



Neutral Citation Number: [2021] EWHC 29 (Fam)

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2021

Before:

MRS JUSTICE KNOWLES

Re Z (Parental Order: Child's Home)

Mr Martin Kingerley QC and Mr Jack Harrison for AB
Mr Andrew Powell and Ms Louise Newcombe for CD
Mr Jas Tamber pro bono for the Reporting Officer

Hearing date: 13 January 2021

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I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children 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.

Approved Judgment**Mrs Justice Knowles:**

1. Although the circumstances that have arisen in this case are extremely rare indeed, they bring into sharp focus the difficulties that can arise in international surrogacy arrangements. This judgment should be read together with a judgment given in care proceedings concerning the child under neutral citation (Re Z (Care Proceedings: Surrogacy) [2021] EWHC 589 (Fam)). I have given permission for this anonymized judgment to be reported.
2. The application for a parental order was made by a couple, AB and CD, who are living as partners in an enduring family relationship. The application concerned a little girl, Z, who was born in December 2019 and is now 13 months old. The application was made pursuant to s. 54 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008). The Respondent to the application is Z's surrogate mother, EF.
3. I am grateful to the advocates for their helpful written and oral submissions. Though Z was not a party to these proceedings, she had been a party to and was represented by Mr Tamber in the care proceedings through her children's Guardian, Ms D. Ms D was also the reporting officer within the parental order proceedings. Once the care proceedings had concluded on 12 January 2021, Mr Tamber remained to assist the court within these proceedings. I am very grateful to him for doing so.

Background

4. What follows is a summary of the background pertinent to this application. A great deal of it has already been set out in the judgment handed down in the care proceedings.
5. AB and CD are a same-sex couple who have been in a relationship for approximately 20 years and have cohabited for the last 17 years. They moved abroad in 2018 so that AB could take up employment as a teacher. Both AB and CD wished to become parents and considered both adoption and surrogacy. They chose surrogacy as they wished for there to be a biological link between their child and one of them and it is evident that they gave careful thought to the surrogacy process. Having undertaken a great deal of research, they chose surrogacy in Colombia because the process was (a) tolerant of gay couples; and (b) was affordable for those with relatively limited means. In 2017, AB also instructed specialist surrogacy solicitors in this jurisdiction so that he and CD could ensure all the necessary legal requirements were met for the making of an eventual parental order in this jurisdiction.
6. CD's personal history played a substantial role in the events following Z's birth. CD experienced neglectful and harmful parenting as a child and was sexually abused by his brother. He became a looked after child when he was aged 11 years and remained in the care system till reaching his majority. During his time in care, CD experienced further sexual abuse perpetrated by his carers, including being trafficked and recruiting other boys to be sexually abused. In 1990 CD was convicted of eight offences of indecent assault on a male aged under 14 years. He received a sentence of three years' probation with a condition of treatment. His name does not appear on the Sex Offenders' Register. It was only during treatment undertaken as part of his sentence that CD came to understand that what he had done was abusive and what had

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been done to him was also abusive. CD has not been convicted of any other criminal offence since 1990.

7. In 2019 AB and CD travelled to Colombia to undertake surrogacy. They chose an egg donor and a surrogate, EF, a single woman. Embryos were created using donor eggs and AB's gametes and, following a successful embryo transfer, EF became pregnant with twins. Sadly, the twins were born prematurely and one twin, Y, died at birth. Z spent time on the neonatal intensive care unit following her birth and was eventually discharged from hospital when she was six weeks old. AB and CD arrived in Colombia on 20 January 2020 to care for her. On Z's discharge from hospital shortly thereafter, both AB and CD shared her care and relied on ongoing medical support and advice given Z's prematurity.
8. The couple were only entitled to remain in Colombia for 90 days and AB was not permitted to take a lengthy absence from work. They took the difficult decision that he would return to their home and CD would follow as soon as Z could safely travel. Following his return home in February 2020, AB was in near constant contact with CD and Z by calls and video. After AB's departure, CD cared for Z and the surrogate, EF, helped him negotiate the language barrier.
9. Z was not considered well enough to travel until late March 2020. By this time, travel restrictions were in place by reason of the Covid-19 pandemic and neither CD nor Z were permitted to enter the country in which AB and CD normally resided. AB, CD and Z found themselves in an unprecedented and unanticipated situation which was entirely out of their control. Z could travel but was unable to enter the country where AB and CD lived. CD was alone in Colombia where he was unable to remain indefinitely and did not speak the language. AB was unable to enter Colombia. In the circumstances, the most feasible option was for CD and Z to travel to the UK on an interim basis with a view to onward travel to be reunited with AB as soon as restrictions allowed.
10. Accordingly, on 1 May 2020, CD and Z flew to the UK on one of the final humanitarian flights from Colombia. Given the context of Z's birth, the Foreign and Commonwealth Office (FCO), UK border authorities and Colombian immigration all required satisfaction (in the form of notarised documents) as to several factors including but not limited to the following:
 - a) Z's eligibility for a British passport;
 - b) DNA evidence in respect of paternity;
 - c) Documentary evidence relating to her birth (in the form of a birth certificate);
 - d) Documentary evidence in respect of the surrogacy arrangement; and
 - e) Consent for Z to travel to the UK with someone other than her parents, namely CD. Both AB and EF provided their consent for Z to travel and be accompanied and cared for by CD.
11. It is clear that the relevant UK and Colombian authorities were content for Z to leave Colombia and travel to the UK with CD. Z was permitted to enter the UK in

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consequence of a visa waiver, a request for the same having been made by UK Visas and Immigration in Bogota to the Border Force National Command Centre in the UK, who subsequently granted the requisite visa waiver.

12. Regrettably, it appears that the Colombian authorities retained almost all the paperwork identified in paragraph 10 above. On arrival in the UK, the absence of that paperwork set in train a series of events which led ultimately to Z's removal from CD's care by the police in the early hours of 3 May 2020. Those events are set out in greater detail in my judgment given at the conclusion of the care proceedings. On 6 May 2020, AB consented to Z remaining in the care of the local authority pursuant to s.20 of the Children Act 1989. She was placed with foster carers and, subject to the restrictions flowing from the Covid-19 pandemic, contact was maintained between her, AB and CD.
13. The main factor in the instigation of the public law proceedings was CD's difficult personal history and his convictions for sexual offences against children. In July 2020, Mr Justice Keehan approved (a) the instruction of a clinical psychologist to assess CD and AB and (b) a parenting assessment of both men by the local authority's social workers. Dr Jayne Allam, clinical psychologist, produced her assessment report in October 2020 which concluded that the relationship between CD and AB was respectful, supportive, and loving. CD was assessed to be at low risk of abusing Z or indeed any other child. She described him as adoring Z and being very mindful of her needs and keen to protect her from harm. AB was not a risk to Z and was able to identify and discuss safeguarding issues which may arise in the future. The local authority's parenting assessment was equally positive and recommended that Z should return to the care of AB and CD.
14. At a hearing on 23 October 2020, the local authority indicated its intention to withdraw its application for public law orders and invited me to approve a transition plan which would see Z move from her foster carers to the care of CD pending their return to the country where AB and CD were resident. Using the legal framework of the inherent jurisdiction, I made Z a ward of court and granted care and control to both AB and CD. This would allow CD to exercise parental responsibility for Z until such time as both she and he were reunited with AB. Z returned to CD's care on 30 October 2020. On 27 November 2020, I approved a plan for Z to return with CD and they left the jurisdiction on 4 December 2020. Following a period of self-isolation, CD and Z were reunited with AB on 20 December 2020.
15. On 12 January 2021, I granted the local authority permission to withdraw its application for public law orders with respect to Z, such permission being granted on the basis that, at the time protective measures were taken on 6 May 2020, the local authority was unable to satisfy the threshold criteria set out in s.31(2). This was because Z had not suffered and was unlikely to suffer significant harm by reason of AB or CD's parenting and care. I also discharged the wardship order with respect to Z. The local authority's application was supported by all the parties including Z's children's Guardian.

The Application for a Parental Order

16. The application for a parental order was made on 9 June 2020. I have outlined above the long and well considered process which led to the birth of Z and her twin brother

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in December 2019. Both CD and AB were entirely committed to involvement in key aspects of the resulting pregnancy which followed the successful embryo transfer in June 2019, maintaining regular and frequent contact with EF and attending (remotely) all ultrasound appointments. Their commitment to becoming the legal and psychological parents of any child born of this process was unquestionable.

17. At the time the parental order application was made, it is accepted that the proceedings appeared to possess certain complicated elements particularly in terms of perceived compliance with the statutory criteria set out within s.54 of the HFEA 2008. However, as time has passed and further information has been gathered, the parental order proceedings have become significantly more straightforward, to the extent that I am now in the position of being able to grant a parental order in respect of Z to AB and CD.

Section 54, HFEA 2008: The Legal Framework

18. Section 54 of the HFEA 2008 provides a regulatory framework which, if satisfied, provides a mechanism by which “*commissioning parents*” (the applicants) become the legal parents of any child(ren) whose conception and birth results from the surrogacy arrangement, whilst simultaneously extinguishing the rights of the surrogate (and others) in respect of the same child(ren). An application for a parental order is essentially declaratory in nature and confers a fundamental status on an applicant and on the child, who is the subject matter of the application. The nature of an order made pursuant to s.54 HFEA 2008 is encapsulated by the (then) President within paragraph 54 of Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam):

“Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family... [it] is fundamentally about [the child’s] identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J’s powerful expression, a transformative effect, not just in its effect on the child’s legal relationships with the surrogate and commissioning parents but also, to adopt the Guardian’s words in the present case, in relation to the practical and psychological realities of [the child’s] identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences.”

19. In interpreting the provisions of s.54 HFEA 2008, it is necessary for the court to have regard to the statutory subject matter, the background, the purpose of the requirement (if known), its importance, its relation to the general object intended to be secured by the Act, and the actual or possible impact of non-compliance on the parties. Furthermore, pursuant to the Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provisions) Order 2010, s. 1 of the Adoption and Children Act 2002 (ACA 2002) is imported into s. 54 HFEA 2008. In Re L (A Child) (Parental Order: Foreign Surrogacy) [2010] EWHC 3146 (Fam), Hedley J emphasised that the consequence of that development is that “*welfare is no longer*

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merely the Court's first consideration but becomes its paramount consideration" (at paragraph 9).

The Section 54 Criteria

20. On the evidence I have before me, I am satisfied that the following requirements under s.54 HFEA 2008 are met:

- a) the application was made by two people, "*the applicants*" (s. 54 (1));
- b) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo (s. 54(1)(a));
- c) the gametes of at least one of the applicants (AB) were used to bring about the creation of the embryo (s. 54(1)(b));
- d) the application was made within six months of Z's birth (s. 54(3));
- e) both applicants have attained the age of 18 (s. 54(5));
- f) the surrogate mother, EF, has freely, and with full understanding of what is involved, agreed unconditionally to the making of a parental order (s. 54(6)); and
- g) In accordance with the surrogacy arrangement, the applicants paid the expenses set out in the statements supporting this application. The total payments made to the surrogate, EF, amounted to £5,500 and various payments amounting to £44,200 were made to the surrogacy agency to cover, amongst other matters, medical care for the surrogate and for Z. There is no evidence that the applicants acted in anything other than the utmost good faith, or that the level of payments or the circumstances of the case could be said to have overborne the will of the surrogate mother. In those circumstances, I authorise pursuant to s. 54(8) the payments that were made to the surrogate mother in accordance with the surrogacy arrangement.

21. There are three further matters that the court must be satisfied about. They are:

- a) s. 54(2)(c) that the applicants are two persons who are living as partners in an enduring family relationship and not within prohibited degrees of relationship in relation to each other;
- b) s. 54(4) that, at the time of the application and the making of the order, the child's home must be with the applicants and either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man;
- c) whether the court should exercise its discretion and give retrospective approval to the sums paid which would otherwise have contravened s. 54(8).

S. 54(2)(c): Enduring Family Relationship

22. The applicants assert that they meet the criteria in s. 54(2)(c) as they are not related to each other and are in an enduring family relationship. That which does (or does not) amount to "*two persons who are living as partners in an enduring family*

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relationship” has been the topic of consideration in several authorities. The following principles may be derived from the case law:

- a) The term in question, namely, “*living as partners in an enduring family relationship*” is not defined within the HFEA 2008 or other associated legislation;
 - b) The term is replicated within s. 144(4) of ACA 2002;
 - c) Within that context the term “*living as partners in an enduring family relationship*” has been analysed as follows: (a) the question of whether the parties are “*living as partners in an enduring family relationship*” is clearly a question of fact and degree in each case (paragraph 16 of T & M v OCC & C [2010] EWHC 964 per Hedley J); (b) the term was “*no doubt chosen so as not to require the residence of both in the same property*” (ibid); and (c) what may assist in determining this issue is (i) an unambiguous intention to create and maintain family life and (ii) a factual matrix consistent with that intention (ibid).
23. S. 54(2) is not a time specific provision, insofar as there is no clause within it which requires the applicants to be living together and/or in an enduring family relationship at any specific point in time. Particularly, there is no requirement that the applicants are in an enduring family relationship at the time of the making of the application and/or at the time of the making of the order, (as noted in Re N (Surrogacy: Enduring Family Relationship: Child's Home) [2019] EWFC 21 in which the court cautioned against reading in any specific requirement as to the relevance of timing [see paragraph 34]).
24. Additional support for the wide interpretation of the meaning of an enduring relationship may be found in the judgment of Keehan J in Re A (Surrogacy: s.54 Criteria) [2020] EWHC 1426 (Fam). He held that, notwithstanding their separation at a later date, the clear common intention of the parties had been to remain together at a time prior to entering into a surrogacy arrangement. He identified several factors that enabled the court to find the intended parents had been in an enduring relationship, namely:
- a) Prior to the surrogacy arrangement, the intended parents were in an enduring relationship;
 - b) They wished to have a family and desperately wanted a child of their own;
 - c) They agreed to pursue a surrogacy arrangement and each provided their gametes to produce embryos for transplantation into the surrogate;
 - d) At the time of the joint application for a parental order, both of the intended parents were committed to playing key roles in the child's life and were committed to his care and well-being;
 - e) At the time of the application, both of the intended parents had and/or wished to have a close relationship with the child;
 - f) Both of the intended parents were committed to working together to promote the welfare best interests of the child throughout his childhood and beyond;

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g) The intended parents wished to have their biological status as the child's parents recognised in law.

The above demonstrates that an enduring family relationship is characterised not just by the commitment of two adults to each other, but also by their commitment to the child born as a result of the surrogacy arrangement.

25. In this case, as is clear from the evidence which has been filed, the following factors support the submission that the applicants are in an enduring relationship;
- a) The applicants have been in a relationship for more than 20 years with AB describing CD as not only his partner but also his best friend;
 - b) the applicants have cohabited for 17 years;
 - c) The applicants both wanted to be parents for a long time, a desire born out of their enduring commitment to each other;
 - d) The applicants moved abroad in order that AB could take up employment, demonstrating the enduring nature of their relationship;
 - e) At the time of the joint application for a parental order, the applicants were committed to playing key roles in Z's life and were committed to her care and well-being; and
 - f) The enduring nature of their relationship as parents is evidenced by their resilience in the face of the significantly challenging events since Z's birth, both in Colombia and in this jurisdiction.
26. I am satisfied that s.54(2)(c) is satisfied in this case.

S.54(4)(a): Child's Home

27. S. 54(4)(a) expressly provides for the child's home to be with the applicants at the time of the application and the making of the order. At the time of the application, Z was in local authority foster care. She returned to the care of CD on 30 October 2020 and has been living with both CD and AB since 20 December 2020.
28. Several cases have already set out a broad and purposive construction of what is meant by "*the child's home*". The following may reasonably be derived from those authorities which have adopted that construction referred to above:
- a) The concept of home may be construed flexibly;
 - b) Applicants living separately and/or having two separate homes is not, per se, fatal to a determination that the child had their home with the applicants at the relevant time (see paragraph 67 of Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam));
 - c) Each case is fact dependent and will require an assessment of such matters as when it could be said was the last time the child had his or her home with the applicants. This would include consideration of factors such as when they shared a home with the

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child and if they have not, why not. If they have, but that has ceased, why and in what circumstances and whether the child could still be said to have their home with the applicants, even construing that term flexibly;

d) the term “*home*” must be given a wide and purposive interpretation and the term is not and should not be restricted to cases where the applicants live together under the same roof (paragraph 58 of Re A (A Child: Surrogacy: s54 Criteria) [2020] EWHC 1426 (Fam)).

29. The prospective nature of s. 54(4)(a) was considered in the matter of AB (Foreign Surrogacy: Children out of the Jurisdiction) [2019] EWFC 22, which concerned difficulties that had arisen in terms of the subject children’s immigration status. In that case, the children were not living in this jurisdiction by the time of the final hearing in February 2019. It is not possible to discern from the judgment when they may have been able to gain entry to this jurisdiction, the applicants in that case having not, at the time of the hearing, made any immigration application. The court recognised the roles played by both parents in terms of their care of the children (who remained living with wider family members) insofar as, separately, the applicants had travelled to Tehran to help care for the children. It was clear, that the applicants had not cared for the children together at any stage nor was it clear when they might do so in the future. Irrespective of those factors, the court was able to construe the terms of s. 54(4)(a) so as to grant the parental orders sought.
30. In this case, by way of comparison, AB was, during the care proceedings and at the time the application was made, exercising parental responsibility for Z. Z was not the subject of an interim care order and remained accommodated pursuant to s.20 of the Children Act 1989 until she was returned to the care of CD on 30 October 2020. Indeed, prior to the commencement of care proceedings, it is clear that both CD and AB had cared for Z in Colombia and, to that extent, Z’s home was with the applicants prior to the application for a parental order being issued. Were it not for the involvement of the local authority, CD and AB would have continued to care for her whilst in this jurisdiction with CD undertaking the daily parenting tasks and AB having contact by phone and internet video.
31. Adopting a wide and purposive interpretation of s.54(4)(a), I am satisfied that Z’s home was with the applicants at the time the application was made. She is clearly living with them at the time of the making of the order.

Section 54(4)(b): Domicile

32. The law in relation to domicile is well-established. An individual is said to have a domicile of origin from birth. They will be said to be domiciled in that country unless and until they abandon it and acquire a domicile of choice in another jurisdiction. The most comprehensive analysis of this issue within the context of s. 54 HFEA can be found in paragraph 13 of Re Z and B and C (Domicile) [2011] EWFC 3181 (Fam) (per Theis J) and reads as follows:

a) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it;

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- b) No person can be without a domicile;
 - c) No person can at the same time for the same purpose have more than one domicile;
 - d) And existing domicile is presumed to continue until it is proved that a new domicile has been acquired;
 - e) Every person receives at birth a domicile of origin;
 - f) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise;
 - g) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice;
 - h) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which the residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious;
 - i) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently or indefinitely, and not otherwise. A person who has formed the intention of leaving a country does not cease to have his home in it until he acts according to that intention; and
 - j) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but if it is not acquired, the domicile of origin revives.
33. The applicants consider themselves to remain domiciled in this jurisdiction. Both were born in this jurisdiction and retain UK citizenship. Neither has taken steps to either revoke that citizenship or obtain citizenship in respect of another country. Neither has an enduring right to remain in the country where AB works, and both are only entitled to remain there for as long as AB remains in active employment. In those circumstances, their residence abroad is not in any way permanent. Neither applicant has taken steps to abandon domicile in this jurisdiction nor acquire a domicile of choice abroad and neither intends to reside abroad permanently or indefinitely.
34. I am satisfied that both applicants are domiciled in this jurisdiction and that s. 54(4)(b) is met.

Welfare

35. Having been satisfied that the requirements of s. 54 HFEA 2008 are met, I turned to the welfare considerations. Z's welfare is the court's paramount consideration in accordance with s. 1 of ACA 2002.
36. I have been assisted by the report of the parental order reporter which is supportive of the parental order application as being entirely in Z's best interests. She records that Z is thriving in the care of AB and CD and that they clearly dote on her.
37. I have also considered the assessments undertaken within the public law proceedings which concur with the Parental Order Reporter's views. The parenting assessment of

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both applicants identified several protective features and concluded that both were able to provide a loving, safe home for Z. Dr Allam's psychological assessment confirmed her opinion that neither applicant posed a sexual risk to Z and that both were aware of how to safeguard her in future.

38. The evidence clearly demonstrates that Z's welfare needs are met by the making of a parental order, which is the order I make.
39. Z's twin brother, Y, died shortly after birth. Had he survived, I would have been asked to make a parental order in respect of him as well as Z. I cannot do so but I acknowledge that his conception and birth remains of great significance to both AB, CD and Z.

Conclusion

40. The circumstances that arose in this case are highly unusual. I conclude by paying tribute to AB and CD. They have conducted themselves with dignity and patience throughout their dealings with the local authority and the court. Both have been subjected to intense scrutiny and searching assessment. That process has vindicated them as parents for Z and put paid to any lingering doubts about their suitability. I met with them and saw Z with them. Z is a delightful child who is relaxed and happy with both of them. She has brought great joy to their lives and they clearly adore her. I have no doubt they will both do all in their power to give her a happy and secure childhood.
41. That is my decision.