of the child arrangements order dated 11 August 2021, a step parent adoption order in favour of X and a contact order providing for Z to spend time with G twice per annum in the presence of X and Y and indirect contact twice per year.
64. At the hearing on 16 October 2023 the order recited the respective positions of the parties, the documents that had been sent to Dr Willemsen and made detailed directions to ensure the hearing listed on 23 November 2023 remained effective, including setting out the hearing timetable.
65. Whilst all directions were largely complied with there was a flurry of emails prior to the hearing starting raising issues between the parties as to whether Dr Willemsen should see research papers referred to by the parties in their position statements. At the request of the court Ms Lee K.C. has helpfully provided an agreed chronology as to how this issue arose. I have already referred to the impact that had on the hearing and Dr Willemsen.

The evidence

X and Y

66. X and Y filed four joint statements. In their first, dated 22 April 2022, in support of their variation/discharge application, they describe their joy in having Z in their lives, their intention that they would both equally be Z's parents and would form a close bond with their surrogate that would '*ultimately lead to an enduring friendship*'. As regards Z they state '*we have created a secure, loving family home for [Z] in which he has thrived and become the most amazing little boy; we are so proud of him, and our family. It is therefore distressing that [G] has continuously tried to undermine us as [Z's] parents and as a family*'.
67. X and Y were members of Surrogacy UK when they met G and state that '*it was mutually agreed to proceed on an 'independent journey' after [G] informed us that this was her preference*'. They said they ensured that G had legal advice prior to signing the agreement. As regards any ongoing relationship with G they stated '*We always envisaged having an enduring friendship with our surrogate and the integrity of this relationship was of paramount importance to us in the journey to make our dreams come true. We were delighted that [G] seemed to share our ethos and vision. In terms of any future contact, we discussed this with [G] and agreed that this would be a natural process that would evolve over time. We discussed that an appropriate level of contact*

would be a few times a year and no specific arrangements would be needed in this regard’.

68. Following the unsuccessful embryo transfer G asked for a break before considering any further treatment. They all attended the Surrogacy UK annual conference in September 2019, as X and Y felt that *‘this would be an excellent opportunity for [G] to network with other surrogates and attend ‘surrogate only’ workshops’*. X and Y state it was after attending this conference that G offered to switch to a traditional surrogacy. After reflection and further discussion they decided to accept that offer stating *‘we did not attend implications counselling as a team, we did discuss it at length with [G], our thoughts in regard to the biological link that would be created not just with her but also her family, especially her sister and our friend [her sister].[G] gave us absolute reassurance that she had fully considered these implications and would view the biological link as an egg donation’* and did not suggest a greater role or different relationship to that of a surrogate.
69. Referring to the letter written by G on 27 December 2020 X and Y state that from an early stage in the pregnancy G *‘deliberately kept us at arms length and seemed very reluctant to share information with us about the pregnancy and the development of our son’*. As an example, they described the attendance at the 12 week scan and learning of an earlier scan they were not aware of. They said they were *‘made to feel that the baby we had always dreamed of would never be ours’* describing an occasion when they had sat on the nursery floor and cried. They continue *‘Subsequently, the reasons for [G’s] shift in approach became clearer as we now know that [G] was changing her position and was seeing herself more as a mother and not a surrogate.’* They express sorrow that G was unable to share her feelings with them earlier stating *‘she chose to damage our relationship and trust but excluding us and making us feel that somehow her actions were our fault. On reflection, we cannot help but feel that [G] had made up her mind early on regarding her intentions towards [Z] and deliberately left us totally oblivious to what was to come’*.
70. They describe how vulnerable they felt their position was and were *‘terrified that [G] would not ‘hand over’ our son at birth. It was a truly awful experience, and we spent the entire pregnancy in a state of anxiety and ‘treading on eggshells’ around [G]’*. They deny any suggestion from G that they did not offer her appropriate support and refer to the many messages that passed between them, usually initiated by them and the other support they provided. They describe G unilaterally amending the surrogacy agreement in June 2020 regarding who was present at the birth and when the child would be handed over. They did not consider they had any voice in these changes. Z was handed to them seven hours after his birth and they describe what they considered they missed.
71. X and Y did not accept the suggestion by G in her December 2020 letter that they had not supported her after the birth. They arranged post-natal counselling, funded post-natal counselling and provided other support. They considered from after the birth to the end of December 2020 they maintained regular contact with G, provided regular updates about Z and encouraged G to visit them as often as she liked. She visited on three occasions leading up to the Covid-19 lockdown restrictions being imposed again in November 2020. Following that they said they messaged but G ignored their offers for telephone or video catch ups. They initiated a video catch up on 18 December 2020 when G made no mention then of her feelings, she knew the parental order application had been filed with the court and they had sent photos when requested at Christmas.

72. They describe receiving the December 2020 letter from G on 27 December 2020, which was the first time G had mentioned that she was contemplating not consenting to the parental order. They felt *'utter devastation'*, their dreams *'were in tatters'* and they felt their family was *'being threatened'*. They spoke with G about the letter on 30 December 2020 and agreed mediation was the best way forward. They described G starting to *'exert considerable control on us over her contact with [Z]'*. G asked for contact a few days after the letter, X and Y said it was too early and they needed a little more time and offered her the following weekend. X and Y agreed to fund legal advice for G around the parental order process. The mediation started in late January 2021. X and Y said they sent G updates and pictures and videos of Z and saw each other approximately monthly. They agreed to have group therapy to work through their relationship and how G *'might feel comfortable in her role as [Z's] surrogate and how that would fit in with our family'*. They found a therapist and had individual sessions and one group session and were due another one. On 18 April 2021 G decided against any further therapy.
73. X and Y said when they spoke to G on 26 April 2021, following her request for a short break, she reassured them she would be consenting to a parental order, asked to be removed from the family album, did not wish to see them or Z at that time and they were only to be in touch regarding the parental order proceedings. G described this as *'the best way she could get through the PO process'*. On 13 May 2021, following her meeting with Cafcass, G informed X and Y she would not be consenting to the parental order at that time. X and Y said G offered no explanation and *'we felt our world was falling apart and the immediate period after this was extremely difficult for our family'*.
74. X and Y continue in their statement that two days after speaking to G she asked to see Z stating *'As she had done previously, she attempted to force contact at the most devastating time for our family with no apparent regard or insight into our feelings and impact this would have on [Z]. It felt like she was again making a point that our feelings are not relevant to her or her contact with [Z].'* In their message responding to G's request they stated *'As we understand it you have chosen not to sign the parental order. This is a complete betrayal of our agreement, our friendship and our trust. It is clear you are not thinking of [Z's] best interest. Given the gravity of your actions we do not think it will be appropriate for you to visit us at this time. Any future contact will need to be fully considered, putting [Z's] and his family's interest at heart'*. G responded that she saw it as a betrayal of their agreement and the reason they did not allow her to see Z was because she had not provided consent when they had said previously they would always allow her to see Z *'irregardless [sic] of the relationship between'* them. G continued *'I am also a part of [Z], a big part of him and he has a right to know me. Denying him the right to know me and have a relationship with me is not putting his interests at heart'*. X and Y responded stating *'what we are saying is that future contact will need to be discussed further in the context of the path you have decided to take us all down... We have always told you that we would not deny [Z] knowing who you are and his surrogacy journey. This has not changed. However, this does not mean that you have unfettered access to [Z] at a time of your choosing. We will not be further discussing this with you at this time until we have had legal advice'*.
75. Following the court hearing on 8 June 2021, relating to the parental order application, it was recommended that they discuss interim contact. Contact took place on 11 July 2021. The parties attended further mediation where X and Y accepted they reached agreement although stated in their statement on 22 April 2022 *'after [G] had taken*

legal advice she made further demands changing the nature of the visits and adding additional contacts. We took legal advice and felt we had little option but to agree to the new demands. This was truly exceptional circumstances that we found ourselves in and we had to try and negotiate a path that would respect us as [Z's] parents and ensure that the legal position of his parents matched his reality. We gave our consent to the order with considerable reservations in regard to [Z's] welfare, as we felt that [G] was unlikely to be flexible in her approach to contact and harboured desires for an inappropriate relationship with [Z]. However, we hoped, we could make the arrangements work for [Z] and [G] would have more respect for our family and accept her role as [Z's] surrogate'.

76. As regards the visits that took place in August and September 2021, following the August 2021 order, X and Y describe in their statement they all had *'lengthy discussions over how we could make the child arrangements work for [Z]'* bearing in mind his age and it was not in his interests to be regularly separated from his primary caregivers. Y's email dated 27 August 2021, the day before the first contact in accordance with the August 2021 order, states *'In terms of tomorrow, we feel that it will be in [Z's] best interests that we will all spend the day together. [Z] currently suffers from separation anxiety when neither of us are with him and due to his young age and the fact he hasn't had regular contact with you, we feel this would be best for him to make sure he is settled and comfortable'*. G responded that she understood that but felt it was important he got used to spending time with her without X and Y, continuing *'On this occasion, I would agree to spend an additional amount of time together tomorrow. However, I would like to spend some quality time with [Z] on my own. As mentioned above, this time together will be important and beneficial to him'*.
77. Their statement continues that it was mutually agreed after the September 2021 contact that whilst Z was so young all visits would remain joint visits with some time alone during the majority of those visits. They said that alone time took place during the visits on 28 August 2021, 11 September 2021, 9 October 2021 and 21 November 2021.
78. X and Y said as part of their ongoing discussions they also asked G to give them assurances over the role that she wished to play in Z's life stating they *'needed to know that she not only respected us as his parents, but also that she did not want to have a role or relationship that would be confusing, unsettling or emotionally damaging for Z.'* The parties exchanged emails and both made some amendments to what X and Y had set out about G's role. G stated she wished to abide by the terms of the August 2021 order. X and Y responded expressing their concern *'As we recall, the Child Arrangements Order as it stands was not agreed during the mediation. As you well know, you demanded changes to what we discussed in mediation shortly prior to the last court hearing. Before our phone call tomorrow please could you clarify the role you wish to play in [Z's] life. This remains an area of grave concern for us with regards to [Z's] emotional wellbeing as you have been very inconsistent on this extremely important issue. It appears that you seek and/or harbour desire to have an inappropriate relationship with him in which you have a maternal role during his childhood and that he grows up recognising you as his mother. If you do not wish to have this kind of relationship with [Z], then, once again, we ask you to put this in writing and clarify what role you do see for yourself as it appears that you have firmly rejected the role as his surrogate. As [Z's] parents we have a right to know your true feelings in this regard.'*

79. The parties spoke on 16 September 2021 and X and Y state they agreed the next visit on 9 October 2021 would be a joint one. They describe the tensions between them at that visit as palpable and were picked up by Z, as they describe him as being clingy during the visit and unsettled and restless afterwards.
80. The next two contacts on 21 November 2021 and 18 December 2021 were described by X and Y as *'difficult'*. At the visit on 18 December 2021, according to X and Y, G made it clear she saw herself as Z's mother and accused them of taking Z from his mother at birth in the presence of Z. This provoked an argument, witnessed by Z, which resulted in unsettled behaviour by him.
81. After this visit X and Y expressed their concern to G about the impact on Z of contact and his identity as a child of same sex parents born by a surrogate and his emotional stability.
82. The contact due to take place on 2 January 2022 could not take place due to Z's illness. X and Y subsequently told G they did not have any other dates due to other commitments. X and Y wrote to G in January 2022 asking her to attend further mediation, G refused to pay a third of the mediation cost and X and Y said they could not cover the full cost.
83. X and Y deny any suggestion they were not willing to comply with the August 2021 order and state the reason why it didn't work was due to G's unwillingness to show flexibility *'given [Z's] young age and the true nature of the destabilising relationship she sought with [Z] became very apparent'*.
84. It was in those circumstances X and Y state they made the C100 application to discharge or vary the August 2021 order, due to the conflict the order was causing and how it was impacting on Z through the changes in his behaviour in becoming more clingy, unsettled and crying. X and Y informed G by email of this application on 9 February 2022 and that they were stopping all contact visits with immediate effect. G's solicitor responded objecting to this and X and Y responded at 11 pm on Friday 11 February 2022 re-iterating their position stopping all direct contact.
85. G stated she did not see that last email and attended X and Y's home on 13 February 2022 for contact in accordance with the order. X first came to the door and refused contact, when G repeated her request X and then Y became increasingly abusive with threats to call the police. The court has seen a transcript of and listened to the recording. X and Y were not aware G had recorded these exchanges. X and Y consider they were set up for this exchange by G as she covertly recorded it. G said she attended as it was her contact day and recorded the visit as she said it was difficult for people to believe how X and Y behaved towards her. X and Y sought advice from the police.
86. X and Y describe in their statement their feelings about G's decision to appeal the parental order and the impact they say it had on Z. They did not consider G respects them as Z's parents or the integrity of their family and her actions mean that there is now simply no chance for any reconciliation or re-building of trust between them. Regardless of whether the application to appeal is successful or not, the intent is clear and makes her direct contact with Z utterly incompatible with their family life.

87. In the April 2022 statement X describes the impact on him of events and states '*[G] has a role in [Z's] identity, but it is a role that is limited to his birth origins, it is not all defining. I will support [Z] in knowing his identity and that of course includes his birth origins and connection to [G]. However, this cannot be at the expense of his greater sense of identity, as my son, the son of a loving same-sex couple and a child born through surrogacy to two gay parents that wanted him more than they can express and love him more than words will ever do justice*'.
88. Y sets out the impact on him of what has taken place, how he feels G has controlled them and undermined them as a family and how as a same sex family they have not had the same rights and chances. He believes the August 2021 order is damaging Z's welfare stating he '*was always intended for us; he is our son created through artificial insemination and surrogacy. This is what we all agreed, all intended and has always reflected [Z's] reality and identity. Of course, it is important for [Z] to know his life story and that includes his birth origin, but it cannot be right that this will be at the cost of his childhood stability and emotional welfare*'. They regard G as seeing herself as being Z's mother, whilst not on a practical day to day basis it is akin to some kind of 'social mother'. They say this role is simply not compatible with Z's family structure; '*there is no 'vacancy to fill' just because [Z] has same-sex parents*'. They state they have always feared G sought this role and relationship with Z. They consider the only role that was ever intended for her was that of his surrogate and egg donor. They seek discharge of the child arrangements order to prevent G seeking further amendments to the order and consider they, as Z's parents, will always act in his best interests which they consider to be two periods of indirect contact, with updates.
89. In X's statement of facts June 2023, in support of his adoption application, he described the three periods of contact after Z's birth between September and December 2020 stating G requested more contact which he stated '*was not what was envisaged or agreed at the time of the surrogacy agreement in May 2019, or otherwise*'. He continues that following the order dated 11 August 2021 during the first few contact visits '*it became apparent that [G] did not just want limited contact, but a more involved role in [Z's] life*'. X seeks to dispense with the consent of G on the grounds that Z's lifelong welfare needs requires that.
90. In their updating statement in June 2023 X states it was what was agreed between the parties that he would be Z's legal parent. The consequence of the parental order being set aside is that '*it has introduced instability and insecurity into [Z's] life...an adoption order will restore stability and security to [Z's] life both now, throughout his childhood, and for the rest of his life. I have applied for a stepparent adoption order so that the idea of me being [Z's] 'stepparent' is dispelled in place of his reality that he has two loving parents, both of whom are his fathers and both of whom should be legally recognised*'. He considers central to the adoption application is Z's identity, which X regards himself as a significant part of a family unit with same sex parents. As a consequence, X believes Z needs to have both his parents recognised as such in law as this will give him '*the same stability and security that is enjoyed by other children in same sex families*'. Without the order X fears Z will see his family as not whole, as unequal and that '*this fragmented legal set-up will potentially have a negative influence on his emotional wellbeing in regards to this very significant aspect of his identity. An adoption order would confirm that the role I play in [Z's] life is no different to the role [Y] plays but is different to the role [G] plays, which is that of his surrogate*'. X

recognises that neither he nor his wider family would treat Z any different whether the adoption order was made, the close, secure family ties would remain but X wants Z to feel secure with the legal recognition that an adoption order would give. It goes beyond the day to day care of Z, it would ensure his birth certificate and his legal relationship reflects Z's reality. As regards G, X and Y describe how they have compiled a photo album, have books about surrogacy and explain to Z in age appropriate terms that G carried and gave birth to Z. As regards ongoing contact with G they set out indirect contact until Z requests otherwise as *'anything more than indirect identity contact before such time would put [Z] in the way of emotional harm due to the risk of him being caught in conflict'*.

91. In their August 2023 statement, in response to G's statement, X and Y make clear their position about indirect contact is irrespective of whether an adoption order is made and maintain their intention for Z to participate in the indirect contact in a positive way. They strongly refute any suggestion they have made false allegations about G and rely on the negative thoughts about them G published. They have complied with the order dated 31 March 2022 regarding interim contact and state they had little choice but to stop direct contact to ensure Z was removed from a harmful situation.
92. X and Y state *'we do not agree that there was ever any discussion with [G] prior to or after [Z's] conception that she would have any role in [Z's] life other than that of his surrogate...it was only ever intended that [G] would be a family friend and her role in [Z's] life would be that of his surrogate'*. They confirm their position is that it is *'no longer in [Z's] best interests for there to be a close relationship between him and [G]...It will be for [Z] to decide, when he is older, if he wishes to pursue a relationship with [G] and of course he will, through our proposed contact arrangements, have full knowledge of his biological connection to [G]'*. They consider it would be strange for Z to have contact with G as he has no existing relationship with her. As regards G's proposals they *'are the introduction of this new relationship into his life which sadly cannot be supported by us, as we believe it will place [Z] in an intolerable position, putting him in the way of emotional harm and the very real risk of him being caught in conflict'*.
93. The covert recording of the exchanges between the parties on 13 February 2022 X and Y view that act *'hostile, deceitful and a breach of their privacy'* as they consider G knew contact would not be happening that day, they apologise to G for the way they spoke to her but explain they did so due to the high level of stress they felt under. They said they were at *'breaking point'* and considered G wanted to provoke that reaction from them.
94. Turning to the suggestion that they moved without informing G, they state G always knew they intended to move to the neighbouring county. They wanted to be near X's family. They describe feeling controlled by G when she secured a short term order on 13 March 2022, preventing them from moving without notifying her.
95. X and Y describe the impact on them of having a parental order, then having it discharged as a result of the appeal. The impact of this and enduring litigation as having caused them both significant levels of stress, anxiety and low mood. They fear this will have a knock on effect on Z.

96. X and Y set out their fears about G's attitude to them as two fathers bringing up Z and G's views about families that do not have a 'mother'. They set out the comments G has put online, including through organisations that are against surrogacy. They consider those views are more accurate of her true feelings than the more sanitised views expressed in her written evidence and they fear she may express them to Z, particularly if she saw him without them being present. Her view on surrogacy, X and Y and gay parenting are in direct conflict with the values they hold and wish to raise Z with. Should G have regular unsupervised contact they believe she would *'portray herself as a maternal figure and promote the aforementioned negative views to [Z], which would cause him significant emotional turmoil'*.
97. X and Y updated their position in the email from their solicitors on 20 October 2023 namely that they sought an adoption order in favour of X, propose contact as recommended by the local authority of two direct contact with X and Y present and two indirect contacts. They consider there should be no contact order but if the court considered an order was required they would not oppose one and if such an order was made there should also be an order under s91(14) CA 1989.
98. In their final joint statement, dated 31 October 2023, they set out that their position regarding contact has evolved as they now *'understand and appreciate the importance of [Z]'s welfare of direct contact taking place, in line with the recommendations of the Local Authority and Guardian'*. They continue *'As [Z's] fathers, it is our duty to ensure that [Z] is confident in knowing that while he only has two parents (us), [G] was an essential part of his creation and therefore there is a role for her in his life. It will be for [Z] to determine the extent of the relationship he has with [G] as he grows older but, for now, it is for us to build a foundation of understanding within [Z] that [G] is a relevant person in his life'*. They consider the Local Authority report details *'extensively with the bond that exists between [X] and [Z] as father and son and recognises the benefits to [Z] in cementing the reality of this relationship in law by the making of an adoption order. This sentiment is echoed in the Guardian's report'*. They take issue with Dr Willemsen's view that an adoption order would not affect Z directly. They consider it would make X Z's 'Daddy' in the fullest sense of the word, legal recognition of his family unit will bring about a sense of stability and pride in him being the child of two fathers in an LGBT family. They note that Dr Willemsen observes that the making of an adoption order would ease their anxiety and stress, which can benefit Z in the short and long term. They state X *'is unconditionally committed to [Z] for life and is [Z's] psychological and emotional father and parent. It therefore seems unfathomable to us that [Z] would not want his 'Daddy' recognised in law and equally that he would not be adversely affected in the future when he becomes aware that this is not the case'*. The statement describes their level of insight, how it has evolved, how the situation has impacted on them and they do fully appreciate and acknowledge G developed a bond and love for Z during the pregnancy. They are not fearful of a relationship forming between G and Z but remain concerned about the views expressed by G about surrogacy and how if Z was exposed to those it would be harmful for Z, observing G only deleted her social media posts after they filed their statement in August detailing them.
99. Whilst they agree direct contact is needed this is to *'ensure that he has full knowledge of his birth and biological origins'*. This purpose is for identity contact rather than to establish a parental relationship. They consider restoring the contact in August 2021

order is an *'overstep'* bearing in mind their concerns about G's views on surrogacy and Z's right to a family life. They remain clear that they should be present during any periods of direct contact as *'it is important that [Z] sees all the adults getting along and for all the adults to see how contact is benefiting [Z]'* they recognise that G may find this difficult and suggest that they would be open to her bringing someone with her. As regards G's role they see it as Z's *'surrogate mother and biological mother. This is an important role in terms of his birth and biological identity, but perhaps less important in terms of his family life and who his parents are'*. As regards the Guardian's suggestion about calling G 'mummy [G]' they are *'concerned that the inclusion of the term 'mummy' may be confusing for such a small child who will be familiar with the term 'mummy' in relation to peers who may have 'mummies' in the traditional sense'*. They suggested as an alternative 'Auntie [G]'.

100. They seek an adoption order, do not advocate a contact order but will offer contact in line with that recommended by the local authority and Guardian. If the court considers an order should be made they would not oppose such an order being made to have effect for five years, with an order under s91(14). Finally, they confirm they are prepared to seek private therapeutic support.
101. In oral evidence X re-iterated to Ms Cabeza that G is important in Z's life, he hopes G and Z will have a bond *'Not something we consider to be a worry. Not going to change my love for [Z], would only add to [Z's] life not take away'*. As regards the benefit of an adoption order X said *'I always knew there would be conversation with me not being his biological father but didn't envisage saying I am not his legal father. Me being [Z] legal parent reflects his reality.'* He did not see that as a way of excluding G *'It secures his place with me, it will not erase [G]. She will always be his biological mother'*. Y said an adoption order would give them *'peace of mind'*, so whatever happens to him he knows Z would be cared for by X and he would feel reassured that his family is *'whole and secure'*. During the pregnancy X accepted to Ms Bazley he did not share his anxieties about Z not being given to them with G. In answering the question that the cheery pictures of the nursery they sent G didn't convey how they were really feeling, he said they were trying not to burden G. Having heard Dr Willemsen's evidence he can see the internal struggles G was having about the child she was carrying and accepted using the term *'deliberate'* in his statement was not the right word to use. He also accepted that the criticisms he made in his statement regarding the birth arrangements needed to be looked at in the context of the Covid 19 restrictions at the time. He felt the December 2020 letter was an attack on them, when Ms Bazley suggested that was not what G was saying, X said it was *'how we felt at the time'*. When asked about consent to the contact the August 2021 order X said *'In practical way yes but in emotional way difficult. We found ourselves in difficult position, parental order reporter said best interests and accepting terms [G]'*. He considered the contact order was *'emotionally and psychologically imposed on me. The dilemma I faced not being [Z's] legal parent if I not accept it. How I felt at the time'*. Y said he *'felt extreme pressure for us, we between difficult situation no parental order and family not legally recognised or have parental order with contact'*, although he accepted what was agreed at mediation in July 2021 and the August 2021 order were *'pretty much the same'*. When Ms Bazley suggested the pressure only makes sense if they were not intending to comply with the August 2021 order, Y responded *'While we did have reservations did try to rebuild it. We wanted to understand from our perspective'*. Y denied to Ms

Bazley it was a similar situation now as he said they had had '*professional input and reflected*'.

102. Y agreed their view remained in June 2023 that G shared Z's DNA and there should only be indirect contact stating '*we wanted guidance and advice about contact*'. In answer to questions from Ms Bazley about Z's need for an adoption order X said it was needed for Z's security, although accepted that it would not make any difference to Z how he sees his world. When asked when they said there was no vacancy for a mother he responded '*[Z] doesn't need a mother, he needs two parents re his welfare needs. There is a place for [G] as biological/birth mother*'. In response to Ms Bazley's question about whether allowing Z to have real relationship with the person who gave birth threatens his position X responded '*It will play into role his family not complete*'.
103. When it was suggested to him that this was not an adoption case X responded that this was the legal framework he found himself in and it was not just important to him and Z but also securing Z's legal relationship with X's wider family. In response to Ms Bazley's questions about the level of blame they place on G in their statements X showed some recognition he now sees things differently. Y said that Dr Willemsen's evidence has '*helped us understand the situation better*' and in response to questions from Ms Bazley Y said '*The reality is [Z] is in a motherless family. There is a role for surrogate and biological mother which we are promoting*'. When Y was asked what does adoption bring Z, he responded '*Not for day to day practicalities of parenting. The adoption order far greater – stability, security and pride that family legally recognised will help form security*'. As regards the social media posts put up by G, Y said he thought G should consider the anxiety, hurt and pain felt by X and Y and the impact on them of reading those views. Y did not accept that what she posted could not be seen as her views. As regards the comments made about G in their statements when Ms Bazley suggested that it could have been expressed in a more balanced way, Y agreed and looking back acknowledged it could have been dealt with differently. He agreed what was missing after Z's birth, or even before, '*was the opportunity to understand each other and what the other was going through*'. Y said they are committed to Dr Willemsen's recommendation of the need for X and Y to have their own therapy. Ms Bazley took Y through the contact arrangements that Dr Willemsen wanted to see Z with G a second time and X and Y's refusal to agree that, Y said '*we queried the necessity of a second assessment*' and as regards the seven reasons listed why they did not agree to what Dr Willemsen proposed about the second visit, Y said they had allowed the first visit and felt the second assessment was not necessary. Both X and Y maintained the need for them to be present at any contact with G.

G

104. G has filed two statements. Her statement in July 2023 G sets out that she does not wish, and has never wished, to be an active co-parent for Z, and has not sought to interfere with X and Y's exercise of parental responsibility regarding Z. She says has sent many messages to X and Y setting out the role she seeks to play in Z's life including a message in September 2021 that states '*I do not seek to parent [Z] and 100% recognise you both as [Z's] parents. I do not seek to be in a maternal role for [Z] nor do I seek for him to grow up recognising me as his mother*'. In her statement she says she '*would simply like [Z] to know me as the woman who brought him into the world, understanding that we have a biological connection but that I am not his 'parent' nor will I take on a 'mothering' role for him. I believe it is important for him to be brought*

up knowing that he was born as a result of a surrogacy arrangement and believe it would benefit him to know me as he grows up even if the relaxed and informal way of achieving this, which was intended by [Y], [X] and me is no longer possible. As she continues in her statement *'Although I was never seeking to have a mothering role in [Z's] life, it was never intended that I would be just a surrogate or a mere egg donor and I would never have agreed to be a surrogate on that basis*'. In her oral evidence she referred to the benefits of Z having contact with her as *'Promoting his identity – a whole rounded view*'. X and Y are family friends, they are godparents to her niece and the intention was that G would be part of the wider circle of adults who love Z, they would see each other at family events and additional occasions of informal contact as well. G wants Z to feel comfortable with who he is and where he comes from, and she believes knowing her will help him achieve that. G recognises the difficulties the proceedings have caused but hopes that they can have a relationship of mutual respect and trust focused on Z. Further, she considers it is important for Z to know about B, B knows about Z and G describes her experience of her partner being an adopted child and not being able to ask questions about his biological parents and the circumstances of his adoption, and the impact it has had on him.

105. G accepts she sent the letter on 27 December 2020. As she said in her statement filed in the parental order proceedings she said *'I decided to write to [X and]Y to explain how I was feeling. I had hoped if I shared how I was feeling and everything was out in the open then we might be able to work on our relationship. I indicated that I didn't feel that I could give my consent whilst the relationship between us was so fragile as I was worried that they would cut me out of [Z's] life completely.'* In her oral evidence she displayed understanding of the impact of this letter on X and Y, accepted it could have been expressed differently but it was how she was feeling at that time. When asked by Ms Cabeza about the friendship they had, G responded that they had a *'friendship based on surrogacy*'. It was not a naturally occurring friendship.
106. G did not consider the contact proposed in X and Y's statement was sufficient to maintain a relationship between her and Z. She considers the August 2021 order meets Z's welfare needs, although would accept the additional Christmas and birthday visits could be incorporated into the 6 weekly cycle rather than being additional visits. G also supports the therapy which would help improve the relationship between the parties and help support and manage the contact arrangements.
107. G sets out in her statement her reasons for opposing the adoption order. X and Y have made a number of unfounded allegations towards her, which they seek to use to justify cutting her out of Z's life. G states she is upset about any suggestion that she may be homophobic. She finds the allegation deeply upsetting and asks, rhetorically, why would she have agreed to be a surrogate for a same sex couple if that was her view. She has described the circumstances of the tweets and online material posted by her, as she said in her oral evidence she did not have many people to speak to at the time and has apologised for the impact of those comments on X and Y. G's fear is the increased acrimony brought about by these proceedings and the way she has been portrayed by X and Y is harmful to Z, emphasising the importance of Z being able to maintain an independent relationship with her. If he is not able to do that, G fears Z will find it increasingly difficult to reach out to her, and will view surrogacy in a negative way.
108. G states that even if there is a contact order attached to an adoption order she has no confidence X and Y will comply with it, largely based on what G considers was their

failure to comply with the August 2021 order. G describes her experience after that order, which clearly set out the arrangements and dates when it *'quickly became apparent, however, that they had no intention of allowing contact as per the order'* Their email response regarding the first contact session stated they wanted to spend the day together as Z suffered from separation anxiety. G agreed what they proposed as she would see it may be helpful for Z and she wanted to see him. When she arrived at the home on 28 August 2021 G states they made it clear that they would not let the contact take place that they had agreed to, with Z and G having time alone together. G states she had been happy to have the recording in the order about flexibility, as she considered that would mean such matters as working around Z's naps/feeding times, rather than a complete change to both the length and nature of Z's contact with G. According to G, she felt X and Y became increasingly hostile to her, she was very worried they would stop contact altogether and so went along with their requests to only have joint visits, although she could not understand the extent of the concerns they expressed in their emails in September 2021. G felt X and Y were extending the emails about contact arrangements to seeking clarification about G's role in Z's life. G said she felt she had little alternative but to agree to their conditions, as she feared contact sessions being cancelled. As a consequence, the contacts in September, October and November did not take place in accordance with the August 2021 order.

109. G describes X and Y's engagement and communication with her became more infrequent and hostile. The visit on 18 December 2021 was for about an hour in the park. G said she was not allowed to engage with Z and X and Y refused to acknowledge G *'continuing to play with [Z] as if I wasn't there'*. G described X and Y starting an angry *'tirade at me, telling me I was not wanted in their family'*. G said she tried to placate them and said she felt embarrassed and vulnerable about what was happening. G accepts she eventually reacted and stated that they had *'taken a baby away from his mother'*. G acknowledges she was wrong to have reacted in this way, she recognises the remark would have been upsetting for them and she apologised in her statement for that but said she felt worn down by X and Y's repeated breaches of the court order and what she considered was their obstruction of her time with Z. G said in her oral evidence she struggled with X and Y's description of her wanting to spend time with Z as wanting an *'inappropriate relationship'*
110. The scheduled contact on 2 January 2022 did not take place, with no further dates proposed by X and Y. G stated she did not accept the decision by X and Y in their email dated 9 February 2022 to stop all contact between her and G, including the one scheduled for 13 February 2022, and she was *'driven to the conclusion that they had never intended to make the order work and were simply minded, from the outset, to prevent [Z] having any kind of relationship with me'*. G said she felt in an awkward position, if she didn't attend on 13 February 2022 X and Y could say that Z was available and she had not attended. She attended for contact and accepts she covertly audio recorded what was said. According to G, the way they spoke to her then was indicative of the way they had treated her in previous contact visits. G states the recording gives a very different picture to that portrayed by X and Y in their statements.
111. G does not accept the suggestion that Z has experienced instability and insecurity. The evidence from X and Y is that Z is thriving in their care, meeting all his milestones and G states she has always supported Z remaining living with X and Y. G considers adoption is a *'disproportionate and unnecessary step. More importantly, these issues*

need to be balanced against the fundamental matter of [Z] being able to have an ongoing relationship with me and, in due course, [B] and perhaps [G's niece]. I believe this outweighs the issues raised by [X and Y]’.

112. As regards parental responsibility, G has set out that she does not wish to be involved in day to day decisions or major decision regarding Z. She would like to be notified if there was any major issue regarding his health or wellbeing as she may be able to help and if there were plans to leave the jurisdiction permanently or for longer than 6 weeks.
113. In her final statement dated 15 November 2023 G, like X and Y, commented on the final reports filed. She emphasised her view that a contact order is required, whether or not an adoption order is made. She supports the recommendations made by Dr Willemsen about restoring the contact ordered on 11 August 2021 stating *‘This is the only order that reflects [Z’s] reality, that he lives with his fathers and spends time with me. It is his reality that I am his birth mother, who carried him and wants to play a role in his life. I would never have agreed to be a traditional surrogate in circumstances where I was not going to have any meaningful involvement in the child’s life’*. She states that an important part of her decision to have a child for X and Y was because of their close connections with her sister and niece and what she understood to be the common intention that any child born would always be connected to her and would know her and her family as he grew up. She questions the acceptance of the social worker and Guardian that X and Y have changed, or now have more insight, bearing in mind her experience of what happened at the time the parental order was made and what she considers were barriers and obstacles to contact taking place in accordance with the order. There was a repetition of this behaviour in discussions for the contact with Z in the presence of Dr Willemsen. She refutes X and Y’s suggestion to the Guardian that they had no option but to agree the August 2021 order. G does not accept the recommendations of the social worker and the Guardian. She re-iterates she supports Z remaining in the care of X and Y and wishes to *‘play a role in his life through ongoing contact which takes place in a way that supports [Z] having a relationship with me. [X and Y] have not allowed this to happen to date. Accordingly, I believe that [Z’s] welfare requires the court to make orders which ensure an ongoing relationship between him and I in the way that has been recommended by Dr Willemsen. This will not happen if there is an adoption order, whether or not there is also a contact order’*. Like X and Y she would welcome engaging in work to help restore their relationship.

Dr Willemsen

114. Dr Willemsen, clinical psychologist, was the jointly instructed expert. He has been a clinical psychologist since 1995, worked at Great Ormond Street Hospital between 1998 – 2000, at the Tavistock Clinic for 7 years until 2007 and since then has been in private practice. He is registered with the Health and Care Professions council (HCPC). He is an expert witness in about 40 cases per year. He has assessed and worked with families in contact disputes including those involving false allegations, parental alienation, surrogacy and many other circumstances that relate to children, parents and parental ability to care for children.
115. In August 2023 he saw X and Y on three occasions, G on two occasions and Z with G in the presence of Y on one occasion. He requested a further visit with Z and G but it was not possible to agree the necessary arrangements with X and Y.

116. In the summary in his first report dated 12 September 2023, he considered the case is characterised by the difficulty of managing anticipated loss: G’s loss of Z, and X and Y’s loss of the baby. As he said in oral evidence *‘Both have anticipated loss – one is [G] letting go and [X and Y] is to receive’*. He considers the three adults did not manage to find a forum to speak together about these powerful feelings. G responded to her anxiety by initially withdrawing while the fathers later responded by pushing G out. Dr Willemsen considers that *‘despite these difficult and complex relationships I consider that it is in [Z’s] best interest to have direct contact reinstated, to allow him to be aware of his conception, reality, and biological background, as he grows up, while fully acknowledging the roles his fathers’ play in [Z’s] life’*.
117. Dr Willemsen noted that the surrogacy agreement provides hardly any consideration to the emotional risks in entering into the agreement. G spoke in her interviews about now appreciating she went into the surrogacy agreement too soon and probably also not having fully thought through the implications of a move from gestational to traditional surrogacy. Dr Willemsen notes the process took a considerable toll on X and Y, although he considers the resolve of their distress is a focus on G without fully grasping their personal difficulties.
118. Dr Willemsen considered G could speak with much affection and detail about the difficult experience of her pregnancy, stating, for example, that she felt as if she could not (was not allowed) to have feelings, much to her distress. X and Y began to feel anxious during the pregnancy of possibly losing what they considered was their child. As he states *‘There was no possibility to talk these feelings through (of [G] loving the baby and [X and Y] possibly losing the baby) because to do so felt frightening for all three of them. [G], in my view, could acknowledge her feelings, and certainly now she can although I think [X and Y] have hardly acknowledged the loving feelings [G] developed during the pregnancy. They did mention that they thought they might lose the baby. I think that [G] having affectionate feelings for [Z], apart from the actual role she may play in [Z’s] life, feels threatening to them to the point that they have strongly held to the surrogacy agreement and the narrative of [G] being a ‘surrogate’ because in that narrative there are no, or hardly any feelings from the surrogate for the baby. In the agreement...the risks of such feelings are not acknowledged perhaps with the proviso that counselling can be accessed if necessary’*.
119. Dr Willemsen considered it important to look at the manner in which each of the two parties dealt with their feelings of anticipated loss. He considered G can describe those feelings in the tweets she published, of not wanting to let go of Z and her sense of loneliness after leaving hospital and at Christmas. She was in touch with those feelings and her feelings of loss turned into anger, of feeling used and questioning the surrogacy process which Dr Willemsen considered neither party had prepared themselves well for. Dr Willemsen views her responses (such as the tweets) as a way of working through the very difficult feelings she was confronted with, which could not be worked through with X and Y and she had to bear some responsibility for. She considered she could help X and Y have a baby without fully taking on board any feelings she may have. In response to Ms Cabeza, Dr Willemsen said he was fully aware of how difficult these tweets must have been for X and Y.
120. Dr Willemsen considers X and Y’s management of these painful emotions were overshadowed by their feelings of amazement on the arrival of Z. Their way of dealing with anticipated loss was to keep to the surrogacy agreement and to *‘try not to divert*

from what cannot be anticipated and causes anxiety. They saw and see [G] as a 'surrogate'. The anxiety is also managed by X and Y by being the same, both being fathers and both needing to be 'legal' parents.

121. In Dr Willemsen's view one of the differences between the parties is that G has done a lot of soul searching and been trying to understand and give meaning to her feelings, so as to work out a way forward for Z. He denied the suggestion that he had taken on board the narrative of Z as a victim, he said in response to Ms Cabeza *'I see her as someone who has taken responsibility for her behaviours'*. X and Y have generally focused on G not keeping to the surrogacy agreement, undermining them, not acting in Z's best interest in challenging the parental order and not consenting to the adoption application. He views the lack of insight by X and Y into their feelings have made them turn G into an aggressor whose aim is to attack their family *'They appeal to set aside that she has affectionate feelings for [Z]...and she would upset [Z's] life when she challenges [X and Y]. Whereas [G] has shown doubt, dilemma, struggling with difficult feelings and be concerned about who she is in [Z's] life, [X and Y] have largely held to a narrative without challenging the way they managed their anxieties.'* He regards the missed opportunity was not to *'sit down together and acknowledge the anxieties related to the anticipated losses suffered by both parties.'*
122. In his report Dr Willemsen details the difficulties he experienced in seeking to set up the arrangements to observe Z with G. Dr Willemsen considered the emails from X and Y's solicitor, with detailed conditions, essentially set up a barrier and was another attempt by X and Y *'not to have to feel but instead find a process or framework to support their narrative'*. For Z Dr Willemsen considers *'there is a concern how much [X and Y] can support direct contact without feeling aggrieved, or indeed fearful that the relationship between [Z] and [G] may become more meaningful than they would like. There is a concern that they could take matters in their own hands, become their own authority, and decide what is good for [Z] without being able to appreciate authority (the court) and experience (the assessment) from others'*. In the end Z was seen with G in the presence of Y, Dr Willemsen notes there was hardly an acknowledgment from Y towards G.
123. In his first report, when asked about therapeutic work, Dr Willemsen states it can be effective if X and Y allow themselves to question their behaviour *'If their focus remains on the outcome they wish to achieve, the therapy becomes a vehicle to achieve that goal, rather than a place where different feelings and understanding can be explored and questioned'*. He considers X and Y have *'limited ability to promote direct contact because they see contact as threatening their relationship with [Z] and their relationship with each other'*. In his oral evidence, Dr Willemsen did not consider contact needed to await therapeutic work being undertaken, it can be done at the same time. As regards the suggestion by X and Y that it will be confusing for Z to have contact with G, Dr Willemsen's view is that it might be that X and Y have difficulties *'accepting the reality of [Z's] conception and what sense [Z] may make of it as he grows up. It seems to me, based much on the experience of adoption and seeing people who have not known about their biological roots, that such roots and the concrete experience of seeing people who look like you, are very important'*. Dr Willemsen is concerned that with G *'set aside reality is moved out. It seems to me a healthy option to have him see her, because there will be an openness about the conception and reality which will not come to haunt him as he becomes older. With haunting I mean the ghost*

experience of knowing she could be there, she wanted to be there, but she was not. He considered either of the options, an adoption order or no adoption order and with either option direct contact taking place pursuant to the order made on 11 August 2021 as being of benefit to Z. He accepted it could be argued that X would feel more settled with an adoption order although he is not of the view this would affect Z directly.

124. The recommendation in his first report was that contact is put in place along the lines of the August 2021 order *'to support [Z's] reality. This reality includes his fathers and [G] who gave birth to him. This may be complex, in terms of relationships, but there will be every opportunity for [Z], as he grows up, to make sense of his conception, and have some knowledge and experience of the biological connection with his birth mother'*. Adding in his oral evidence *'...that [level of contact] is not a loss for the family, the fathers are his family [refers to videos with ducks] ...I do not see [the August 2021 contact] as a threat to [X and Y]'*. Contact proposed by the other parties is more aimed towards Z's knowledge but not a relationship with G. Although he stated his views do not differ whether there is an adoption order or not, save to observe that the original parental order required G's consent, with the adoption order G's consent can be dispensed with and he raises the concern that psychologically such an order *'could be experienced as the father's getting from [G] what [G] did not want to give. This may result in a further strain in the relationship, and a further complex dynamic for [Z] to get his head round as he gets older and tries to understand his history'*. In his oral evidence Dr Willemsen took into account X's view that an adoption order would secure X's position and may be easier for X and Y but he also needs to consider the background and his own experience in managing the contact he wanted to observe between G and Z. In response to Ms Bazley about X and Y wishing to remain in control he said *'This is the danger – when feel out of control they will rein in'* which he agreed had implications if there was an adoption order. In response to Ms Lee, he said *'This is because of the complexities in the relationships, an adoption order will not help this'*. He agreed with Ms Bazley when she said the reality for Z is he is not in an adoptive family. He stressed in oral evidence the importance for Z of contact with G, it enables Z *'not just to know the narrative but has the possibility to live it'*. Dr Willemsen disagreed with the suggestion that it may be difficult to explain X has a child arrangements order and G does not exercise her parental responsibility, as he said he doubted it would ever come in a concrete question, the response would be *'that's how we agree to it'*. In response to Ms Lee about the dangers of G being notified about matters is the risk of further litigation, Dr Willemsen recognised that was a legal possibility but *'unlikely'* in his view to take place.
125. In Dr Willemsen's addendum report dated 14 November 2023 he further analyses the issues in the context of whether he should attend court to hear the evidence of the lay parties before he gave evidence. In that analysis he considers the position of each of the lay parties from Z's perspective; as he sets out *'Family life is central, not as seen from the perspective of the three adults, but from the child's perspective. The fathers, that is, [Y] claimed they are a 'motherless' family. The court may wish to consider the significance of this statement. Of course, from a concrete perspective this statement is correct, and there is, in my view, every encouragement to give the fathers for the life they wish to lead. 'Motherlessness', however, does not exist. The child was born from two people, biologically, and from three people, psychologically...The mother certainly played a part, biologically and psychologically, in the conception of the child. One of the implications of not considering what family life is, is revealed in the professionals'*

reports. There appears to be an assumption made about family, for example when the social worker considers that contact should only be at a certain level because of a 'right to family life', without defining what family is and what family life involves for the child, now and in the future'. He also analyses what is said about identity, whether knowledge is enough for identity formation so that in time the child can himself determine what, if any, contact he would wish to have. He continues 'Little thought is given to identity being a dynamic process. Identity is relational by its very nature. In other words: 'I am who I am through the experience of the relationships I have with other people.' 'Knowing' is closer to letter box contact which is not considered fit for purpose for many children'. It is his view that the suggestion of the fathers being present during any contact 'has considerable consequences for the quality of the child's identity development'. He considers the anxiety about the child's separation from the fathers lies mostly not with the child, but with the fathers.

Ms Harvey

126. The Local Authority report pursuant to rule 14.1 Family Procedure Rules 2010 (FPR 2010; 'Annex A report') was prepared by Ms Harvey and is dated 21 September 2023, with addendums dated 19 October 2023 and 6 November 2023. She qualified as a social worker in 2008, worked as a social worker for 5 years, with the local authority adoption team for 8 years and since March 2022 has been working as an independent social worker undertaking assessments for the court in non-agency adoptions. She has experience of dealing with same sex step parent adoptions, all made by consent where mostly there had been breakdown with the absent birth parent.
127. In her report Ms Harvey reported very favourably on Z's development and said he presented as *'a happy and content child during her visits to the family home'* and described his relationship with X indicate Z is a child *'who feels secure and loved by him'*. She saw Z in the family home on 10 July 2023, 31 July 2023 and 15 August 2023 with X and Y. Ms Harvey describes these in her report as assessment visits. Ms Harvey met G once by way of a video call on 30 August 2023, which she describes as a meeting to gain her view and gather information for the assessment. Ms Harvey had video meetings with X and Y and G on 20 September 2023 to discuss her recommendations. In their discussions she reports G as saying X and Y are *'his parents, but I don't think adoption supports allowing him freely to get to know me. When I consented to the parental order it was under the understanding I would still see [Z] regularly'*. G said she did not want to *'just be an egg donor'*.
128. In her discussions with X and Y she reports their view that indirect contact between Z and G met Z's best interests due to the ongoing conflict between the parties. They moved from that position stating they were willing to take on the advice of professionals *'as long as the frequency was appropriate and they were part of the contact then they were more open to this'*.
129. In her analysis of the welfare checklist under s 1 Adoption and Children Act 2002 (ACA 2002) she deals with the likely effect on the child of ceasing to be a member of the original family she observes *'It is a sad situation that the circumstances and difficult and fraught relationships between the adults has led to [Z] being unable to maintain a meaningful relationship with his biological mother however I believe becoming adopted will not prevent him from having a relationship with her in the future and learning about his life story. [X and Y] I believe have evidenced their openness with*

[Z] about his origins and their wish to continue to do so as he gets older. I believe they want what is best for [Z] and do not want to disrupt any secure relationship they have built with him which is based on trust, therefore wishing to promote direct contact when he is older’.

130. Her analysis of the orders that are available for Z are set out at the end of her report. Her concern about a child arrangements order is it would not have the sense of permanence of an adoption order. She says without that permanence this could continue to create emotional turmoil which she believes could *‘eventually impact on [Z], causing him emotional harm’*. She believes the narrative of explaining to [Z] as he gets older that G still has parental responsibility but yet does not want to exercise it *‘is confusing for [Z]’*. In her view, this type of order is more likely to be the subject of further litigation.
131. In making her recommendation she refers to the length of time the litigation has gone on, considers the only possible outcome to secure Z’s future is adoption. She regards it as important that X’s position as Z’s father is recognised in law and it provides a *‘narrative for [Z] as he gets older, otherwise he may be confused why one of his father’s, who he views as his father does not have the same parental responsibility as his other father’*. As regards G she notes she wishes to continue to see Z but does not wish to parent him *‘therefore in my view she does not require parental responsibility’* and the adoption order will enable X to make decisions jointly with Y. She considers X and Y will promote Z’s identity.
132. As regards contact she considers the purpose of it is to promote identity, help him understand X and Y accept his connection to G his biological mother, and enable Z to build trust with X and Y to ask questions about his heritage. Ms Harvey considers X and Y are more likely to support and promote direct contact with an adoption order being granted, as they are less likely to feel worried about being subject to further litigation. She considers any contact should be in the presence of all the adults due to *‘the importance of [Z] seeing all the adults get along as this is the best way [Z] will develop a positive sense of his identity and life story’*. In addition to a contact order for direct contact twice a year and indirect twice a year she supports an order under s91(14) as this would *‘prevent any impact on [Z’s] welfare of long term proceedings if brought back to court’*.
133. In her addendum reports she supported contact as recommended in her original report as in her view 3 month intervals between direct/indirect contact will promote Z’s relationship with G *‘whilst ensuring this does not impact on his right to family life and his relationship with his two fathers’*. She recognised that in time Z is likely to want to see G on her own and more frequently. Ms Harvey invites the court to consider an order under s91(14) due to the emotional turmoil caused by the proceedings, the length of time they have gone on and the impact on Z’s wellbeing. The purpose of the order *‘would be to prevent any impact on [Z’s] welfare of long term proceedings if brought back to court regularly’*. Ms Harvey confirmed that there would be no local authority support services available to the parties.

Ms Pulbere

134. Ms Pulbere’s report is dated 5 October 2023. She first became involved with the case in June 2022, Z was joined as a party to the proceedings in July 2022 at a time when

the proceedings were stayed pending the outcome of G's appeal against the parental order. As well as the written material and observing the evidence in the hearing, she saw X and Y at their home on 26 September 2023, Z was present. The following day she had an interview with G.

135. She describes Z as a *'happy, lively, bright, and inquisitive child who is developing well and who is meeting, if not exceeding, all his developmental milestones.'* She notes that Z *'has lived with his papa and daddy all his life, their relationship is a very close and affectionate one and the fact that [Z] is adored by his fathers who have provided him with very good levels of care is not disputed and this has been abundantly clear throughout my involvement with the family.'*
136. In her discussions with X and Y they reported that there were no difficulties with how Z responded to G at the meeting with Dr Willemsen, Y had done his best to prepare Z. Z was fine on their journey home and had been his *'usual, happy self since then'*. X reported that Z had said he had a good time and would like to see G again, he would like it in a park and would like X and Y to be present. Z also reported this to Ms Pulbere that he had had a good time and was able to report what he had done with G.
137. Ms Pulbere observed in her report *'[Z] has a good sense of his place within his family unit with his daddy and papa and with their support, [Z] was also happy when he spent time with [G]. [G's] responses to [Z] also provided an emotionally safe place for [Z] in which he was happy to play and engage her and his papa in his games'*.
138. In her discussions with X and Y, Ms Pulbere reports they have read and taken on board Dr Willemsen's report and whilst there are aspects they do not agree with *'They both reflected that they do not feel threatened in any way by [Z] potentially loving [G] if he was to spend time with her and they also reflected that they are happy that [Z] is loved by [G]. They told me they support [Z] when he sees videos with [G], and this was evident in how well [Z] coped with seeing [G] and talking with his daddy about her and with me as well'*
139. In her discussions with X and Y, she raised how [G] is referred to and suggested using her first name, possibly with 'mummy' first as that was more likely to be readily understandable by Z. X and Y told Ms Pulbere that they have always wanted G to be involved in Z's life but what remained in issue between the parties was the adults' expectation of how Z would see G; as part of regular meetings between friends/family or independently by G on her own with Z. When she met X and Y they had reconsidered their position and agreed direct contact twice a year and indirect contact twice a year. They considered that would be the starting point that *'they felt they could manage at this stage and they expressed the view that should things change and/or [Z] asks them, they will be able to support [Z] seeing [G] more, including on his own, when he will be older'*. When she pressed them on how they could be trusted bearing in mind the difficulties with the previous orders *'they were both clear that having had the opportunity to reflect on what the professionals involved have said and what their original views were as well, they now believe in this proposal whereas before they felt the Child Arrangements Order was something imposed on them that they had no option other than to agree to as otherwise they would not have had the Parental Order made'*.
140. In her discussions with G, whilst she was happy to hear about the change in position and wanted to trust them she was concerned how long it had taken them to agree Z

should see her. She was also concerned that they had stopped her from seeing Z when they were legally Z's parents which makes her less confident that they will be able to support such contact, especially if an adoption order is made. Her view is that the adoption order is in essence *'the Parental order second time around' that will 'close the door' for [Z] and for her in ensuring that she gets to see [Z] and be part of his life and see [Z] grow up'*.

141. Ms Pulbere considers that it is inevitable that as Z grows up he will start to ask questions about where he came from, and whether he has a mother as identity and belonging are an intrinsic part of child development. She considers Z has a *'very clear sense of his family – papa, daddy and [Z]. It is my assessment that [Z] would easily include 'mummy [G]' (or similar term) in his sense of family if this is promoted with him by the adults in his life'*.
142. Ms Pulbere considers that G wants to retain parental responsibility for Z as that provides G with a *'sense of insurance for her being part of [Z's] life as he grows...it is an indication of [G's] lack of trust in [X and Y] in supporting [Z] to see her'*. It is Ms Pulbere's view that G's desire to 'hold onto' Z *'is casting a long shadow'* in Z's family unit and her view is that Z needs the stability and security of a court order that will ensure his live with arrangements with his fathers is legally cemented.
143. As regards future contact with G, Ms Pulbere states *'there is no question about its importance'* for Z's knowledge of his identity, he would easily know who G is and where she fits in so long as this is approached in a sensitive manner by X and Y. Ms Pulbere notes that Z has a memory of G, has said he would like to see her again which indicates the indirect contact he has had with G has been purposeful for him and recommends using one term to describe G, such as 'mummy [G]' as at three years Z is now laying down long-term memories and using one term will help Z build his sense of identity. Due to the history she considers Z requires a defined contact order to ensure his best interests are promoted. She recommends a discharge of August 2021 order, a step parent adoption order in favour of X that dispenses with G's consent and an order for Z to see G twice a year and indirect contact twice a year.

Legal framework

144. The starting point is the relevant statutory provisions that govern these applications.
145. The application to vary/discharge the August 2021 order involves consideration of what order is in the child's best interests, having regard to the welfare checklist in s 1(3) CA 1989.
146. The statutory framework relating to the step-parent adoption is in the Adoption and Children Act 2002 ('ACA 2002'). The application in this case is made pursuant to S 51(2) ACA 2002 which provides for the making of an adoption order on the application of one person where the court is satisfied that 'the person is the partner of a parent of the person to be adopted'.
147. Section 47 specifies the conditions for making an adoption order:

“(1) An adoption order may not be made if the child has a parent or guardian unless one of the following three conditions is met; but this section is subject to section 52 (parental etc. consent).

(2) The first condition is that, in the case of each parent or guardian of the child, the court is satisfied—

(a) that the parent or guardian consents to the making of the adoption order,

(b) that the parent or guardian has consented under section 20 (and has not withdrawn the consent) and does not oppose the making of the adoption order, or

(c) that the parent’s or guardian’s consent should be dispensed with.

148. In this case G has parental responsibility as the birth mother, she does not consent and so to make a step parent adoption order her consent would need to be dispensed with pursuant to s52(1)(b) ACA 2002 which provides the court can only do that if ‘the welfare of the child requires the consent to be dispensed with’.

149. In determining whether or not to dispense with parental consent, the child’s welfare throughout his or her life is the court’s paramount consideration (s.1 ACA 2002) and in coming to its decision the court must have regard to those matters in s.(1)4 ACA, known as the ‘adoption welfare checklist’ namely:

(a) the child’s ascertainable wishes and feelings regarding the decision (considered in the light of the child’s age and understanding),

(b) the child’s particular needs,

(c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,

(d) the child’s age, sex, background and any of the child’s characteristics which the court or agency considers relevant,

(e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,

(f) the relationship which the child has with relatives, [with any person who is a prospective adopter with whom the child is placed,] and with any other person in relation to whom the court or agency considers the relationship to be relevant, including— (i) the likelihood of any such relationship continuing and the value to the child of its doing so, (ii) the ability and willingness of any of the child’s relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child’s needs, (iii) the wishes and feelings of any of the child’s relatives, or of any such person, regarding the child”.

150. Before making an adoption order, s.46(6) ACA 2002 provides that:

“..the court must consider whether there should be arrangements for allowing any person contact with the child; and for that purpose the court must consider any existing or proposed arrangements and obtain any views of the parties to the proceedings.”

151. The legal effect of an adoption order under s.51(2) can be summarised as follows: a) The child is treated as if born as a child of the step-parent for all purposes (s 67(1) ACA 2002);
- b) The child is treated in law as not being the child of any other person other than the step-parent adopter and the natural parent who is that stepparent's partner (s67(3)(a) ACA 2002);
- c) The natural mother's parental responsibility for the child will be extinguished (s46(2)(a) ACA 2002);
- d) The adopter obtains parental responsibility for the child (s46(1) ACA 2002).
152. It should be noted that adoption which has the effect of depriving the mother of parental responsibility, does not provide the only means whereby the step-father could be granted parental responsibility for Z without the natural parent being deprived of their parental responsibility. Once married, Section 4A Children Act 1989 ('CA 1989') allows the court to make a parental responsibility order in favour of a step-parent either with the consent of both parents with parental responsibility (s.4A(1)(a)) or by court order (s.4A(1)(b)). The only other route open to seek parental responsibility would be by the making of a child arrangements order naming the step-father as a person with whom Z is to live. Such an order would automatically give the stepfather parental responsibility while the order remains in force. S.12(2) CA 1989.
153. In *Re P (A Child)* [2015] 1 FLR 1327 McFarlane LJ (as he then was) considered how an adoption application brought by a child's step parent is to be approached. This was in the context of a number of decisions that concerned agency adoptions. He set out the historical context starting at para. [38]. At [42] McFarlane LJ went on to consider the European Court of Human Rights ('ECtHR') cases, in particular *Söderbäck v Sweden* [1999] 1 FLR 250 ('*Söderbäck*'). *Söderbäck* was a case where the parents had never cohabited and the father's contact with the child had been very limited. As McFarlane LJ recorded at para. [42], the ECtHR held that Article 8 was engaged, but that an adoption order was not disproportionate in the light of the purpose of the adoption which was to consolidate and formalise the child's family ties in the light of the father's limited contact with her. At [44] McFarlane LJ went on to quote from that part of the judgment in *Söderbäck* which explained the distinction between cases involving the permanent placement of a child outside the family with a view to adoption and adoption by a stepparent as follows:
- "The Court considers that the present case falls to be distinguished from the Johansen case in the following respects. While it is true that the adoption in the present case, like the contested measures in the Johansen case, had the legal effect of totally depriving the applicant of family life with his daughter, the context differs significantly. It does not concern the severance of links between a mother and a child taken into public care but, rather, of links between a natural father and a child who had been in the care of her mother since she was born. Nor does it concern a parent who had had custody of the child or who in any other capacity had assumed the care of the child."*
154. Having considered the approach of the European Court in *Söderbäck*, McFarlane LJ went on to discuss the proper approach to step-parent adoptions in this jurisdiction, stating at para.[46]

“ In an adoption application the key to the approach both to evaluating the needs of a child's welfare throughout his or her life and to dispensing with parental consent is proportionality. The strong statements made by the Justices of the Supreme Court in Re B and taken up by judges of the Court of Appeal in subsequent decisions to the effect that adoption will be justified only where 'nothing else will do' are made in the context of an adoption being imposed upon a family against the wishes of the child's parents and where the adoption will totally remove the child from any future contact with, or legal relationship with, any of his natural relatives. Although the statutory provisions applicable to such an adoption (in particular ACA 2002, s 1 regarding welfare and s 52 regarding consent) apply in precisely the same terms to a step-parent adoption, the manner in which those provisions fall to be applied may differ and will depend upon the facts of each case and the judicial assessment of proportionality.”

He went on to draw a ‘qualitative difference’ between adoption by total strangers and an adoption by family members in a child protection case where rehabilitation is not compatible with the child’s welfare stating at para. [47]

“... adoption by strangers being at the extreme end of the spectrum of interference and adoption by a family member being at a less extreme point on the scale. The former option is only justified when 'nothing else will do', whereas the latter option, which involves a lower degree of interference, may be more readily justified.”

155. McFarlane LJ continued at para. [48]

“Where an adoption application is made by a step-parent, the approach of the ECtHR in Söderbäck v Sweden should be applied according to the facts of each case. In doing so the following central points from the judgment in Söderbäck are likely to be important: a) There is a distinction to be drawn between adoption in the context of compulsory, permanent placement outside the family against the wishes of parents (for example as in Johansen v Norway) and a step-parent adoption where, by definition, the child is remaining in the care of one or other of his parents; b) Factors which are likely to reduce the degree of interference with the Art 8 rights of the child and the non-consenting parent ['Parent B'], and thereby make it more likely that adoption is a proportionate measure are: i) Where Parent B has not had the care of the child or otherwise asserted his or her responsibility for the child; ii) Where Parent B has had only infrequent or no contact with the child; iii) Where there is a particularly well established family unit in the home of the parent and step-parent in which 'de facto' family ties have existed for a significant period.”

156. At para. [61] he emphasised the importance of considering the context of each particular case which will run from ‘a fully opposed, public law 'stranger' adoption at one extreme, to an adoption within the child's existing 'de facto' family unit, which is made with the consent of both parents’ at the other end of the spectrum. He also identified cases in between these two extremes as being cases such as the present case where a step-parent adoption is actively opposed by a noncaring parent who has played no active role in the life of the child for some years, in contrast to an opposing parent who remains fully involved in the life of the child.

157. McFarlane LJ went on at para. [62]:

“The reason why context is important is that, in each case, it is necessary to evaluate the proportionality of the intervention in family life that is being proposed. For the child, and for the child's welfare throughout his life, there will be a qualitative difference between adoption by strangers, with no continuing contact or legal relationship with any member of the birth family, on the one hand, and an adoption order which simply reflects in legal terms the reality in which the child's family life and relationships have been conducted for some significant time. In ECHR terms, no adoption order will be justified in terms of its interference with family life rights unless it is 'necessary' and 'proportionate', but in assessing those factors the degree to which there is an interference will be relevant. In short, in the present case, the loss to A, and the loss to her father, of his legal status as her father who holds parental responsibility for her, interferes with their respective family life rights to a relatively modest degree.”

158. The approach set out in *Re P* was approved in the more recent case *Re L (A Child: Step-Parent Adoption) [2021] EWCA Civ 801*. That case related to a child age 11 years whose wishes supported the adoption order being made.
159. The court has also been referred to *Re G [2006] UKHL 43* and the observations made by Baroness Hale about parenthood, setting out at para. [33] that *‘there are three ways in which a person may be or become a natural parent of a child, each of which may be a very significant factor in the child's welfare, depending on the circumstances of the particular case’*. The three ways she sets out are firstly, genetic parent, secondly, a gestational parent and finally a social/psychological parent. This case involves all three forms of parenthood: G is a genetic and gestational parent, Y is a genetic and social/psychological parent and X is a social/psychological parent. As Baroness Hale makes clear there is no presumption in favour of any one of the categories. The lodestar is what meets the welfare needs of that particular child.
160. s 91(14) CA 1989 provides that on disposing of any application for an order under the CA 1989 the court may order that no application for an order may be made in respect to the child concerned by any person named in the order without the leave of the court. This provision has recently been considered in *Re A (A Child) (Supervised Contact) (s91(14) Children Act 1989 orders) [2022] 1 FLR 1019* where King LJ noted the changes that have now been brought into effect in s 91A CA 1989 that include the risk of harm in considering whether to make an order under this provision.
161. In this case an order is sought under this provision not on the basis of repeated applications but on the basis that after such an extended period of litigation the child's welfare requires the order to be made.

Submissions

162. All parties have provided detailed written submissions and had the opportunity to respond to the submissions of others.

On behalf of X and Y

163. Ms Cabeza and Ms Amonoo-Acquah, on behalf of X and Y, highlight in their submissions the common ground between the parties, including the agreement between the parties that their friendship would continue after the birth and G would spend time with the child and have a natural and affectionate bond in the context of being his

surrogate mother. They list in their written submissions the other matters covering the period prior to their initial agreement to the matters raised in their oral evidence. They emphasise that this is a unique and exceptional case that none of the professionals had direct experience of before.

164. In their closing submissions X and Y now accept a contact order should be made, whether the court makes an adoption order or a child arrangements order.
165. They set out a number of findings of fact they seek the court to make. This hearing was not listed to determine any particular facts, it is to determine the two applications before it having regard, in particular, to the relevant welfare checklists. As part of that undertaking the court may consider it necessary to make factual findings relevant to those welfare issues. It is of note that the many factual findings listed in their closing submissions there is little, if any, acknowledgement or reflection by X and Y of their role in the situation the parties and Z find themselves in. All the findings seek to absolve them of responsibility and to lay it largely at G's door. On one view this may reflect X and Y's fixed thinking the evidence has made reference to, perhaps indicating that they have not really started on the journey of reflection required to come to terms with the situation they are all in. That is something that the court is going to have to carefully consider.
166. In their analysis of the evidence Ms Cabeza submits the evidence of Dr Willemsen is flawed in a number of ways and can't be relied upon. In particular, they rely upon what Dr Willemsen sets out are the competing narratives that X and Y suggest there was no agreement about continuing contact between G and Z whereas G states there was. They submit that although there have been and remain disputes about the level and form of contact '*it was only in the aftermath of the failed contact in December 2021*' that X and Y adopted a position of no contact. They state '*Their narrative is, and always has been, that it is important for [Z] to have the security of two legal fathers and it would be inappropriate for [G] to present to [Z] as a traditional mother figure*'.
167. They also submit there was no evidential basis for Dr Willemsen's view that X and Y continued to experience anticipated loss of Z after his birth until December 2020. They take issue with Dr Willemsen's analysis of the December 2020 letter and submit this letter was in effect '*the lens through which Dr Willemsen absorbed and analysed the case*'. Finally, they take issue with his view that G having affectionate feelings for Z feels threatening to them to the point that they have strongly held to the surrogacy agreement and the narrative of G being a 'surrogate' because in that narrative there are no, or hardly any feelings from the surrogate for the baby. They submit this displays Dr Willemsen's lack of understanding and experience of surrogacy and a '*disturbing and prejudicial mindset against surrogacy – a theme which infuses both of his reports*' and submit Dr Willemsen '*has imagined this anxiety into the case dynamic, as it would, if true, explain the mother's narrative in her letter of 27 December 2020*'. Ms Cabeza submits the reference by Dr Willemsen to '*erasure of mother*' in his oral evidence means he has '*entirely absorbed [G's] narrative as his own*' as it is a phrase used in G's tweets and it ignores the extensive other evidence that points in the opposite direction. She submits '*It is as though Dr Willemsen is incapable of taking a balanced view of the evidence so that he can look at the case from both sides. He is only able to see one side (that of [G]) and anything that contradicts her narrative is either ignored or dismissed*'. Ms Cabeza submits G's driving force is that she cannot let go of Z.

168. Ms Cabeza also submits that there was bias in Dr Willemsen’s report in favour of G and criticises Dr Willemsen for not understanding the difference between public law adoption and non-agency adoption. His reference to the speech by the President of the Family Division is in the context of the former whereas this application is a non-agency adoption. She submits the research supports that the outcomes for children brought up in same sex families do just as well as children in heterosexual families.
169. Ms Cabeza submits *‘Dr Willemsen has mis-interpreted the research by suggesting a causative link between post adoption contact and adoption breakdown, elevating the contact to being essential to the outcomes of the child. The findings are clear – contact can be beneficial and rewarding for all...it is individualised and should be facilitated and supported by all parties. It is a relational process that all need to be involved in.’* She continues that Dr Willemsen has failed to engage with *‘relevant research into outcomes for children raised by intended parents following surrogacy and focussed instead on issues of contact in post adoption agency placements with strangers’* She states *‘Fundamentally, Dr Willemsen does not think [G] deserves to be stripped of her parenthood if she does not consent to it’*. She considers he has been unable to engage in the *‘analysis within the context of [Z’s] reality – which is that his the planned for and loved child of gay married fathers who are raising him – and will be consent [sic] to do so – in the LGBT community’*.
170. Ms Cabeza submits X and Y gave *‘thoughtful, insightful and truthful evidence’* and that they were able to acknowledge their role in the relationship breakdown between September and December 2021 and both expressed regret about the doorstep incident in February 2022. Ms Cabeza submits this needs to be looked at in the context that the February 2022 incident was *‘engineered’* by G. They were devastated on reading the letter from G on 27 December 2020 and have since been focused on seeking to understand and define the role G wishes to play in Z’s life. These fears have been compounded, she submits, by G’s appeal of the parental order and not consenting to the adoption order. She submits *‘they worry that if [G] has contact and she cannot let go of the need to be seen as [Z’s] mother, this will send confusing and potentially harmful message to him that his fathers are not enough and his family with them is incomplete or inadequate. These are issues that vex the applicants. They always wanted for [Z] to have a relaxed natural and loving bond with [G] in which he would fully embrace his own surrogacy journey and celebrate with her the unique and special role she played in his creation to enable his fathers to raise him together as their son’*.
171. As regards G’s evidence, Ms Cabeza submitted that it was during her oral evidence that G first realised her *‘significant role’* in the breakdown of the parties relationship and that whilst X and Y did not dispute that the matters set out in her December 2020 letter were her feelings and perceptions they were unfair in their characterisation of X and Y. As set out above, Ms Cabeza largely lays the responsibility with G caused by her *‘brazenly’* underestimating what being a surrogate would involve and her disappointment and disillusionment in not feeling the great joy that she had been expecting to feel. G was lonely because she could not talk about these feelings and while she was feeling this way X and Y were enjoying caring for Z. She submits these unresolved feelings came to the fore with the arrival of the letter about the parental order application on 24 December 2020, she was required to respond and Ms Cabeza submits G shifted the focus and blame for her feelings to X and Y. This process of *‘vilification was not done with the intention of hurting the applicants, but rather it was the process by which [G] was able to make sense of her feelings while maintaining an acceptable self-image’*. Ms Cabeza submits that far from processing her fears and anxieties, G’s narrative and mindset *‘remains very firmly fixed in that same moment of irrational fear related to losing her status as [Z’s] mother’*.

172. Ms Cabeza supports the analysis of Ms Harvey and Ms Pulbere, whose recommendations remained intact after cross examination. Ms Harvey has considerable experience of undertaking reports in step parent adoption applications and is experienced in how children in such cases view being adopted by a step parent, in particular the status it brings. Ms Harvey considers an adoption order *'brings a sense of belonging and permanence'*. Ms Cabeza submits Ms Pulbere was able to bring a child focused and balanced analysis to the case, she *'was able to look at the proportionality of this case from the perspective of a step parent adoption in which [G] will remain an important person with whom [Z] will have a direct and transparent relationship and did not confuse the issues with those that arise in stranger adoptions of children who have suffered significant harm in the care of their parents'*.
173. By making the step parent adoption it is not a significant interference in G's right to family life since G does not wish to be seen as Z's parent. In so far as it is, it is necessary and proportionate. Her wish to have a relationship with him as his birth mother and for that relationship to be real, direct and meaningful is shared by X and Y and can be achieved by the making of a s8 contact order, which X and Y now consent to. This is an order G can enforce, if required and would not need the leave of the court to do so.
174. X and Y should be present during any periods of contact for the reasons they give, supported by Ms Harvey and Ms Pulbere.
175. X and Y are willing to consent to an order that provides for them to give 28 days notice to G in advance in the event that they intend to relocate to a new address and if they intend to travel outside the United Kingdom for more than 28 days which would interfere with G's direct contact.

On behalf of G

176. Ms Bazley K.C., Ms Magennis and Ms Elsworth on behalf of G maintain her opposition to the court making a step parent adoption order. In summary, they submit Z's welfare does not require that G's consent is dispensed with in accordance with s 52 ACA 2002. They rely on the evidence of Dr Willemsen and reject the conclusions maintained by Ms Harvey and Ms Pulbere as being over-simplistic and not properly dealing with the issues in this case where G does not give her consent.
177. Ms Bazley submits Dr Willemsen *'grasped and engaged from the start with the complexities in this case'*. He considered the case is characterised by the difficulty of managing anticipated loss: G's loss was about letting go of Z and X and Y's was about the prospect of Z not coming to them. In that context he considered that G was in touch with her feelings about this, whereas X and Y were not. He considered G had done a lot of *'soul searching'* about this, trying to understand and give meaning to her feelings and shown doubt, dilemma and struggled with difficult feelings about who she is in Z's life. Dr Willemsen considered X and Y mainly focused on G not keeping to the surrogacy agreement, that she was undermining them in challenging the parental order and not agreeing to the step parent adoption. Dr Willemsen considers that lack of insight by X and Y has in their minds turned G into someone whose aim is to attack their family and have held to this narrative without challenging the way they managed their anxieties. Ms Bazley submits there is support for this analysis in X and Y's first statement where they deal with G's struggle with her feelings, that she had not told them about stating *'Had she done so, things may have been different. Instead she chose to damage our relationship and trust by excluding us and making us feel that somehow our actions were our fault. On reflection, we cannot help but feel that [G] had made her mind up very early on regarding her intentions towards [Z] and deliberately left us*

totally oblivious to what was to come. Dr Willemsen rejected any suggestion that G was being secretive about her feelings for the baby, he considered she was conflicted, it was not that she wanted to keep the baby but she had feelings of guilt.

178. Ms Bazley submits Dr Willemsen was right to attach significance to biology for healthy psychological development for Z and the concrete experience of seeing people who look like you is very important, particularly in relation to identity. He considered Z and G are physically alike. He was clear that did not mean X and Y can't look after Z.
179. Ms Bazley drew attention to the various evidential references where X and Y make clear that a role where G sees herself as Z's mother, they describe as a 'social mother'. Their statement in April 2022 made clear *'The role is simply not compatible with [Z's] family structure; there is no 'vacancy to fill' just because [Z] has same-sex parents. There is a PO in place and this should be respected.'* In June 2023 they stated that they believed the role G should play is that of his surrogate, who gave birth to him and allowed us *'to have the family we dreamt of'*, continuing later in that statement to support their position of only proposing indirect contact, as they feel *'that anything other than indirect contact would confuse the narrative that [G] is [Z's] surrogate with whom he shares his DNA, but nothing further'*. In their October statement they considered it important that Z is *'confident in knowing that whilst he has only two parents (us), [G] was an essential part of his creation and therefore there is a role for her in his life. It will be for [Z] to determine the extent of the relationship he has with [G] as he grows older but, for now, it is for us to build a foundation of understanding with [Z] that [G] is a relevant person in his life'*. Dr Willemsen understood G's position about her role, she recognised X and Y are Z's parents but she is his birth mother, she has formed a relationship with Z and would want to make a contribution to Z's history and identity.
180. Ms Bazley relies on Dr Willemsen's evidence about X and Y's view that Z is in a motherless family in the sense that he is being brought up by two fathers, Dr Willemsen considered the concept of family as being more complex. He said he had tried to understand why the reaction of X and Y when G attended at their home on 13 February 2022 had been so extreme. Ms Bazley submits his view was that it went further than a reaction to a frustrating situation and was more of an attack on G to get her out. The parental order was still in place and there was a contact order, he considered the reaction, in his view, showed a fear of the mother having a place in the child's life.
181. Ms Bazley relies on Dr Willemsen's view that not making the adoption order can be explained and did not consider it would adversely affect Z. His view is that the complexities of this case will not be changed by making an adoption order, including how X and Y see the role of mother. He recognised adoption would be powerful for X and Y's sense of family but understands the fear that contact may cease, it risks the exclusion of G from Z's life and, in his view, risks the relationship between the adults being more difficult and result in a further complex dynamic for Z to get his head around as he grows older and tries to understand his history.
182. Ms Bazley submits it is important to consider what comprises Z's family, before considering the wider concept of family life. Dr Willemsen did not consider there had been a significant shift in the difficult dynamics despite the recent concessions made by X and Y and needed more information from Ms Pulbere as to why she considered there had been a change in X and Y's position through reflection.

183. Ms Bazley submits, when compared to Dr Willemsen the court should consider the conclusions of Ms Harvey and Ms Pulbere with caution. Whilst Ms Harvey has experience of step-parent adoptions, they have all been by consent and she has not dealt with a case with a surrogacy background. She accepted in her evidence that her main focus was to assess the suitability of the step-parent adopter. Her reasoning for supporting an adoption order do not, Ms Bazley submits, engage with the complexities of the situation, for example the background to the case, the position of the parties and Z's particular needs. Her acceptance of X and Y's reflection on professional advice lacks the detailed understanding of Dr Willemsen's concerns about X and Y's position when he sought to arrange contact and fails to properly consider the background to this case, particularly in the light of Dr Willemsen's view that X and Y will only allow contact on their terms, as he had experienced. Ms Bazley submits the strong and forceful resistance of X and Y in allowing Z to be observed by Dr Willemsen is *'highly relevant to their mindset and how they would deal with contact in the future'*. Ms Pulbere's failure in her written and oral evidence to assess X and Y's current position regarding contact against the background, most recently set out in their statement in August 2023 and the way they dealt with Dr Willemsen's contact arrangements also undermines her evidence and conclusions. In her oral evidence her view regarding adoption appears to be as Z has been with and the intention is he remains with his fathers *'adoption is the appropriate way of ensuring that he has that family life'*.
184. Ms Bazley also considers that Ms Pulbere dealt with what is Z's family life in a limited *'concrete'* way. In her oral evidence stating Z's family is nuclear family, meeting his needs and looking after him, Z *'will always have a connection and relationship with his birth mother that the fathers will have a responsibility to promote'*. She did not reflect on Dr Willemsen's wider view of Z's family life in this case which is reflected in the frequency of contact she recommends and the fathers being present during contact.
185. As regards the evidence from X and Y Ms Bazley submits it was revealing that G was extensively cross examined on the December 2020 letter on the basis that the allegations about X and Y in the letter were false, with X and Y displaying little insight in their oral evidence that the letter represented G's perceptions of the dynamics pre-conception and pre-birth. The focus of X and Y's case being on their anger and upset without being able to properly consider G's feelings of grief. Whilst it is right mediation did take place after the December 2020 letter was written, X and Y's position is that they have never forgiven G for this betrayal and the fear it caused. The way G was cross examined during the case demonstrates this approach.
186. Ms Bazley submits the August 2021 order was as a result of extensive discussions between the parties. She relies in particular on the Parental Order Report filed in June 2021 when X and Y informed her that they would be *'happy for [G] to see [Z] every 4 – 6 weeks'*; the Memorandum of Understanding dated 19 July 2021 (noting the mediation sessions took place in February and twice in July) which sets out the contact agreed that largely reflected the August 2021 order; correspondence between G and X and Y's then solicitor between 19 July 2021 and 11 August 2021. X and Y's case that they were under pressure is not reflected in the way that it now appears the order was reached regarding the level of contact. Their position now about that time leaves real concerns that they did not, in reality, intend to comply with it. Their evidence was they had no choice, as without the contact order there would be no parental order. Ms Bazley

relies on the striking similarity with the situation X and Y are in now and the court can have little confidence that their approach now would, in reality, be any different. They breached that order within a few days, emailing on 27 August 2021 stating that they consider it would be best if they spent all the day together due to Z suffering from separation anxiety. It is notable, Ms Bazley submits, that none of the reasons given were new in the sense that they were not known at the time of the August 2021 order. This continued with G feeling increasingly unable to question the arrangement as she feared she may not see Z. In reality none of the visits that took place complied with the August order and the arrangements were dictated by X and Y. Inevitably things became more difficult in November and December due to the increasing tensions. This culminated on 7 January 2022 with X and Y emailing to say they do not consider the August 2021 order is in Z's best interests and offering no further dates '*due to prior commitments*'. As they note, when they write unilaterally suspending contact on 9 February 2022, they did not '*believe that the relationship and role you are trying to force upon [Z] is in his best interests...*' They continue '*as [Z's] parents we have to put his needs first*' and they stopped all contact. G's solicitor responded objecting to that course, there was no response until 11pm on Friday evening, 11 February 2022. Ms Bazley submits that response gave G no opportunity to speak to her solicitor so remained unclear whether contact was taking place or not. It was, she submits, in those circumstances that she attended for contact on 13 February 2022. G accepts she covertly recorded the exchanges, she said because no-one believed how X and Y behaved towards her. Ms Bazley submits it is revealing that until X and Y were made aware of the recording they sought to place the responsibility on G for what took place, for example referring to her berating them and denying they were '*hostile or abusive*' to G. Ms Bazley submits these exchanges provides compelling evidence as to their true feelings towards G.

187. As regards the need by X and Y to be present at any contact Ms Bazley submits this, in reality, is more to meet X and Y's needs rather than Z. For example, for them not to feel excluded from contact and to enable them to have confidence that contact is good for Z. They were unable to consider the risks for Z of being exposed to further conflict.
188. As regards the reliance by Ms Harvey and Ms Pulbere if X is granted an adoption order the fathers would feel more at ease, Ms Bazley observed that despite X and Y having legal parentage after the August 2021 order they breached its terms within days. X and Y's feelings have not changed and give foundation to the fears expressed by G that if the court makes an adoption order history will repeat itself.
189. Ms Bazley notes regarding G's concern regarding relocation the Memorandum dated 19 July 2021 states they were not intending to move away and '*no such plans were in the offing*'. In the correspondence leading up to the August 2021 order there was no mention of any change in the position, or at the hearing itself. In those circumstances no prohibited steps order was sought by G. From correspondence seen during this hearing it appears they placed their property on the market at the end of August 2021, a matter of weeks after the hearing. They did not provide G with their new address, assuming she would find out from her sister when G said her sister had not been given the address. It was this background that resulted in the prohibited steps order being made on 11 March 2022. X and Y complain about control G is seeking to exercise without considering the impact of their behaviour on G and the contact.
190. Ms Bazley submits X and Y's focus on having a 'motherless' family fails to take on board Z's wider reality that he does have a mother. Importantly, G has not challenged

that Z should remain in X and Y's care but she wants Z to know her as a woman who brought him into the world, with whom he has a biological connection and who has an important role to play now and going forward. Ms Bazley submits the evidence demonstrates G's conflict was not seeking to play a maternal role to Z the conflict was focussed on what her relinquishment of that status as Z's mother would mean for Z, now and in the future. She rejects any suggestion this displays prejudice to families that do not have a mother. G is Z's biological mother and considers Z's interests are best met by the continuing role she seeks. The very much reduced contact offered by X and Y, supported by Ms Harvey and Ms Pulbere, poses real risks to Z. In the context of the repeated comments in X and Y's evidence about how they see G it is perhaps understandable that G tried to process her surrogacy journey in the way she did online. She was feeling isolated and trying to make sense of how she felt, which appeared very different from what was being portrayed by others. Much of her online activity related to periods when X and Y behaved in a way that undermined her position or were related to the difficulties in X and Y complying with the August 2021 order or when X and Y filed their statements making comments such as there being no vacancy for a mother.

191. Ms Bazley states the fact that it was intended she would have a continuing role was a key part of her reasons for offering to be a surrogate. She recognises now that when she signed the surrogacy agreement she was still quite naïve. Even though her feelings developed for Z during the pregnancy she remained clear she always intended to give Z to X and Y. When she seeks to explain this in the December 2020 letter X and Y drew back, seeming unable to put themselves in G's shoes bearing in mind her circumstances leading up to that letter being in lockdown, experiencing these difficult proceedings and then receiving the letter relating to the parental order. The extensive and hostile way G was cross examined indicated that X and Y still have limited insight into G's pregnancy and its consequences for G. By contrast, G's reflections on the tweets focused on Z, what the position G was in would mean for him. She sought what she understood had been agreed in the first place: a relationship with the child she helped to create. In her evidence, Ms Bazley submits, G showed insight about being sensitive from the experiences with her son, B. She is fully aware of the need to be supportive to help Z to continue to feel secure in his family.

On behalf of the local authority

192. On behalf of the local authority Ms Kakonge and Ms Bambhra submit Ms Harvey agreed with Dr Willemsen about the importance of direct contact between Z and G. They submit Ms Harvey's assessment is that X and Y see space for G and that they had reflected on their feelings towards G and will support direct contact. Ms Kakonge submits Ms Harvey has considerable experience in dealing with step-parent adoptions and her cases have involved same sex couples. She had extensive involvement with the parties, seeing X and Y either individually or jointly seven times and G on two occasions and has seen notes of the evidence that has been given during this hearing.
193. Ms Harvey's view was that she could see no benefit to Z having a mother with restricted parental responsibility and a child arrangements order. Ms Kakonge submits Ms Harvey had carefully weighed in the balance the proportionality of an adoption order in her analysis at the end of her report when she considered the various orders that could be made. She refers to Z *'having a right to family life with no ongoing proceedings ...the only possible outcome to secure [Z's] future is through adoption...Since [Z] has been born, he has been [Z's] father and it is important this is now recognised by law as it is*

in reality for [Z]. I believe this is important as it also provides a narrative for [Z] as he gets older, otherwise he may be confused why one of his father's, who he views as his father does not have the same parental responsibility as his other father'. Ms Harvey continues G doesn't consent 'because she wishes to see [Z] and play a role in his life which promotes his identity however she does not wish to parent him, therefore it is in my view that she does not need parental responsibility. [X] however wishes to parent him on a daily basis and make decision jointly with [Y] as his father, An adoption order will therefore achieve this'. In her oral evidence she stated an adoption order is important as Z's future will be secured with X and Y 'It is a life long commitment, a message you are here for now and the rest of your life. Any other type of order would mean returning to Court. Further litigation and [Z] suffers...his long term identity needs will be secure with [X] as his step parent – that is the only order that gives the status of a father. That is incredibly important for [Z]'. The risk of further litigation is in the context of Ms Harvey considering G may want more.

194. Ms Kakonge accepts in her closing submissions that both Ms Harvey and Mr Pulbere consider and rely on X and Y's capacity to change. Ms Harvey notes in her report *'At the beginning of the assessment [X and Y] felt direct contact may impact negatively on [Z] due to the conflict between the adults however as the assessment has progressed it has become apparent that [X and Y] are more open to direct contact. I feel they have begun to reflect on professionals advice about what may be of benefit to [Z] and wish to do what is right for him'*. In her discussions with X she states that *'he has given more thought to contact and whilst he still feels that direct contact will be difficult and relationships may be 'superficial' to begin with he is more open to considering direct contact, as long as it is viewed as benefiting [Z]'*. Ms Kakonge submits X and Y have shown a capacity to reflect on their past actions and demonstrated an ability to promote contact and the court can be confident in Ms Harvey and Ms Pulbere's assessment of X and Y's capacity to change in respect of the issue of contact.
195. As regards the frequency of contact Ms Kakonge submits the court can attach weight to Ms Harvey and Ms Pulbere's views based on their expertise.
196. Ms Kakonge submits that a s91(14) order is necessary, proportionate and in [Z's] welfare interests as it will provide a breathing space for the parties and not expose Z to the negative impact of further litigation and allow the relationships to repair.

On behalf of the Children's Guardian

197. Ms Lee K.C., Ms Moore and Mr Eaton on behalf of the Children's Guardian, Ms Pulbere, support the orders now sought by X and Y. They submit the court can and should place reliance on Ms Pulbere due to her expertise and that she has listened to all the evidence during the hearing. As regards the contact with Dr Willemsen they submit *'it is unfortunate that the opportunity for [Z] to spend time with [G] as requested by Dr Willemsen did not go ahead. The guardian agrees with the observations of the court that this was a lost opportunity and may well have moved matters on in a positive direction'*
198. In the written submissions on behalf of Ms Pulbere various aspects of the evidence are highlighted and observes that one is left wondering *'how much more aware and how much better prepared they all would have been for this surrogacy journey had there*

been a joint agreement to take their time and go through the process with the benefit of SUK's support and guidance'.

199. Ms Lee submits that it appeared that Dr Willemsen took everything G had told him about her treatment during the surrogacy journey and as a result appeared to give little weight to the effect of the December letter and the subsequent events on the adult relationships. She submitted *'Dr Willemsen appeared to be wholly aligned to [G's] case and appeared to be viewing the case through the lens of warring separated parents, more akin to a parental alienation case, as opposed to a surrogacy case in which [G] was still saying she did not seek a 'parental role''* She considered insufficient weight was given by Dr Willemsen to certain matters, such as how well prepared Z was for the contact with G and the evidence from X and Y about how Z had been afterwards.
200. In relation to Ms Harvey's evidence, which she submitted was *'clear and thoughtful'*, she acknowledged the remit of an Annex A report is to assess whether X was a suitable person to adopt Z. Ms Lee continued *'It is also not surprising that she doesn't have experience of contested step-parent adoptions. It would be surprising if an application would be made in circumstances where it was, or would be, opposed and it follows that in those circumstances there would be no need for a contact order'*. Ms Harvey agreed direct contact was important and when asked about the contact proposed by Dr Willemsen she felt there needed to be trust amongst the adults and relationships begin to heal and her concern is *'too high of a frequency doesn't leave enough time between those contacts for relationships to repair.'*
201. Ms Lee relies on Ms Pulbere's assessment of X and Y, that they were thoughtful and reflective and appeared to have a better understanding of how G must have been feeling during and after the birth of Z. Ms Pulbere remained of the view that the adoption order remains her recommendation to cement the legal relationship between Z and X and the concern G holds about her relationship and contact with Z not being facilitated can be dealt with by a s8 child arrangements order defining the time he spends with her.
202. In her written submissions Ms Lee accepts the making of an adoption order severs the legal parent link with G but does not sever the biological link. She submits *'the context of the application by [X] is very important: [G] seeks no parental role, and only wants to secure her contact to maintain a relationship with [Z]. That does not require her to retain a 'legal link'...The court will be alive to the fact that there is a need to weigh in the balance the benefit to [Z] of maintaining a legal link to his birth mother who seeks no parental role and agrees to restrictions being placed on her PR, whilst adoption will cement his position in his father's life – throughout his life''* and she submits the adoption order will reduce the potential for further litigation. She submits Z will benefit from knowing that the court agreed that no other order will reflect the reality of Z's lived, day to day, life and his emotional and social reality. She invites the court to place weight on the fact that Z is a child of a same sex family in which he will face some stigma and prejudice and it is important the right message is provided for him.
203. In relation to any suggestion that the events after the August 2021 order will not repeat themselves Ms Lee submits *'The situation now before the court is very different...all three parties felt under pressure when the PO was made, albeit for very different reasons. The impact on each adult of the pressure they felt cannot be underestimated. However, the court has now heard all the evidence and the parties have had time to*

reflect. The fathers have a better understanding of [G's] position and they are clear they understand the importance of contact for [Z] and [Z] having a link to his birth mother. They have made clear they are willing to support that and ask that...'. Ms Pulbere considers it important that either or both of X and Y are present during contact as an important message for Z that the adults can work together and she questions what Z would make of being sent off for the day with G when as Ms Lee submits 'there is no relationship with [G] and she is not, ultimately seeking a parental role. The CG is of the view that there needs to be a balance for [Z] between his family life and contact with [G] and how it all fits together.'

204. Ms Lee submits in respect of any order under s91(14) '*it is hoped that there will be no need for further litigation to take place and rather than impose an order on all of the parties at this stage the CG would prefer that they are given the opportunity to rebuild relationships and not feel the need to resort to litigation*'.
205. In the event that the court does not make an adoption order Ms Pulbere does not support a prohibited steps order being in place other than if the fathers intended to emigrate and permanently leave the country. As regards any shorter period, Ms Lee submits there should be a recital on the face of any final order that if the father's intended to take a holiday outside of the jurisdiction for any period over 28 days that will affect G's contact they will notify her with details of the trip and an alternative contact date.

Discussion and decision

206. This very long judgment reflects this case has raised difficult and challenging issues, both factually and legally. It involves a surrogacy arrangement that resulted in the birth of a child; who was placed with and remains with the intended parents; followed by a parental order being made, together with a child arrangements order; the parental order was set aside on appeal eighteen months later; the child is now the subject of a step parent adoption application by the non-biological intended parent, which the birth mother opposes and a contested contact application.
207. As Dr Willemsen noted in his most recent report '*the elephant in the room is [G] being the mother of the child; she is so by law, not having consented to the parenting order. She will always be his birthmother*'. In his view the '*father's struggle of giving [G] a role in the child's life is related to this unspoken reality*'. The application of the fathers for the child to be adopted can be seen as the child's need to belong to a family that has legal standing, while on the other the adoption application can be considered a challenge to the child's mother, the feelings she has for him, and the role of motherhood and biological origin in the child's life.
208. Whilst many surrogacy arrangements work very successfully, this case provides a graphic illustration of the difficulties that can be encountered if the arrangement breaks down. The need for caution, proper preparation, support and understanding before entering into a surrogacy arrangement is clearly advisable for very good reasons. As this case demonstrates, it can be difficult to foresee how each of the adults will feel at each stage and the benefit of recognising what may happen in advance and to have a support system in place to manage that is, in my view, essential. The consequences of the arrangement all the parties are entering into are lifelong and the need for more than a superficial understanding of what lays ahead is obvious. There was, in my judgment, only limited preparation in this case. Whilst there was a link between X and Y and G

through G's sister and they met up on number of occasions to get to know each other, it seems clear none of the difficult questions that the court is having to deal with today were addressed, or even considered or discussed.

209. In their evidence X and Y rely on the fact that G did not want to go through Surrogacy UK, they report due to the delay that would cause. That, in my judgment, is looking at the issue through a very narrow lens and does not absolve them from considering independently whether that support should have been in place, if that was their view. With the benefit of hindsight, it perhaps provides an early indication for the difficulties that then took place. With the benefit of hindsight there may already have been a pressure to get on with it; possibly caused by the breakdown with X and Y and their previous surrogate, G's knowledge of that and wanting to avoid any further delay.
210. The evidence points to the parties agreeing that G would have a continuing role in Z's life after the birth. They had not agreed the detail but G's evidence has remained consistent, which I accept, that she would not have entered into such an arrangement without that assurance being in place. X and Y accept that was the general agreement.
211. In my judgment, the same considerations apply when the arrangement changed from gestational to traditional surrogacy. They each, for their own reasons, buried their head in the sand about the realities that this change entailed; for X and Y not using their own embryos created for them with a donor egg and for G having a biological connection with the child she was carrying. Any effective counselling at that stage would have helped each of them carefully consider the consequences of that, the implications and, probably, the need for continuing support.
212. Bearing in mind they only went to the surrogacy conference in September 2019 and with the revisions in the surrogacy agreement and the insemination taking place in a matter of weeks afterwards, it is hardly surprising that they each experienced the feelings they describe. There were powerful forces at play; X and Y's long standing wish to have a child and G's wish to help them achieve that.
213. G started having unexpected feelings for the child she was carrying and X and Y became increasingly fearful that G's behaviour was excluding them from experiencing the pregnancy in the way that had not been anticipated. This in turn fed into a fear for X and Y that the child may not be handed to them following the birth. I accept G's evidence that this did not enter her mind and that this has remained the position since, namely that she has never disputed the fact that Z should remain in the full time care of X and Y. However, that was not communicated to X and Y and so it is perfectly understandable the distress they describe they were feeling at that time.
214. The way these anxieties played out meant that any changes were, inevitably, over interpreted. For example, G having the early scan without informing X and Y, so they discover when it is mentioned in passing when they attend the 12 week scan. The changes in the birth plan so X and Y would not be in hospital at the time of the birth. It was at a time when Covid restrictions and precautions were still in place. The delay in handing over Z and the reasons G wanted that. Understanding the reasons why these changes caused further anxiety for X and Y is relevant, as is G's position that it was important to her to be in a position to physically hand Z to them. The silent turmoil each of the adults encountered, bearing in mind the respective fears, conflicts and feelings

of guilt, must have been very difficult for them all and, at the time, unknown to each other.

215. The contrast between the two households after the arrival of Z could not be more stark. X and Y were immersed in all that is involved in being first time parents, were thrilled to have Z in their care, it was their dream come true and they were grateful to G for what she had done. By contrast, G was clearly finding it increasingly difficult to manage her feelings, in particular her feelings of loss, the differing dynamics between the adults and what she saw as the lack of understanding of her position by X and Y. The arrival of the letter from the court about the parental order application on Christmas Eve 2020 brought home in a tangible way the next stage of the process. Although no-one's fault, it was very unfortunate timing. X and Y have struggled to recognise that. Their response has been that she knew the application had been made, without perhaps showing any empathy for G.
216. Undoubtedly the December 2020 letter written by G will have been very difficult for X and Y to read. They have described the impact on them in their statements. They saw the uncertainty about consent as undermining their family unit which caused them very considerable distress. What the letter does convey is the enormous struggle G was having in managing the situation, she did her best to explain her feelings. The letter conveyed her perceptions at the time in the difficult circumstances where she was spending extended periods of time on her own. X and Y have described their devastation on receiving it and became focused on what was wrong in the letter. Whilst that is understandable as an immediate reaction, it is perhaps less so as time has gone on, suggesting they have shown limited acknowledgment or understanding of how this reflected G's feelings at the time and to demonstrate any understanding from her perspective.
217. That is not in any way to suggest X and Y were not experiencing difficulties about the situation they found themselves in, they obviously were, but by focusing on their anger and loss they failed to see the way the letter was a cry for help. This letter provides a graphic illustration of the consequences of the lack of preparedness of the parties for this surrogacy arrangement and the implications of not having invested in a robust enough relationship to weather these difficulties. As G described it in her evidence it was a surrogacy relationship. It is important to acknowledge the Covid restrictions that were in place at the time, which added a further unhelpful dynamic to an already complex situation.
218. X and Y's immediate reaction was to postpone the next contact although, to their credit, suggest mediation. When that did not prove helpful the parental order application continued through the court process. In their meetings with the parental order reporter X and Y are recorded as agreeing contact every 4 – 6 weeks. That report came through in June 2021 and there followed two periods of mediation resulting in the mediation Memorandum dated 19 July 2021. That document is clear about what was agreed between the parties; G to have contact with Z every six weeks with alternate contacts to be joint outings (with sometime for G to be alone with Z) and then full day visits from 10 am to 5pm with G picking up and returning Z from his home. Arrangements were also agreed about G seeing Z at the time of his birthday. The Memorandum also records X and Y had '*no such plans in the offing*' to move. All during this period X and Y had legal advice. The correspondence between X and Y's then solicitor and G in the weeks leading up to the August 2021 hearing was produced during this hearing. It

makes clear that it was the intention of the parties that there would be a child arrangements order in favour of G, that the court would be invited to make both a parental order and a child arrangements order and a draft order was circulated by X and Y's then solicitor prior to the hearing.

219. Whilst acknowledging the inevitable difficulties in any court hearing, especially one involving the serious issues that were before the court in August 2021, I reject the suggestion by X and Y that they were put under pressure to agree these contact arrangements. They had suggested them many weeks previously, they were in large part agreed during mediation and were followed up in a detailed way in the correspondence from their then solicitor. The August 2021 order represented a level of contact X and Y had said over an extended period of time they were happy with and the order was detailed, specific and had a schedule of dates attached to it over the next 6 months. Unlike G, X and Y had legal advice throughout this period and were represented at the August 2021 hearing. To characterise the contact arrangements as X and Y having no choice but to agree ignores the evidence and timeline leading up to the hearing and I reject that characterisation. When taken together with what happened after the August 2021 order it provides, in my judgment, some foundation to G's evidence that X and Y did not have any real intention of complying with the contact order that had been agreed in circumstances where they had secured a parental order.
220. The basis for G's fears about that come in the email dated 27 August 2021 from X and Y. It raises issues that would have been known about at the time of the order and the lead up to it. The reason given not to comply with the clear terms of the order (Z's separation anxiety) was not new or their lack of understanding about G's role. The order made clear in one of the recitals that G did not seek to parent Z, and records she looks to be a presence in Z's life and X and Y agree that it is important for Z to know G. G's repeated requests for the order to be complied with went unheeded by X and Y. In the light of these unilateral changes, which G had very little voice in, the contact that did take place became increasingly difficult and tense. X and Y's evidence was that the changes were 'agreed' with G, but I am satisfied for G there was no real choice, she had to go along with them due to her fear that she may not see Z at all.
221. Inevitably tensions increased. I accept G's evidence that by the time of the contact visit in November 2021 X and Y hardly acknowledged her and the argument that took place in front of Z in December 2021 resulted in G stating they had taken a baby away from his mother after X and Y had said she was not wanted in their family.
222. The contact due in January 2022 did not take place due to Z's illness, and then X and Y were unable to offer any further dates due to their other commitments. By 9 February 2022 X and Y unilaterally stopped contact, that was not accepted on behalf of G and the response back from X and Y's then solicitor came in after business hours on the Friday before the next contact. The covert recording of what took place when G attended for contact on 13 February 2022 is revealing in a number of respects. I reject the suggestion on behalf of X and Y that G attended deliberately to provoke them and prefer her account of doing it to try and get some independent evidence of the way X and Y behaved towards her. She was not aware of the latest email response on behalf of X and Y. Although G could be described as being persistent in requesting contact on the door step, it did not justify the response by X and then Y, in the presence of Z. What was said has rightly been described as '*horrendous*'. The way it is downplayed in X and Y's subsequent evidence is revealing. Their denial that they behaved in the way

described by G rings hollow in the light of the recording and transcript, supporting G's concern of how differently X and Y behave towards her than they are willing to accept. Even making all due allowance for what was clearly a difficult situation, X and Y's reaction was wholly disproportionate and needs to be very carefully considered in the light of all the evidence. The message they gave was that they were not going to comply with the court order.

223. The evidence of X and Y after this was consistent, that they did not consider anything other than indirect contact was in Z's best interests. They expressed themselves in trenchant terms in their statements, largely seeking to blame the situation the parties were in on G and repeatedly making it clear there was no role for her in their family apart from as the surrogate and the DNA connection, with no real commitment to a continuing relationship between Z and G, other than by indirect contact until Z indicates he may want it. As they said 'there was no vacancy', they were a 'motherless' family.
224. During 2023 X and Y's position remained largely unchanged, including in their statement at the end of August 2023; they only supported indirect contact. In that statement they raised the issue of G's comments online about the parties' situation and X and Y's concerns that these represented G's real views, which if conveyed to Z would cause him harm. Their opposition to direct contact remained until their most recent statement on 31 October 2023 when they accepted, for the first time since their application on 30 January 2022, that there should be direct contact on two occasions a year with two periods of indirect contact, stating they accepted the recommendations of Ms Harvey and Ms Pulbere. It was not until their closing submissions that they fully accepted this contact could be by way of an order.
225. G has consistently sought to restore the contact in the August 2021 order. She has taken down her online comments, albeit not until August 2023. She apologised for the harm and distress they would have caused to X and Y and explains that posting these comments was to try and understand the feelings she had at the time.
226. The step-parent adoption application is sought by X to secure his legal relationship with Z, which X and Y state was what was originally intended in the surrogacy agreement. They submit such an order meets Z's long term welfare needs and will give him the security of knowing that X and Y have equal parental status, and will additionally help secure his position as a child in a same sex family.
227. G opposes the application on the basis that she does not consent and Z's welfare does not require her consent to be dispensed with. Part of her reasoning is that she fears there will be a repetition of what happened in August 2021 when X and Y secured parental status and then failed to comply with the terms of the contact order within a very short period of time.
228. The expert evidence about both of these issues differs.
229. In summary, Dr Willemsen considers that the frequency of contact in the August 2021 order should be re-instated as being the right level to meet Z's welfare needs, enabling Z to have a relationship with G that would provide the foundation for him to have a real lived experience of his identity as a child born as a result of a surrogacy arrangement and that G is his biological mother. It is his view that contact at the level suggested by Ms Harvey and Ms Pulbere will not meet Z's identity needs. He also considers that, due

to the history, X and Y have not really started to come to terms with the situation and there is a risk that they have not fully taken on board the welfare need Z has to not just know about G and the role she played in his background, but also to have a continuing relationship with her, a lived relationship with his biological mother, to secure his identity needs. Dr Willemsen remains concerned about X and Y's understanding of the importance of Z's relationship with G and their ability to properly reflect on expert assessment. This conclusion is, in part, informed by his direct experience of trying to arrange the contact between G and Z as part of his assessment.

230. As regards the adoption application he does not consider such an order is needed or required to meet Z's welfare needs, as there is no issue between the parties that Z should remain in the care of X and Y and that X's legal relationship with Z can be secured in other ways. He recognises an adoption order may benefit X but does not consider it will make any difference to Z.
231. Although the circumstances of this case are unusual, Dr Willemsen is the agreed jointly instructed expert due to his expertise in situations like this. Ms Cabeza submits his conclusions are flawed for reasons that include they were reached on a false premise of the parties not having agreed at the start that G would have a continuing relationship with Z after his birth and Dr Willemsen's confusion as between the legal framework involved in an agency adoption and that in a step-parent adoption.
232. Ms Harvey and Ms Pulbere both consider the frequency of direct contact at twice a year and indirect contact at the same frequency to be sufficient to meet Z's identity needs. They both consider that keeps the requisite balance between Z's family life and his need to know G as part of his identity. They both are confident that X and Y have reflected on the professional advice, will comply with and support any arrangements for contact evidenced by their recent change in position about contact and the assurances given by X and Y when they discussed contact with them.
233. Both Ms Harvey and Ms Pulbere speak as one in supporting the making of an adoption order. They each place considerable weight on the lifelong security and stability such an order will give Z.
234. Although the application to discharge the August 2021 order and for the step adoption order are distinct applications, they are inevitably intertwined.
235. In relation to the adoption application I have to carefully consider Z's lifelong welfare needs under s 1 ACA 2002, the welfare checklist in s 1(4) and the guidance given in relation to these applications in *Re P(A child)*. Any orders under the CA 1989 are governed by what is in the child's best interests, the child's welfare being the paramount consideration having regard to the matters set out in s1 CA 1989.
236. There is no dispute that Art 8 is engaged. Importantly Z's family life includes not only securing his position with X and Y, of which there is no dispute, but also ensuring his relationship with G is maintained and secure in the way that meets his identity needs in the widest sense. Clearly X and Y seek to have their right to family life secured with Z, and G equally seeks her right to family life with Z to be secured and for Z's contact with her to take place.
237. In this case I have reached the following conclusions regarding the expert evidence.

238. I prefer the evidence of Dr Willemsen to that of Ms Harvey and Ms Pulbere for the following reasons:

- (1) Whilst I recognise Ms Pulbere has heard all the evidence in the case, Dr Willemsen had the benefit of a number of meetings with the parties, when he was able to explore in some detail the issues that underpin his conclusions, and he had the benefit of seeing Z with G.
- (2) His analysis of the issues in the case have more depth and I reject the suggestion that he was only able to consider matters through G's lens. He was able to articulate his reasons for reaching his conclusion about his concerns about X and Y's ability to fully appreciate Z's need to have an ongoing relationship with G based on his analysis of the background, his own experience in trying to make the arrangements for contact and his assessment as to X and Y, who he considers have not begun to work through the issues which has resulted in their fixed and rigid thinking, whereas G has been able to be more reflective in the way she has processed her feelings to date.
- (3) I reject Ms Cabeza's submission that his conclusions are flawed. He accepted he may not have properly acknowledged the circumstances of the early contact between the adults after Z's birth but as he observed in answer to Ms Cabeza '*...then things take a turn, contact becomes more complex*', G was struggling behind the text messages, there was the underlying anxiety on both sides and he acknowledged how difficult receipt of the December 2020 letter and the tweets must have been for X and Y. His reference to the President's adoption speech needs to be seen in the wider context of his evidence about whether Z's welfare requires an adoption order in this case and his analysis of the wider Article 8 rights engaged.
- (4) Ms Harvey and Ms Pulbere place great reliance on what they saw as X and Y's ability to reflect on the expert evidence without properly engaging with and assessing in any great depth the history and recent events, such as the obstacles placed in the way of Dr Willemsen's request to observe contact between Z and G.
- (5) Ms Harvey and Ms Pulbere overly relied on the security and stability for Z with an adoption order without properly analysing the evidence as to the need for it in the particular circumstances of this case and the risks that may pose to other aspects of Z's welfare, including how such an order would be explained to Z that was secured without G's consent. There has never been any issue that Z should remain living with X and Y and there are other orders that could secure that.
- (6) Dr Willemsen's analysis of the relevant Art 8 rights that are engaged was more accurate and reasoned than the narrower basis that advocated by Ms Harvey and Ms Pulbere. As well as the family life Z has with X and Y his analysis included as part of Z's Article 8 rights, particularly in relation to his identity, the need to have a lived experience of knowing G. There is no issue that G fully supports Z remaining in the full time care of X and Y.
- (7) Ms Harvey's assessment was limited by the framework within the template Annex A report.

239. It is now agreed there should be direct contact between Z and G, the main issues are the frequency and who should be present at the contact.
240. I accept Dr Willemsen's evidence that the purpose of the contact is to enable Z to have a lived experience of his background and his biological mother. His evidence was clear that Z's welfare needs require that to help him understand his particular circumstances from an early age. I also accept his evidence that such contact should not be in the presence of X and Y. Whilst I understand the position of Ms Harvey and Ms Pulbere about the importance for Z to see the adults together supporting such contact that carries with it the risks for Z of the tensions that have been there previously. The recent meeting observed by Dr Willemsen demonstrates, to the credit of both X and Y, that Z has a knowledge of G. There is in my view work that needs to be undertaken by the parties before they can have meaningful joint contact that is likely to benefit Z. The observation of contact by Dr Willemsen makes clear that Z has a knowledge of G, is clearly relaxed in her company and they were able to engage easily. Although the regular indirect contact will have helped, X and Y had prepared him for that visit and going forward will be able to support such contact in the same way.
241. Turning to the issue of frequency of contact I agree with Dr Willemsen that direct contact twice a year and indirect contact at the same frequency is unlikely to meet Z's identity needs. I consider that direct contact on four occasions a year, to include any birthday or Christmas contact, strikes the right welfare balance between meeting Z's welfare needs to have lived experience of G, be able to effectively maintain that relationship and not to interfere too much in the day to day life of X, Y and Z. In addition, there should be two periods of indirect contact, with updating information about Z to be provided to G in advance of any direct contact. The indirect contact Z has become used to and it has obvious benefits. The direct contact should initially be for three hours and build up over a year to a day between 10 and 5, the dates should be agreed for at least the next twelve months, with a regime for agreeing them going forward after that.
242. As to whether there should be an adoption order. I am satisfied that the intention of the parties around the time of the surrogacy agreement was that G would have a continuing role in Z's life, although they did not discuss the detail. Since his birth G has had some direct contact. The indirect contact since March 2022, together with the other material X and Y describe they have compiled, has enabled Z to retain a knowledge of G, which meant the direct contact observed by Dr Willemsen in August 2023 between Z and G went relatively well and Z has said he wants to see G again. I have already recognised the part X and Y will have played in enabling Z to have that ready knowledge of G. G has parental responsibility for Z albeit that she has not actively exercised it and agrees that it should be severely restricted in the context that she does not dispute that Z should remain living with X and Y, Z is thriving in their care and they are in a strong settled relationship. X, to his credit, has made it clear that whether the adoption order is granted or not, it will not affect his unconditional commitment and love for Z.
243. I have no doubt the comments online made by G will have caused enormous distress to X and Y and it is understandable that gave them further reason to be concerned about direct contact. However, I accept the submissions of Ms Bazley when the timing of the tweets are analysed they more often than not relate to a period of real difficulties between the parties and should be seen in the context of G trying to understand and work through the way she was feeling at that time and her recognition of the impact of

what she did on X and Y. Dr Willemsen was clear in his analysis, which I accept, that this was part of the process whereby G was working through the conflicts and difficult feelings she had at the time. It is of note that neither Ms Harvey nor Ms Pulbere address these online comments in their reports as being a relevant welfare consideration now. I am satisfied they need to be viewed in the context when they were posted and I accept G's evidence they do not represent her views and she apologised to X and Y.

244. There has been a previous order whereby X and Y were Z's legal parents with a contact order attached which was, in my judgment, not complied with by X and Y for reasons that do not stand up to any scrutiny, due to their reliance on matters that were known to them at the time they agreed the contact only a few weeks previously. That history does not bode well. Coupled with the events on 13 February 2022 and what was said by X and Y and the way it was said, the difficulties about the arrangements for contact between Z and G in the presence of Dr Willemsen give rise to very real concerns about whether X and Y have really accepted professional advice, other than to the extent they think it meets Z's welfare needs. I consider when the spotlight of the court is turned away there are real risks that they will not comply with orders of the court due to their inability to properly recognise and understand the welfare need for Z to have a meaningful continuing relationship with G and why. I consider that risk is likely to be higher if there is an adoption order, as it is likely to be viewed by them as a way of further securing their legal relationship with Z at the expense of Z's welfare due to the obstacles they are likely to put in the way of that meaningful relationship between Z and G being maintained and supported.
245. In my judgment this is due to their inability to properly take on board the benefits for Z having a continuing relationship with G other than in the way they now propose, which Dr Willemsen considers is detrimental to Z's welfare. I fully take into account how X and Y, understandably, feel distressed at what has happened. Events have not followed the course set out in the surrogacy agreement. They feel strongly they should have equal legal parental status for Z. I largely accept Dr Willemsen's evidence that X and Y need to begin to work through what has happened, which is likely to be difficult and painful for them. I agree with Dr Willemsen that G has worked through some of the difficult feelings she had. The December 2020 letter, although deeply distressing for X and Y to receive, demonstrates the extent of the difficulties she was having to manage on her own during Covid restrictions.
246. I have to weigh in the balance what, if any, other orders could meet Z's welfare needs. The only other realistic order is a child arrangements order that Z lives with X, which would secure the day to day living arrangements. X would acquire parental responsibility which he would share with Y and in a very limited way with G. In reality X and Y would be able to exercise joint parental responsibility for Z in every material aspect of his life. G would remain Z's legal mother and has agreed that her parental responsibility should be curtailed to the extent that she suggested during the hearing. In effect not exercising it other than to be notified in the event that X and Y plan to live permanently out of the jurisdiction or for periods longer than six weeks if it interfered with any contact and Z requires life-saving medical treatment. In accordance with s91(10) CA 1989 it is right this order will only last until Z is 16 years, unless the order specifically states otherwise, having been satisfied that the circumstances of the case are exceptional under s 9(6) CA 1989. I recognise and weigh in the balance that this order lacks the permanence of an adoption order but need to consider that in the

particular circumstances of this case. As Dr Willemsen observed an adoption order is unlikely to make much difference to Z and introduces another complex dynamic for Z to understand. The child arrangements order arguably more accurately reflects Z's reality.

247. Having stood back I have reached the conclusion that the court should not make the adoption order because, in my judgment, Z's welfare needs do not require G's consent to be dispensed with.
248. Z is clearly thriving in X and Y's care. That is not in issue and G has never suggested Z should not live with them, for Z that security is there. Z has seen G recently and has expressed the wish to see her again. Z's identity needs are likely to be better secured with a child arrangements order for the following reasons. It will better reflect Z's circumstances now and ensure his relationship with G is secured, whilst maintaining his current home with X and Y. I recognise that this decision will cause X and Y considerable distress. By making the application they have sought to replicate the parental order they could not secure. I accept X's evidence that whatever the outcome it will make no difference to X's commitment to Z and the evidence is Z is thriving in their care. I have carefully weighed in the balance what X and Y have said about the benefits of this order as a same sex couple and the wider security such an order would give them and Z, but I have had to balance that with what I consider to be Z's wider long terms needs to have an effective meaningful relationship with G and not introduce a further complicating dynamic for Z. Whilst events have not turned out as originally planned under the surrogacy arrangement, from Z's perspective that is his reality and the sooner he understands that in a meaningful way will better secure his lifelong welfare needs.
249. His family life under Art 8 encompasses securing his identity rights which include being cared for by X and Y and having contact with G. I consider for the reasons outlined above, that there is a higher risk of the contact order not being complied with if it is made in connection with an adoption order as until X and Y fully take on board what has taken place and the need for Z to have contact with G in the way I have determined above, there is a real risk they will seek to continue to undermine it, which is detrimental to Z's welfare.
250. So when balancing all the considerations, in particular those in s 1(4), I have reached the conclusion that Z's welfare in the circumstances of this case do not require me to dispense with G's consent, bearing in mind the background to this particular case and the continuing need for G to be recognised as a living part of Z's life, as an important part of his lifelong identity needs. I consider the risks of him ceasing to be a member of the original family, in the sense that his legal relationship with G is extinguished puts that important welfare need at risk. The need to secure Z's legal relationship with X can be met by the court making a child arrangements order confirming Z will live with X. This will secure his welfare needs in the widest sense that apply in this case. Whilst this is not the order X seeks he has remained clear his commitment to caring for Z is unchanged. There will be a contact order in the way outlined above and an order restricting G's parental responsibility in the way outlined by Ms Bazley in the document she circulated limiting it to G being notified in the event of Z receiving life-saving medical treatment, Z moving home, permanently leaving the jurisdiction or for a period of six weeks if it interferes with G's contact. *Re A [2023] EWCA Civ 689* approves the

use of a prohibited steps order prohibiting a parent from taking any steps in the exercise of their parental responsibility. This is supported by Ms Pulbere.

251. Ms Cabeza submits that in the event the court reaches this conclusion it should exercise its inherent jurisdiction to remove G's parental responsibility, accepting that that can't be done under the CA 1989. I reject that submission. Ms Cabeza has provided no detailed analysis of how this can be done.
252. The final matter is the s91(14) application first raised by Ms Harvey in her report. The application is founded on the length of time these proceedings have been going on, which perhaps reflects the complexities in this case. I do consider making such an order is required in this case as Z's welfare needs require it. It will send out a clear message that any further applications are likely to be inimical to Z's welfare and that the focus of the parties now must be to comply with the order and take the steps necessary to seek to rebuild their relationship. The order will be made for a period of 3 years, by which time Z will be settled in school and the contact outlined above will be in an established routine.
253. I hope now that these decisions have been made the parties will be able to focus on the important issue in this case, namely, to take steps to seek appropriate therapy and support with the aim of seeking to repair their relationships, as the one thing that unites all the adults is ensuring that Z's welfare needs are met. This is now the opportunity for each of them to demonstrate to Z that they can work together and each play their part to ensure that is achieved.