Neutral Citation Number: [2021] EWHC 3840 (Fam)

Case No: ZC21P00105

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2021

Before:

MRS JUSTICE THEIS

- -

Between:

W	**Applicant**
- and -	
X	**1st Respondent**
- and -	
Y	**2nd Respondent**
- and	
Z	
(Through his Children Guardian Lillian Odze)	**3rd Respondent**

- -

Ms Dorothea Gartland (instructed by **Laytons ETL**) for the **Applicant**
Ms Alev Giz (instructed by **International Family Law Group LLP**) for the **1st Respondent**
The 2nd Respondent Did Not attend
Mr Michael Gration and Ms Maria Stanley (instructed by **Cafcass Legal)** for the **3rd Respondent**

Hearing dates: 15th – 17th November 2021
Judgment: 9 December 2021

- -

Approved Judgment

.....

MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

Mrs Justice Theis DBE:

Introduction

1. This matter concerns the future care arrangements relating to Z, now aged 1 year ('Z'). He was born as a result of a surrogacy arrangement in Georgia that was the joint decision of W and X. The surrogate who gave birth to Z is Y. She is a party to the proceedings, but has only actively participated in a limited way. She is a Georgian national, the surrogacy arrangement and birth took place in Georgia and she remains living there. Z is a party to these proceedings, represented through his Children's Guardian, Lillian Odze.

2. As was agreed between W and X, X took the lead in the surrogacy arrangements, his gametes were used with a donor egg to create the embryo, he was present at the time of Z's birth and took the lead in making the necessary arrangements for Z to travel here with him.

3. There has been extensive litigation between W and X since April 2021, following the breakdown of their relationship. Prior to that, the parties had jointly made an application for a parental order in January 2021.

4. A number of interim hearings have been necessary to deal with the changing factual landscape on the ground. Most recently, Z's care has been largely shared between them where he lives with X from Monday to Friday and with W from Friday to Monday.

5. There was a fact finding hearing in July with a judgment dated 13 August 2021. Following on from that hearing, directions were made leading to this hearing to determine the future welfare orders for Z. The issues for the court can be summarised as follows:

   (1) The application for a parental order is now supported in principle by both W, X and on behalf of Z but Y has not engaged in the proceedings in a consistent way. The most recent information is that Y does not consent to a parental order being made. There is an issue as to the extent to which her position may have been influenced by X. In the closing submissions on behalf of W it is submitted this application should be stayed, following the approach taken in *Re AB* [2016] EWHC 2643 (Fam).

   (2) X's application for leave to remove Z from the jurisdiction to live in North Macedonia. This is opposed by W and on behalf of Z.

   (3) If X's application is refused, the precise details regarding a child arrangements order will depend on whether X remains in this jurisdiction, or not.

6. The court heard oral evidence from X, W and Ms Odze as well as Vladimir Boshnjakovski ('VB') the expert in North Macedonian law and Dr Marc Desautels ('MD'), Chartered Clinical Psychologist.

7. The court has had the benefit of detailed written submissions from all parties and is extremely grateful for the careful analysis of the issues in those submissions in this difficult case.

Relevant Background

8. The background to this matter is set out in detail in the judgment given at the conclusion of the fact finding hearing on 13 August 2021. As a consequence, it is only necessary to give a summary.

9. W and X met in 2015 in the US. W was born in England and was on temporary secondment in the US related to his job. X has dual US and Macedonian citizenship. He was born in the US, was brought up in Macedonia and left there aged 18. Although he has visited his family each year he has not lived there since he was 18.

10. W has worked full time in London (save for the 2 year secondment in the US) and X has been largely based in the US, although has spent periods working in other jurisdictions.

11. W and X met in 2015, when W returned to London they had a long distance relationship and then separated in about late 2017/early 2018. In 2019 they went on holiday together, their relationship resumed and they discussed long term plans of marriage and children. W states the agreement between them was X would take the lead in and fund the surrogacy arrangements and W would focus on providing and funding a family home in London.

12. Enquiries of surrogacy agencies during late 2019 resulted in W and X agreeing to proceed with a surrogacy agency based in Georgia..

13. W and X married in New York in 2019, W returned to London and X remained in New York.

14. In October 2019 X travelled to Georgia, signed the necessary paperwork and was introduced to Y. Both W and X chose an egg donor. In December 2019, X went to Georgia to donate his sperm, the embryo transfer took place and the pregnancy was confirmed, with a due date in 2020.

15. In July 2020, X moved to London to live full time with W. X states he transferred all his savings to W as a contribution to the property. This sum was later transferred to X's parents in April 2021, at X's request.

16. X alleged there were incidents of domestic abuse in August 2020 where he alleges W physically assaulted and threatened him. X went to Georgia in September 2020 prior to Z's birth, X wanted W to go with him (which he considered W could through his work), W said he was unable to travel to Georgia due to the Covid-19 travel restrictions, although X wanted to go with him.

17. Following his birth, Z was able to get a US passport. Although X paid for the surrogacy arrangement W sent additional sums in to cover the costs of a nanny to assist X with Z whilst they remained in Georgia. X and Z came to this jurisdiction in late 2020.

18. There were further incidents alleged between the parties. In January 2021 the parties made a joint application for a parental order, in the C51 application the box is ticked that Y consents to the order being made.

19. In February 2021 there were communications between X and Y, unknown to W, when X informed Y he wished to withdraw from the joint application for a parental order.

20. Following further difficulties in February and March X contacted the police in early April stating he plans to leave the home. Shortly afterwards there was an argument between the parties, X left the home with Z, then returned to pack his belongings and said he was going to an Airbnb but refused to give any details. X left and took Z.

21. On 7 April 2021 W applied without notice to X seeking orders to prevent X from removing Z from the jurisdiction. The matter came back on notice on 9 April 2021. Directions were made that secured the passports and the interim position and Z was joined as a party. Just prior to a hearing on 12 May 2021 X filed a statement in which he made serious allegations of physical abuse against W. In addition at the hearing the court had detailed information about Z's immigration position and future options. The orders recorded the agreed way forward regarding immigration applications for Z. Directions were made leading to a two day fact finding hearing in July.

22. The matter returned to court again in late May due to Z suffering seizures and being admitted to hospital and then X becoming unwell. The end result was Z was placed in W's care with a hearing fixed for early June.

23. On 29 May 2021 X applied for a domestic violence concession visa without informing the court or the other parties. On 3 June 2021, X applied for an occupation order. On 8 and 17 June 2021 further directions were made, including a direction for a s37 report, to enable the two day hearing to proceed in July.

24. The August judgment set out the findings, which are summarised in the agreed schedule of findings. The more serious allegations of domestic abuse alleged by X against W were not found to have occurred but findings were made that X had been verbally aggressive and threatening to W and had sought to distance Z from W, also that W had been verbally threatening to X and in relation to both of them *'Due to the complexity of their relationship and the dynamics at play there was probably some coercive and controlling behaviour by both W and X in relation to each other'.*

25. Following that hearing, directions were made for an expert to be instructed to deal with the issues relating to the legal framework in North Macedonia, for the parties to file evidence responding to the findings made and their respective proposals for the future care of Z. In addition it was agreed that Dr Desautels would undertake a psychological assessment of X.

Y's position

26. Despite very extensive attempts by the parties and the court, as outlined in the helpful chronology prepared by W's solicitor, Y did not join this hearing. A Georgian interpreter was on standby to enable her to do so and the interpreter had, at the invitation of the court and the parties, also communicated with Y informing her that the hearing was taking place. All the messages sent have registered as having been received by her. There was no response.

27. There were no other steps that could reasonably have been taken to engage Y in these proceedings. It is of note, as Mr Gration observed in the closing submissions on behalf

of Z, that Y's unwillingness to engage with these proceedings doesn't sit comfortably with her reported reason for withdrawing her consent as she wished to retain her status as Z's mother.

Expert evidence

28. Mr Boshnjakovski is a lawyer based in North Macedonia. In his report dated 20 October 2021 he outlined the relevant legal framework in that jurisdiction and the steps that would need to be taken for an order made here to be recognised. In his opinion, any welfare order made in this jurisdiction in this case may not be recognised for enforcement in North Macedonia as he considers one of the requirements to do so, namely the recognition of the decision is not contrary to the public order of the Republic of North Macedonia. In his opinion, some local courts may see a foreign decision granting parental status or rights to two same sex individuals as importing same-sex parenthood in a jurisdiction that does not otherwise allow this. He considers that the time taken for a decision to be made as to recognition is likely to take between three months and up to three years to complete.

29. In relation to the question as to whether an order made here in relation to welfare or parental responsibility would be recognised as affording W rights of custody within the meaning of Article 3 of the 1980 Hague Convention (the Convention), Mr Boshnjakovski confirmed North Macedonia had signed and ratified the Convention and the Convention should afford W rights of custody. However his report refers to unofficial inquiries with the Ministry and Labour and Social Relations, which acts as the Central Authority. They are reported to have confirmed they have not had experience of a case involving same sex parenthood and consider, unofficially, an order in such circumstances would face obstacles with being enforced under the Convention. The expert stressed this is an unofficial view. He considers that there is an implicit and effective prohibition on two people of the same sex being recognised as parents of a child. Whilst he recognised there is no precedent, he considers there exists a real possibility that this prohibition could be elevated to the level of public order and could result in grounds to refuse to recognise such an order.

30. In his view if the foreign order was not recognised it would be *'very difficult'* for W to establish any position under the local laws to establish his position in relation to Z.

31. In his oral evidence, he agreed a complicating feature in this case is the fact that Z's birth certificate in Georgia has a person registered on the birth certificate who did not give birth to Z. As he observed, in North Macedonia *'they consider the names on the birth certificate as prima facie evidence of who the birth parents are'.*

32. Dr Desautels is a Clinical Psychologist and his report is dated 13 October 2021. He saw X for a remote assessment on 8 October 2021, two days previously X had completed the psychometric questionnaire. His report concludes that the difficulties in the parties' relationship, including the move to London and Z's birth, have meant that X's coping skills were no longer sufficient to protect him from the re-emergence of PTSD symptoms and this combination of factors led to a deterioration in his mental state. In his opinion X meets the criteria for a diagnosis of PTSD and Dr Desautels considers X is not receiving adequate treatment. He recommends he requires CBT or EMDR and because of the complexity, chronicity and nature of his trauma, X is likely to need longer than the 8 – 12 sessions recommended. He considers a minimum of 6 months of

weekly sessions would be required before an improvement is noticed. Dr Desautels considers X's motivation for treatment is above average, which bodes well for treatment outcome.

33. He considered relocation to North Macedonia would help alleviate some of X's isolation, provide him with additional support for Z's care and would contribute to reducing the severity of his mental health problems. Those problems would, however, be likely to remain if no treatment is sought.

34. Remaining in England would increase the risk of further deterioration to his mental care and the care he provides for Z would risk being negatively impacted in the short to medium term.

35. X's mental health is still affected by the difficulties in his relationship with W which could impact on his ability to co-parent with W. If he remains in England, X's mental ill health is likely to remain for a period of time but with treatment and clear arrangements between X and W, could gradually reduce over time. If X were to relocate to North Macedonia, and once his mental health problems have been addressed, he may be in a more favourable position to work with W but it was contingent on his mental health being properly and effectively treated.

36. Dr Desautels observed that X had a tendency to avoid negative or unpleasant aspects of himself which may make him less receptive to feedback or input from others. This could bring further challenges to co-parenting and if he relocated to North Macedonia this could be amplified as W's presence in Z's life would be reduced and the risk of alienation would consequently increase. In his oral evidence, he said this view was based on a constellation of circumstances in this case and agreed X being away from W could result in X being more accommodating.

37. He confirmed in his oral evidence he had found X motivated and engaged. He saw it as a positive factor that if X was here when engaged in therapy he would be doing so somewhere where he would be openly living as someone who is gay. However, he equally said X would gain support if receiving therapy when living with the support of his family. He considered the PTSD needs to be addressed first as it is then highly likely other symptoms (such as depression) may be alleviated. Dr Desautels stressed the need that wherever X was living, the specialist therapeutic treatment is required.

38. If X remained here, Dr Desautels confirmed if his report was disclosed to the GP, together with a request for secondary mental health care this, in his view, would be likely to result in X receiving the treatment he requires in a time frame of between 1 – 5 months.

Other evidence

39. In his eight statements and oral evidence, X set out the difficulties he has had, and continues to have, about remaining in this jurisdiction. As he has set out, he has very limited connection to this jurisdiction, has no family or significant other support available here apart from his relatively short lived relationship with W.

40. X described how difficult he has found it practically and emotionally to manage the difficulties he has encountered in securing accommodation, legal advice, financial

assistance, including applying for state benefits which he found humiliating, and the logistics of caring for Z since the parties separated. He gave a very graphic account of how difficult he finds it relying on such limited financial means and the implications regarding what he can provide for Z. X described how he has tried to continue his academic work but has found it increasingly difficult with the other demands on him. When asked about staying here, he said '*W knows that is impossible. I don't feel safe here, I have no single person who I can consider a close friend and relative, can't get a job, only thing I see is the interior of the home, courts and hospital. I don't see how I am able to provide Z with a life here that would be in his interests'.*

41. He was asked about his contact with Y and what steps he has taken to discuss matters with her. He accepted the communication he had with her in February 2021 was without W's knowledge and prior to him communicating to W that he no longer wished to proceed with the joint parental order application. He also accepted that in February, he had made the unilateral decision to contact Y to the detriment of the parental order application being successful. He denied this was because he did not recognise W as Z's father. He acknowledged the reference to a woman in the text exchanges with Y in the bundle is a reference to the nanny who assisted with the care of Z soon after his birth. He remained clear that there had been no contact between him and Y between November 2020 and February 2021 and that all contact with Y since then are detailed in the papers. He denied he had sought to put pressure on Y in April 2021 and said those messages need to be seen in the context of the litigation going on at that time. His contact since the August judgment reflected what he understood was requested, to contact her to see if she could reconsider her position regarding consent.

42. He said he had made attempts, including during this hearing, to engage with Y but she had not responded. He confirmed his updated position that he supported the making of a parental order and if that was not possible, he accepts W should have equal parental responsibility for Z. He agreed the benefits for Z if a parental order was made.

43. Attached to his most recent statement, he has exhibited a letter from his family in North Macedonia setting out the support that would be provided for X and Z, which includes a house that is owned by the family where he and Z could live, as well as financial and other support, including details about nursery and schooling that would be available. He acknowledged that his parents did not know the details of the break-up of his relationship with W save for a generalised reference to 'issues' he has told them about (such as *'scar on head, milk issues')* and neither his parents, or his wider family, had met or had any contact with W. In answer to questions from Mr Gration, he acknowledged he had not given his family any details about these proceedings as he '*didn't want to upset them'.*

44. As regards the counselling or other support he has been able to access, he said he has had six sessions through a local service but had encountered difficulties in accessing other support, either on the basis that he was not eligible or not able to undertake such support as he had no access to public funds. He was not able to give much detailed information about precisely what therapeutic support would be available in North Macedonia, although he referred to the possibility of accessing such support remotely.

45. If his application was granted, he proposed that W should travel to North Macedonia to see Z, as he considered that was less disruptive for Z.

46. As regards the immigration applications, he accepted the application made in late May based on domestic abuse was made without the knowledge of the court or the parties, he said he didn't realise they should have been notified. He said Z is part of any application he made for immigration purposes here. He described that application as *'an act of desperation'.*

47. In relation to what Ms Gartland called Plan B, if his application for leave to remove was refused, X was taken through a number of flats W had provided details about. X remained clear he needed at least a one bedroom property so that Z's cot could be accommodated. He was taken through the nursery proposals made by W, he said they had agreed a different nursery but acknowledged that was more expensive. Again he stressed the difficulties he has in remaining living here both financially and with the lack of wider support available to him although stated in his answers *'housing is the key issue'.*

48. In his questions, Mr Gration sought to explore with X the extent to which he considered W's role as a parent as he did not have a biological connection to Z. He explained his reference to this issue in his first statement at paragraph 44 was on the basis that he was advised to raise this issue. In relation to his position now he said he accepted W should play a full role in Z's life and that W and Z *'have a strong relationship'* and acknowledged there would be an impact on Z if there was a reduction in the time Z spent with W, although he considered regular facetime contact would help.

49. He was asked about what he described to Dr Desautels about it taking him two days to recover from every handover, he said *'I don't expect it to continue for ever'.* X did not accept there was any risk to contact with W not taking place if he went to North Macedonia with Z.

50. W has filed 6 witness statements. In his oral evidence, he confirmed the financial support he felt he was able to afford for a period of six months to June 2022, essentially rent of £1,300 pm and the nursery costs that amount to £1,876 pm. He considered X was eligible for some financial support via Universal Credit which he put at £470 pw according to the Universal Credit reckoner. He described the benefit he felt he had gained from attending a parenting programme, as recommended in the s 37 report.

51. W described the difficulties when Z had a febrile seizure in October 2021 whilst he was in W's care and what he described was X's aggressive attitude to him at the hospital. He said what he wants is for him and X to co-parent Z. He described how well they worked together at Z's first birthday, they were able to share the occasion together. W felt they could co-parent but X's attitude changed due to what X felt about the content of W's most recent statement.

52. Ms Giz pressed W as to why he had not contacted Y himself. He said he didn't have her contact details and felt by entering into the surrogacy arrangement she had already made the decision for Z to be brought up by W and X as his parents. He felt X's communications in April 2021 with Y were not a reasonable reaction to the without notice orders that had been obtained by W, W considered such steps were designed to thwart W. He had not understood the surrogacy arrangement with Y to mean she would be an ongoing presence and had not been aware of the communications between X and Y in February 2021.

53. Ms Giz suggested W did not have much to say to professionals that was positive about X. W responded that X is very intelligent and when he sets out to do something, he is courageous. He agreed the observations about X's care made in the s37 report and that Z looks well cared for. As regards X's earning capacity, he said he considered X is *'highly employable'* due to his academic qualifications and that he can speak a number of languages.

54. W acknowledged X has no family or other support here although he said X having regular contact with his family was not a feature when W and X were together. W acknowledged his wider family had not met X, W said they wanted to but X was scornful of W's relationship with his parents.

55. W was pressed on why his father did not respond to the message from X in May from the hospital when Z was ill. W said by that point his parents knew of the allegations X had made three weeks previously and they were shocked by them. He was asked about how often they had visited, he said they were elderly and had concerns about Covid. They last visited in June for his birthday and they communicate over skype each week.

56. W was asked about the position if X's application for leave to remove was refused and whether he would let X take Z to North Macedonia to see his family for visits. W said as things stand, he has a fear they would not return. When asked what that fear was based on, he replied *'fact X wants to thwart my relationship, the way he left in April saying he was going to return to North Macedonia and then NYC'* and demonstrated an understanding of the legal position then regarding Z. He was asked about the position if X's application was granted and whether he would go and visit Z in North Macedonia, he said he didn't think he would be welcome and if Z went, he didn't think he would be able to maintain his relationship with Z stating *'If Z goes to North Macedonia I don't see I could parent him in a meaningful way'*, relying in part on what he says X said prior to their separation that X's parents would not want W in the house. W also considers that if Z goes to North Macedonia it is likely X will want to move again.

57. W acknowledged in his evidence that X hates it here but stated X has not *'given it a chance, not taken steps'*

58. In her oral evidence, Ms Odze confirmed the recommendations in her report remain, she did not support X's application for leave to take Z out of the jurisdiction to North Macedonia. She described how she had taken into account X's statement that he would go back to North Macedonia, without Z. She agreed it was a tall order asking X to remain here. She considered the combination of the legal advice about the position in North Macedonia if Z did go and Dr Desautels view about X's need for specialist treatment meant that although she recognised going there may relieve the stress for X, the consequences are that it is likely to break the relationship between W and Z and X was unlikely to get the treatment he requires. Ms Odze did not underestimate the reasons why X does not want to remain here, as she said they are *'real'* but have to be balanced with the need for Z to maintain a relationship with both his parents. She said whilst X states he will promote the relationship between Z and W, yet at the same time, X blames W for the situation he is in.

59. Ms Odze considers W and X need to work on their communication, so it is not through solicitors. As she observed, the wider families are not able to bridge the gap, what is

needed are steps to rebuild the trust between W and X. There has got to be a way but they need professional help, especially as Z will become more aware of the tensions.

60. Ms Giz pressed Ms Odze about her recommendation and the underlying reasons. Ms Odze observed that there are findings made that X had sought to distance Z's relationship with W and evidence that X was still deeply angry with W. These features, coupled with the fact that X had not received the treatment he requires, Ms Odze did not see in those circumstances X will be able to promote W's relationship with Z, particularly in the light of his recent description that it takes him two days to recover from seeing W at handovers. Ms Odze said she had factored into her balancing exercise the impact on X of remaining here. She agrees it is a tall order but against that is the real risk in her view of Z losing his relationship with W. Ms Odze said it was not just about the risks from not being able to enforce any order, it also included the need for X to have therapy as well. Ms Odze said her recommendation if X's application is refused is for a shared care arrangement with the change over via the nursery each Friday. She observed that a Friday is a good time as the weekend lays ahead before the routine of the week starts again. She considered such a division meets Z's welfare needs, as it conveys the message of the equal role of both X and W and limits the risks for Z if things go wrong.

Legal Framework

61. There is no significant issue about the relevant legal framework. Relocation cases are particularly difficult due to their binary nature, either the application is permitted or refused.

62. Z's paramount welfare needs is the lodestar which guides the court in reaching its decision. The summary of the relevant principles, as outlined by Williams J in *Re C (A Child)* [2019] EWHC 131 (Fam) at paragraphs 15 and 16, provide a useful guide.

63. Paragraphs 28 – 31 in *Re F (A Child) (International Relocation Case)* [2015] EWCA Civ 882 sets out how the principles should be applied in practice, referring to the need to undertake a balancing exercise in which each option is evaluated as the court undertakes a global holistic evaluation.

64. As regards the application for a parental order, it is accepted that without the consent from Y the application cannot proceed. Ms Gartland raises the issue about whether the application should be stayed, following the approach this court took in *Re AB [2016] EWHC 2643 (Fam)*. This would enable the application to be restored in the event that the position regarding consent changes.

65. In the closing submissions on behalf of Ms Odze, although not seeking any declaration of incompatibility, Mr Gration and Ms Stanley raise the following issues about the disparity of the way the current provisions relate to a same sex male couple not being able to have their parental status recognised in a way that does not arise with a female same sex couple. Mr Gration and Ms Stanley state as follows:

'Whilst not directly relevant to the court's determination of the issues as they now stand, it is a feature of this case that, in being dependent upon the surrogate's consent to the making of an order that fully and properly recognises W and X as Z's parents, they are dependent upon the consent of Y. In that regard, whilst the Guardian does not

seek a declaration of incompatibility, it not being considered in Z's best interests to prolong proceedings, and in the absence of the other parties making an application for the same, the following points are noted:

(a) Surrogacy provides a means by which two individuals whose assigned genders are male can create a family which has a genetic link to one parent.
(b) By direct analogy, the means by which two individuals whose assigned genders are female can create a family which has a genetic link to one parent is by assisted conception (either IVF or artificial insemination).
(c) In relation to (b)

(i) section 42 of the HFEA 2008 provides for the recognition of the second parent as the legal parent from the point of the embryo, sperm and eggs or sperm being inseminated, irrespective of where the assisted conception took place, unless it can be shown that the second person did not consent to the procedure. This applies irrespective of whether the procedure took place in this jurisdiction.
(ii) The same applies under section 43 in relation to (b) where the two individuals are not married or in a civil partnership but the treatment occurs in an HFEA licenced clinic within the UK and where under section 44 the agreed female parenthood conditions are met demonstrating that second parent consents to being treated as such.
(iii) In either (i) or (ii) an individual whose assigned gender is female is able to be recognised as the second parent from the point of conception and conferred the status of second parent at birth automatically as long as the above provisions are met.

(d) In the case (a), an individual whose acquired gender is male is unable to be recognised as the legal parent until either a parental order is granted or an adoption order. The requirement under section 54 of the HFEA for the surrogate's consent and the absence of any ability for this to be dispensed results in a situation in which, by virtue of the assigned genders of the intended parents, a child born of surrogacy commissioned by two individuals whose assigned genders are male, is not afforded the same rights to have both intended parents recognised as their legal parents as child who is born of assisted conception commissioned by two individuals whose assigned genders are female.'

Submissions

66. Ms Giz on behalf of X eloquently sets out X's position in the written submissions. In relation to the parental order, she submits Y's last known position was that she had not understood that a parental order would extinguish her parental rights and as a result did not agree to such an order. She expressed the feeling in her email dated 19 October 2021 that she was *'feeling pressured to give up motherhood under the assumption it would be best for Z. I cannot comprehend how disappearing from Z's life could be beneficial for her (sic)'*. In relation to X's communication with Y, she submits the communication in April needs to be viewed in the context of the orders that were being made at that time and the effect of them on X. Any criticism for recent communication should be rejected as it was something that W requested in his statements and was envisaged by the court in the August judgment. X's position remains the same, he fully supports the court making a parental order.

67. As regards the application to relocate Ms Giz invites the court to weigh in the balance a number of factors, including the following. X's difficult financial circumstances where he has no income or recourse to benefits in circumstances where he has significant debts. The consequences of X having no credit rating which has a direct impact on his ability to live in this jurisdiction, for example limiting his ability to sign a tenancy, secure household bills in his name. X has lived through the extreme stress of isolation, loneliness and uncertainty in London in circumstances where he has had to move three times and not had the benefit of family or other support. In his seventh statement, he sets out the detail of how he proposes to rebuild his life if his application is granted and what would be available for Z. These plans involve a clear role for W in Z's life. The support that would be available is set out in the statement signed by X's parents. The prospects of X's treatment being successful would be enhanced by X living with the support of his family in North Macedonia, as well as meeting Z's cultural needs. The impact on X of the application being refused should not be underestimated. X has demonstrated on a number of occasions his commitment to W's parental role, for example contacting him in May when Z was admitted to hospital. Dr Desautels evidence was that remaining in England would increase the risk of further deterioration in X's mental health.

68. In relation to Mr Boshnjakovski's evidence, Ms Giz submits his conclusions are based on what he says might be the position in North Macedonia in the court there not recognising orders relating to same sex parents, including in relation to the operation of the 1980 Hague Convention. She submits the expert's evidence is over cautious and addresses potential risks. She submits the court will need to balance these risks with X's evidence about his commitment to W's ongoing role with Z, the relative ease of travel to North Macedonia and the support that would be available from his family. Weighed in the balance too must be the advantages for Z of X's application being granted. He would grow up in the traditions and religion of his family. Ms Giz submits there remain concerns about W's attitude to X. This is illustrated in what he had said to Ms Lewis and Ms Odze and if Z was in W's care, there is a real risk X's relationship with Z would not be supported or promoted.

69. If the relocation application is refused, Ms Giz has set out the financial support that would be required to enable X to have suitable accommodation. She submits £1,200 pm is not enough, it needs at least £1,500 pm for one bedroom properties. On the information available, W has spare income each month of £2,375. In addition, he seeks an order that will permit him to take Z to North Macedonia for a holiday to meet his wider family.

70. Ms Gartland, on behalf of W, submits that when focussed on Z's welfare needs, X's application should be refused. The central issue, she submits, is the ability of each of X and W, Z's two psychological and social parents, to enable and promote Z's relationship with the other parent. The context of the findings made in August are relevant to considering this issue.

71. In relation to the parental order application, she submits it remains in X's gift to bring Y back to the table for discussions about the benefits for Z of this court being able to make a parental order. She notes the following WhatsApp exchange between X and Y on 18 August, 5 days after the fact finding judgment: *"W and I would like to continue with the joint parental order application as we think this will be in the best interest of Z so I would really appreciate it if you could think about giving your consent to the application…If you want to talk on the*

phone please let me know." Y replies *"Hi X if W and you are in agreement I have no problem giving my ok".*

72. Ms Gartland submits it is critical for Z's immigration applications and status to be resolved and W wishes to instruct specialist solicitors to manage this so that an application for leave to remain outside of the rules can be managed in a way that maximises the prospects of success. She relies on the difficulties X has caused in relation to the immigration applications as being relevant to the courts overall assessment of X. As she notes in the detailed position statement on behalf of the Children's Guardian on 12 May 2021 which included an analysis of the immigration position it states, *'Mr X appears to consider he has no option but to leave the UK with Z. This outline provides information challenging that assumption'.*

73. She notes that if X's application is granted without Z's immigration status being resolved here, Z would remain a US national and would retain the rights of entry here afforded to those nationals, but more substantive rights would need to be explored with X's agreement.

74. As regards financial support, if Z remains living here, Ms Gartland confirms W's proposals to provide a deposit and be guarantor for the rental of a suitable property up to £1,300 per month and to pay for full time nursery care at £1,876 pm. This, she submits, can only be funded through loans from his family. W intends to issue financial proceedings within the divorce proceedings to give a framework for financial issues between the parties to be resolved.

75. Ms Gartland submits Mr Boshnjakovski's oral evidence followed his written report. Without recognition of the orders made here in North Macedonia W would have *'no possibility to enforce any rights in relation to Z'.* He outlined in his oral evidence what he considered would be the practical obstacles to recognition or enforcement under the 1980 Hague Convention.

76. Ms Gartland places reliance on the history as illustrating X's understanding of the legal position in a way that undermined W's relationship with Z. For example in his first statement he confirmed he had Y's consent to take Z abroad, that W did not have parental responsibility and his intention was to *'either stay in Macedonia or move back to the US depending on where I found employment'*. In that statement, he continues to confirm he has instructed his solicitor to apply to the court for leave to withdraw the application for a parental order. This, Ms Gartland submits, is an early indication of X's position regarding a lack of respect for W's position in relation to Z, which in reality has continued since that date. She gives as an example X's evidence that in May 2021, if foster care had been an option he could have preferred that to Z being placed in W's care.

77. In undertaking a holistic evaluation of Z's welfare needs, she submits a reality for Z is that he is a much wanted child that both X and W wished to become joint parents of. He is dearly loved by both W and X and has a right to know them both. If Z could express his wishes, he would want to continue to see W and X on a regular basis.

78. The findings made in August demonstrate that X will find it difficult to enable Z to have a full relationship with W. She submits when looked at in the context of the history and X's resourcefulness, he has the ability to work here. Whilst she recognises the move

to North Macedonia is clearly the place where X believes will solve many issues that he has the evidence is the therapy he requires is available in London combined with regular childcare for Z and a defined care arrangement with W, sharing the care could also bring improvements in X's well-being. Whilst the move to North Macedonia would enable Z to develop his love and relationship with X's family, the risk to Z at this point in his life is that his relationship with W will likely be severed and permanently damaged. She submits as recently as 10 October at hospital, X was insinuating that W is a paedophile. X is not in a position to positively promote W as Z's parent, as in North Macedonia same sex parenting does not have the same legal basis as it does in this jurisdiction. It is only if Z remains in London will Z be able to continue to grow up being able to develop a strong relationship with each of his parents, as he will be living with each of them on an equal basis.

79. Finally, Ms Gartland submits X's approach to the immigration application is revealing. Rather than pursuing an approach that would have benefited Z following what had been agreed at court through the making of an application for leave to remain outside the rules. Instead, X made an application that was not revealed to the other parties until after it had been made and appears to be an application that has limited prospects of success.

80. In the submissions on behalf of the Children's Guardian, Mr Gration confirms Ms Odze is very aware of the difficulties that X has faced whilst living here and has taken those into account in her analysis of what is in Z's best interests. Mr Gration described X's evidence of the difficulties he has encountered as being *'clear and moving'*. Mr Gration submits that whilst this evidence must be considered, the focus should remain on Z and the impact on him of the various options the court is being asked to consider. Ms Odze remained clear that the option that least promotes Z's welfare is relocation to North Macedonia. Ms Odze's overriding concern is X's *'obviously very negative attitude towards W and the impact that may have on his ability to promote and facilitate a relationship between Z and W in the future'*. Having considered the fact finding judgment, the expert evidence and X's oral evidence, she considers there is a *'significant risk that if X were to be given leave to remove, he would find himself unable to facilitate contact between Z and W with devastating consequences for their relationship'* with limited recourse to enforce any order in North Macedonia. When compared to the position if Z remained in England, there is less risk of Z losing his relationship with either X or W as if either stop complying with orders, there would be recourse back to the court. If X does leave without Z, Ms Odze does not consider it likely W will stop contact with X. Even if he did, X would have a remedy back to this court.

Discussion and decision

81. Dr Desautels report included an insightful observation that *'The couple appeared to have been ill prepared to cope with the challenges brought by X's relocation to England combined with the pressure brought by Z's birth'.* The reality is although W and X had known each other for a number of years, they had spent very limited time together. They had married but not lived together and then within a very short period of time,

had to manage X's move to London and the arrival of Z in circumstances where he was born abroad and spent two months before being able to come here to be cared for by both W and X.

82. There was no available foundation of family or wider support they could draw on when the inevitable difficulties arose and they were each ill equipped to manage the difficulties they encountered. As a consequence, difficulties that could have been resolved quickly escalated to the extent that Z has spent half of his life the subject of bitterly contested litigation. As Ms Odze observed, Z became lost in all that went on.

83. Despite their difficulties, as described in the August judgment, the more recent evidence is that Z has benefited from having regular, stable arrangements in place where he has seen both X and W. The evidence demonstrates that he has a secure attachment with both X and W, they are both able to care for him to a high standard.

84. In undertaking the holistic evaluation of the welfare options for Z, the court needs to carefully balance the evidence in favour and against each option. The evidence demonstrates that Z has benefitted from being able to have and enjoy a secure and settled relationship with both X and W. This is in the context where both X and W's positions are to support the role each has in relation to Z.

85. X states that an important consideration in the balancing exercise is the impact on him of remaining here in the circumstances he is now in with uncertain accommodation, very difficult financial circumstances, with limited ability to realise his earning capacity, lack of family and other support here and the detrimental impact on his mental health of remaining here. Whilst recognising the difficulties X has in remaining here, W proposes a package of financial support that would enable X to secure 1 bedroom accommodation near to the proposed nursery, with financial support for the nursery which will help support X realising his earning capacity. This together with securing the therapeutic support recommended by Dr Desautels, which with the disclosure of Dr Desautels report the support, can be accessed in the way he suggested in his oral evidence. Both X and W have recognised that an application will need to be issued for financial provision following the decree nisi.

86. W sets out that an important consideration is the risk if Z does move to North Macedonia with X of W's current close relationship with Z being severed. This is due to the findings made by the court in August that X had taken steps to undermine the relationship between W and Z. X continues to hold W responsible for the situation he is in and describes the impact on him of handovers. In those circumstances, W submits whilst X states he accepts W's parental role in Z's life the reality is very different, with the result that there is a significant risk that once in another jurisdiction, X will avoid taking steps to properly support Z's relationship with W. Such action needs to be seen in the context of the legal experts advice that there is a real risk that orders made here would not be effectively enforced, and this includes steps take under the Hague Convention. Ms Giz submits this risk is not justified on the evidence, X has complied with orders relating to Z seeing W to date, he recognises the important role W has in Z's life and the legal experts report only refers to the possibility of difficulties in recognition or enforcement under the Hague Convention. As a consequence, the risks of this happening are low compared to the risks of remaining here for X and the impact that would have on his ability to care for Z.

87. It is also important for the court to bear in mind the risk, if X's application is refused, that X may move to North Macedonia in any event and the impact that step would have on Z. Whilst such a change would have an impact on Z, there is no suggestion that W is not able to care for Z. W has encouraged Z's relationship with X and if there were any issues the matter could be restored back to this court.

88. Having considered the evidence as a whole and, in particular, the careful analysis undertaken by Ms Odze, which I accept, I have reached the conclusion that X's application for leave to remove Z from the jurisdiction should be refused. I have reached that conclusion for the following reasons:

(1) Z has established a secure attachment to both X and W, who he regards as his parents, which his welfare needs require should be maintained. Those important relationships are more likely to be maintained if Z remains in this jurisdiction where it is more likely X and W will remain. Even if X decides that he will move to North Macedonia in any event, which he has stated he may do, when considering the evidence as a whole that is the least worse option to meet Z's welfare needs as Z will remain here, W would be able to care for him, X would be able to spend time with him here which would be supported by W with effective recourse to the court here, if required. If Z went to North Macedonia with X it is more likely that his relationship with W would be seriously at risk of being undermined and/or severed which would be inimical to his welfare needs.

(2) Whilst on one view the description given by X of his life here and the impact on his mental health of remaining here was compelling and needs to be weighed in the balance very carefully, I considered it was revealing in his oral evidence that the issues surrounding the difficulties in accommodation were so important. In my judgment the uncertainty about that aspect of his life has, understandably, been one of the most difficult aspects for him to manage. W has made proposals about that. They were not made until the second day of this hearing, in my judgment they should have been made earlier. W's proposals to fund and support such accommodation until June 2022 up to the sum of £1,300 per month provide an important period of security and stability for X which will benefit Z.

(3) The uncertainty about financial support has, in my judgment, significantly contributed to the difficulties in X being able to contemplate remaining here. Having considered the evidence as a whole X with the financial support offered by W that will help secure accommodation coupled with the nursery support will enable X to realise the earning capacity which in my judgment he has due to his work history, his impressive academic record and the resourcefulness he has demonstrated regarding work in the past. There is no reason why, with the right financial and other support being available, he can't realise that earning capacity here, as he was planning to in North Macedonia or the other jurisdictions he has considered moving to.

(4) Whilst I have considered X's evidence about the support he would derive from his family if he went to North Macedonia, the fact of which is not significantly in issue, in my judgment he would continue to receive support from them if he remained here. I recognise it would be different but it would still be available. If the division of time was as Ms Odze suggests he would be able to travel to visit them or they could come here and he would be able to maintain regular contact with them, as he

does now. It is recognised this is not what X wants and the impact on him of his application being refused on him has to be weighed in the balance. I readily recognise that is going to be difficult for him but he has demonstrated resilience and commitment to meeting Z's welfare needs and readily recognises the psychological help he needs, both of which are positive factors. The psychological treatment X needs is more likely to be available here and Dr Desautels opinion is such treatment is likely to be successful, and would have a wider positive impact on X's mental health which would not only benefit X but also Z's longer term welfare needs.

(5) Dr Desautels evidence was clear about the treatment X needs and how it could be accessed here in a relatively short period of time. By comparison the evidence about what treatment options were available in North Macedonia were generalised references to it being available but without any granular detail. Dr Desautels evidence was clear that it needed to be the specialist help he identified in his report. Whilst he recognised the benefits X would derive from having the support of his family he was equally clear about the separate need for the specialist treatment to bring about any longer term change that Z's welfare needs required to take place.

(6) I agree with Ms Odze that there is a real risk if Z went to North Macedonia with X the relationship Z has with W would be at serious risk of being broken. This is based on a number of factors. The findings the court made in August**;** X's inconsistent approach about the parental order application; the barely disguised way X holds W responsible for the situation he finds himself in which is very likely to impact on his ability to effectively maintain Z's relationship with W; the evidence from Dr Desautels that X tends to avoid difficult situations; the deliberate steps X has taken to undermine his and Z's immigration position (such as making the application he did in May 2021, without informing the other parties that he had made that application when the parties had agreed an alternative course would be taken in relation to Z's immigration application).

(7) Although Ms Giz submitted the risks were not that high or were speculative, I accept the evidence from Mr Boshnjakovski that it is unlikely that any order made here would be recognised in North Macedonia for the reasons he gave, which includes the uncertainty regarding any steps which are taken under the 1980 Hague Convention. This is due to the legal position in North Macedonia regarding same sex parental relationships and the realities he refers to on the ground in that jurisdiction. Ms Giz also submitted the option of in some way making an order for relocation but suspend it or make it conditional until an application for recognition has been placed before and determined by the Macedonian court. I reject that submission as the continued lack of stability will be inimical to Z's welfare as the uncertainty, which could last for some time will remain a source of difficulty between X and W, which will have an impact on Z.

(8) Due to the difficulties in the relationship between X and W there is limited foundation, confidence or trust between them that orders would be complied with. With the support and assistance that would be available here through family therapy it is more likely that work could be undertaken to build that trust to enable them to co-parent in a way which would be in Z's best interests, as it would give a more secure foundation for them to exercise their parental responsibility in relation to Z and make decisions about his future welfare needs.

(9) It would give X and W the opportunity to build and establish relationships with their respective wider families and/or a wider support network which would benefit Z. I recognise that if the application is refused this is more difficult for X in relation to his family, however, there is no evidence they could not, in the first instance, travel here with visas.

(10) W has the more secure financial resources available to him in the short term to provide the support he has outlined until the necessary applications can be made within the divorce proceedings for more longer term provision to be made. I hope both parties will not lose sight of the benefits of being realistic about the financial resources available and seeking to reach longer term agreement about financial matters. There have already been significant sums spent on legal costs and every effort should be made to avoid further sums being spent in that way when they could be available to directly or indirectly benefit Z.

(11)I have weighed in the balance the impact of this decision on X and the consequences for Z's welfare needs. No option for Z is risk free. Ms Giz raises the issue that if the application is refused whether X would be able to have leave to remove Z to North Macedonia for the purposes of a holiday. For the reasons I have outlined the risks at present, in my judgment, remain the same in relation to Z's relationship with W even for a short term visit. The risks are not static and will evolve over time. If X and W are able to take steps to provide a more secure basis to their parental relationship with Z, with X having had the necessary psychological treatment and for them to each gain a better understanding of the wider family so there is a firmer foundation on which there could be confidence that the risks that I have assessed are present now if Z went to North Macedonia would be manageable. If they were, there are undoubted wider welfare benefits for Z to be able to visit and spend time with X's wider family.

89. The final issue relates to Z's immigration position. It is clearly essential for his welfare needs that issue is resolved. On the evidence the court has steps need to be put in place to manage the withdrawal of any current immigration application and it being replaced by an application for leave to remain outside the rules. On the information this court has from Z's welfare perspective remaining here with the opportunity to be able to maintain his secure relationships with X and W would undoubtedly meet his welfare needs, in both the short and long term.

90. Ms Gartland has raised the issue of a stay on the parental order application. Ms Giz and Mr Gration have not had the opportunity to respond to this. Subject to any representations they make there is some force to the approach suggested by Ms Gartland. In the unusual circumstances of this case it would leave open the prospect of being able to restore that application in the event of a change in circumstances, such as Y's position regarding consent. Both X and W are now united on the benefits for Z of a parental order being made. That is what was originally intended by them both and in the ever changing landscape in this case that option may, once again, be available for Z.

91. As regards the arrangements if both W and X are in this jurisdiction the proposals outlined by Ms Odze of Z sharing his time between W and X's care for 7 days with the handover on Fridays has the advantages she has outlined in her report and oral evidence and will meet Z's welfare needs.

92. The court hopes that having reached a decision in relation to these applications, the parties can now constructively engage, with the assistance of their solicitors, to reach agreement on the terms of an order that reflects the court's decision.