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Case No: LS21P01690/LS22P00468

IN THE HIGH COURT OF JUSTICE FAMILY DIVISION
SITTING AT THE LEEDS FAMILY COURT

Date: 02/12/2022

BEFORE

MR CHRISTOPHER HAMES KC
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

R	**Applicant**
- and -	
T	**Respondent**

- -

Mr Will Tyler KC and Ms Jennifer Lee instructed by Expatriate Law for the applicant
Ms Jacqueline Renton instructed by Kingsley Napley for the respondent

Hearing dates 14-18 November 2022:

- -

Approved Judgment

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. No person named in this version of the judgment may be identified by name or location and the parties' anonymity 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.

This judgment was handed down at a remote hearing on 1 December 2022 by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 4 July 2022.

Introduction

1. I have been conducting a hearing to consider preliminary issues of jurisdiction relating to applications made by the applicant, R, in respect of a sibling group: A, born before 6 April 2009 (the relevant date under fertility legislation) and a number of other children, all born after that date.

2. A was conceived with IUI (Intrauterine insemination) and the other children by IVF (Invitro fertilisation). They share the same genetic father who was a sperm donor. None of the children are habitually resident in England and Wales but live in a country in the UAE, although A attends boarding school in England.

3. The applicant contends that she is the non-biological mother of all the children. She was in a civil partnership with the respondent from November 2006 until June 2016, so throughout the period of the children's conception and birth. She has parental responsibility for A. She is not herself registered on the children's birth certificates but her surname appears among their registered names. For several years following the breakdown of her civil partnership with the respondent she spent a lot of time with the children in England. All contact has now ceased. She has made applications under the Children Act and under the Inherent Jurisdiction with the underlying aim of obtaining orders for the children to spend time with her.

4. The respondent, T, is the children's genetic and gestational mother. She lives in a country in the UAE with her children.

5. The fundamental underlying issues of this dispute are about the past nature of the applicant's relationship with the children and, consequently what relationship the children should now have with her. Both parties claim the other is attempting to re-write history. The applicant claims she is the legal and psychological mother and parent to the children. The respondent denies that

the applicant was a parent or that she played a parental role in their lives; she likens the applicant to a close family friend but accepts she was a good carer of the children. In these circumstances I have had extensive oral evidence from the parties about their relationship and the parenting of the children.

6. On 13 July 2022, Mr Damian Garrido QC, sitting as a Deputy High Court Judge, directed the listing of this hearing to consider, with the benefit of oral evidence and substantial legal submissions, the following issues:

   (i) Is the applicant a parent to the children, or any of them?

   (ii) Does this court have jurisdiction to make child arrangements orders and/or other orders regarding the children's welfare?

   (iii) Should any such jurisdiction be exercised?

7. Because of the complexity of the legal issues this case has raised, I have reserved judgment to consider and reflect on all of the evidence and submissions I have received. I have read all of the material in the court bundles, counsel's skeleton arguments and supplemental closing submissions. I have listened to the evidence of the parties, their witnesses and oral submissions from the parties' experienced counsel. I have carefully considered all of the authorities to which counsel have referred.

8. I am grateful to all of the lawyers involved in this case particularly because they have all acted pro bono at the hearing before me, including the vital preparatory work. This gratitude extends not only to Mr Tyler KC, Ms Lee and Ms Renton but also to the respective teams of solicitors at Expatriate Law and Kingsley Napley. I have no doubt that both parties can consider themselves extremely fortunate to receive such sterling service.

Summary of Background

9. The applicant was born in the US and is in her early 40s. She is habitually resident in England and Wales. In 2009 she became a British citizen and went on to join a professional sports team for GB for the London 2012 Olympics.

10. The respondent was born in the UK and is in her late 30s. She is now habitually resident in the UAE.

11. The parties met in 2005, it appears through playing a team sport. They soon formed an intimate relationship and started living together. They entered into a civil partnership on 23rd November 2006 at the Register Office in the UK

12. All the children were born in England. They have British nationality. The respondent received fertility treatment relating to all the children at Clinic F, in the US. All embryos were created with an anonymous sperm donor. There is a factual dispute as to the extent of the applicant's role in this process and consequently whether or not she consented to the fertility treatment.

13. In spring 2009, just after A had his first birthday, the parties entered into a parental responsibility agreement registered at the Central London Family Court.

14. In May 2009, the respondent states that the relationship broke down because she discovered the applicant was having an affair, although she accepts there were periods when their intimacy resumed and when the applicant lived in her home. She explains that the applicant's presence in her home was mutually beneficial to both of them. In 2012 the respondent met her current wife, H.

15. The applicant, although not denying the affair, states that their relationship only finally broke down in 2014 shortly before the respondent moved with the children to a country in the UAE. She says that up to then, she, the respondent and the children all lived together as a family.

16. The applicant was present at the births of A and some of the younger children. Unfortunately, she was not able to attend the births of the two youngest because she was in the USA visiting her dying father, who had Stage 4 cancer. He died days after the youngest children's birth.

17. The applicant is not named as a parent on any of the children's birth certificates. A was registered with a hyphenated surname "T-R" (the respondent's surname followed by a hyphen and then the applicant's surname) and the younger children have been registered with a middle name "R" (the applicant's

surname) shortly before their surname "T" (the respondent's surname).

18. On 2 November 2014, Witness 6 baptised all the children. The applicant is recorded on the baptism certificates as 'Guardian' while the respondent is called the mother. I have seen a video of what was clearly a happy family occasion.

19. In December 2014, the respondent relocated to a country in the UAE with the older children. The younger children remained in the care of the applicant and a nanny, Witness 5, in England for approximately four months, before eventually joining their siblings in the UAE in April 2015. The applicant travelled out with the younger children but returned to England shortly afterwards. The respondent states she had already met and become committed to H and denies that she ever intended or agreed to move with the applicant to the UAE.

20. Prior to her departure for the UAE in December 2014, the respondent agreed in principle to make the children available to spend time with the applicant. The agreed arrangement was for the children to stay with the applicant in England for 6-7 weeks each summer, and in in the UAE, for 1-2 weeks over the Christmas and New Year period every year as a minimum.

21. While the parties do not agree the extent of the time the children spent with the applicant, it is agreed that the children spent over 45 days with the applicant in England during the summers of 2016, 2017 and 2018 and 26 days in the summer of 2019. It is also agreed that the children also spent time with the applicant in in the UAE at other times from 2016 to 2019 when, on occasion, the respondent was travelling abroad on business or for pleasure.

22. On 17 June 2016, the parties' civil partnership was dissolved. On 6 February 2017, a final financial remedy consent order was made by the Family Court sitting in Southampton. It bears a signature in the name of the applicant, although she has recently denied that she signed the consent order. That order recorded that the parties wished to give effect to an agreement on child support pursuant to the Child Support Act 1991, and directed the applicant to pay child

periodical payments of £100 per month per child to the respondent for the benefit of *"the children of the family"*. Each of the children are then named, although without any reference to "R" in any part of their respective names. The formal dissolution process appears to have been amicable.

23. On 3 January 2018, the respondent married her same-sex partner, H. On 8 August 2021, the applicant married her same-sex partner, J.

24. On 7 June 2019, the respondent and H made and registered parental responsibility agreements for all the children, although the applicant is not mentioned as a parent with parental responsibility on the agreement relating to A.

25. By 2019/2020, the children's time with the applicant had greatly reduced. It is likely that the disruption caused by the global pandemic played some part. The applicant last saw the younger children for a day in December 2021 when she flew to the UAE. She last saw A in December 2020.

26. The oldest child, A, was enrolled and commenced boarding at a boarding school in the UK in September 2021. During A's school holidays, A visits the respondent in the UAE where the respondent, H and the children are living but also spends the exeats and holidays with the respondent's family and family friends in England. A was present in England when the applicant made her applications to the court. The younger children remain living with the respondent and her same-sex partner in the UAE where they attend school.

The Proceedings

27. The applicant issued a C100 application on 15 March 2022. The application stated that "the applicant's status as a same sex parent prevented her from applying to the court in the UAE and the English courts have jurisdiction by virtue of Sections 1(1)(a), 2(1)(b)(i) and 2A of the Family Law Act 1986, as interpreted by s42(2)". This is a reference to the Human Fertilisation and Embryology Act 2008. On issue, the application was allocated to Mr Garrido QC sitting as a deputy High Court Judge and directions were given.

28. On 30 March 2022 the applicant issued a C66 application seeking permission to invoke the court's parens patriae jurisdiction under the inherent jurisdiction. She contended that if the English court declined to accept jurisdiction under the Family Law Act 1986, she would have no way of accessing or having determined what she claimed were her parental rights because of the stance taken by the UAE. Not only did the state not recognise parental rights relating to same-sex parents but also criminalised same-sex relationships. She stated that the English court should not allow such discrimination against same-sex parents and should therefore intervene.

29. At the first hearing before Mr Garrido QC on 4 May 2022 application was made by a legal team instructed by A for disclosure to them of the case papers. Mr Garrido adjourned that application until the conclusion of the hearing before me, ruling that the application was premature. He urged the parties to explore alternative dispute resolution to address the substantive welfare issues and to ensure the children can have a positive relationship with each party. He also urged them to take a pragmatic approach to agree the position as to the laws of United Arab Emirates (of which the country where the children and respondent live is one) concerning same-sex relationships to avoid the need for an expert. He listed a preliminary issues hearing for 3-days in July.

30. On 16 May 2022, the applicant applied for a legal funding costs order which was determined on 27 June 2022 by Mr Garrido QC making an order that the respondent pay £20,000 to the applicant on the applicant's undertaking to repay the sum should the court at the end of the proceedings consider she ought to do so.

31. At the first listed final hearing on 13 July 2022, Mr Garrido QC considered that more oral evidence was required than could be accommodated at that hearing and that further documentary evidence was available. Furthermore, the parental agreements made with H had only just been disclosed by the respondent and it was necessary for her position to be investigated. He therefore adjourned the jurisdictional issues to me to determine at this hearing.

32. A further application was made for a legal funding costs order on 13 July 2022 which was determined on 18 July 2022 by Mr Garrido QC making an injunction forbidding the respondent from making any payment for her legal costs until she contemporaneously also paid an equivalent amount to the applicant's solicitors. She has not made any such payments and so both parties' legal teams have acted pro bono.

33. On 20 July 2022, the applicant issued a Form A to apply for financial provision following her civil partnership with the respondent and an application to set aside and/or to vary the consent order made on 10 May 2016 for fraud. She claimed she had not signed the consent order. On 20 October 2022, Recorder Sterling discharged the obligation of the applicant to pay child maintenance, discharged all accrued arrears and dismissed the applicant's Form A. He made a modest costs order in favour of the respondent of £1,417.

34. The respondent applied for permission to appeal the funding decisions of Mr Garrido QC but by order dated 7 October 2022, her application was refused by Lord Justice Baker.

35. I conducted a pre-trial review on 7 October 2022. I recorded the parties' agreement to three propositions as to the legal status of same-sex relationships and parenthood under the laws of the relevant country in the UAE as follows:

'a. Same sex relationships are criminalised by the laws of the UAE;

b. a non-biological, same-sex parent of a child is not recognised as a parent by the laws of the UAE;

c. a non-biological, same-sex parent of a child has no locus to apply to the relevant country in the UAE's *personal status court in relation to contact with the child or other aspects of parental responsibility.'*

34. I also permitted the parties to adduce further evidence from third parties and nursery records. The applicant sought to adduce statements from 3 further witnesses and the respondent from 2.

36. In the week before the hearing the applicant issued a C2 application seeking permission to rely on a further witness statement from herself and from 2 further witnesses. As the application was opposed I indicated I would consider the application on the first day of the hearing and that the material should not be placed in the main bundle.

37. On the first day of the hearing, both parties wished to rely on further material in the supplemental bundle. It was agreed that certain medical records should be admitted together with a further statement of the applicant. The applicant wished to rely on 2 short statements from further witnesses. The respondent wished to rely on an exchange of emails with the fertility clinic (Clinic F in the US). There was no dispute that all this material was relevant but points were taken about the fairness of their late admissions. I allowed all of the material in the supplemental bundle to be admitted, observing that the witness statements had all been served some 2 weeks before the hearing and that there would be no prejudice to the respondent as the statements essentially contained similar material to the statements from other witnesses already served. It did not appear to risk the hearing not concluding on time, even if the makers of those statements were called to give oral evidence to me. I noted the applicant's critical comments about the email exchange, but those comments went to the weight to be attached to the documents in all the circumstances which would include how and when they were obtained.

38. I also formally transferred the proceedings to the High Court as it appeared that there was some ambiguity as to whether this has previously occurred. It is common ground that the application under the inherent jurisdiction should have been issued and considered by the High Court. My order was formally approved by the Designated Family Judge and the Family Division Liaison Judge.

39. Over the course of the hearing, I heard oral evidence from the applicant and the respondent; 5 witnesses called by the applicant: Witness 1, Witness 2, Witness 3, Witness 4 and Witness 5; and 2 witnesses called by the respondent, Witness 6 and Witness 7. I also

permitted an application to re-call the respondent to explain various anomalies in the disclosure of the records from the fertility clinic in the USA.

Summary of the parties' cases

40. The applicant contends that she is the mother and parent of all the children.

41. She contends that by virtue of the parental responsibility agreement she is the parent of A.

42. She contends under section 42 of the Human Fertilisation and Embryology Act 2008 ("the HFEA") she was a civil partner of the respondent at the relevant time and that the respondent is not able to show that she did not consent to the placing of the embryo or sperm and eggs for each of the younger children.

43. Further she contends that she was these children's psychological parent.

44. If she is found not to be a parent of the children she contends that all of the children, although not her natural children, were treated by both she and the respondent as a child of the family under s42(4A) of the FLA.

45. By her application under the Children Act 1989 she seeks a 'Part 1' order under section 1(1)(a) under the Family Law Act 1986 ("the FLA"). She contends that the English court has jurisdiction to make a section 1(1)(a) order pursuant to sections 2(1)(b)(i) and 2A(1)(a) of the FLA on the basis that there are continuing proceedings for the dissolution of the parties' civil partnership and her applications before me are made "in connection with" those civil partnership proceedings. She invites me to give this statutory provision a broad construction, 'reading it down' to pay proper respect to the broad purpose of the FLA, to the children's welfare and their rights pursuant to section 3 of the Human Rights Act and Article 8 of the European Convention on Human Rights and the absence of any forum available to the applicant.

46. In respect of A only, she contends that the court has jurisdiction under sections 2(1)(b)(ii) and 3 of the FLA because A was present in England and Wales when she issued her applications in March 2022.

47. If these jurisdictional arguments fail, she relies on the children's nationality to invoke the parens patriae jurisdiction because she argues that the situation should be characterised as *forum necessitatis* because there is no other available forum in the world. However, she accepts that she is not entitled under the FLA to seek an order under the inherent jurisdiction for an order which gives her care or provides for her to have contact with the children.

48. The respondent seeks the dismissal of each of the applications for want of jurisdiction. She denies as a matter of fact that the applicant consented to the fertility procedure: she says she barely had any involvement in the fertility process for each of the children. She contends that the applicant was a good family friend to her and the children, and from time to time were intimate, but no more.

49. She refutes each of the jurisdictional bases relied on by the applicant. She invites me to find that the Hague Convention 1996 restricts the jurisdiction of the English court under the FLA to situations where the children are habitually resident in England Wales and that therefore the 'matrimonial jurisdiction' under the FLA is no longer available. She denies that the children were a 'child of the family' under s42(4A) of the FLA 1986. She suggests that 'child of the family' should be construed alongside s42 of the HFEA to restrict 'child of the family' of the civil partners unless the non-birth mother is also a parent. She contends that the applicant's Children Act application is not issued "in or in connection" with the civil partnership proceedings within s2A of the FLA 1986 and that I should not 'read down' the statutory provision.

50. She asserts that the only jurisdiction which the court may have based on a child's presence, even in respect of a section 1(1)(a) order, is only to be exercised in line with Articles 11 and 12 of the Hague Convention 1996. They do not apply because the UAE is not a signatory to the Hague Convention. Therefore, she contends that there is no presence based jurisdiction available to be exercised in respect of A. In any event she contends by way of analogy Article 11 is a secondary jurisdiction to be used in urgent situations for the protection of a child.

51. She asserts that the parens patriae jurisdiction is not applicable because the 1996 Hague Convention does not preserve any residual domestic jurisdiction (unlike Art 14 of the BIIA).

52. She contends that the parens patriae jurisdiction should not be invoked in a case about custody or contact. She denies that there is anything to protect the children against.

Legal Framework

53. It is necessary to set out the core statutory provisions engaged by the parties' arguments in this case. I will also set out in this section of my judgment the key authorities which have assisted me in the construction and application of those provisions.

54. The HFEA 2008 came into force for children born on or after 6 April 2009. It does not therefore apply to A but only to the younger children. The key provision is section 42 which reads:

> *Woman in civil partnership or marriage to a woman at time of treatment*
>
> *(1) If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership with another woman or a marriage with another woman, then subject to section 45(2) to (4), the other party to the civil partnership or marriage is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).*
>
> *(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1).*

55. It is clear from section 33 of the 2008 Act that only the respondent can be legally the children's 'mother'.

56. Section 42 contains on its plain reading a rebuttable presumption of consent to treatment for women in the position of the applicant. It was considered by Sir James Munby P in *Re G (Human Fertilisation and Embryology Act 2008) [2016] EWHC 729 (Fam)*:

> *'[26] For present purposes I am content to adopt, with some small adjustments, the submission of Miss Grey as to what these cases demonstrate:*
>
> *(i) The intention of the 2008 Act and its predecessor the 1990 Act is to provide certainty, which is why there is a presumption. (ii) Section 42 of the 2008 Act creates a rebuttable presumption that consent exists in cases of marriage or civil partnership. The presumption can be rebutted by evidence which shows that consent has not been given. (iii) Once evidence to counter the presumption has been led, the presumption cannot be used as a "makeweight". So even weak evidence against consent having been given must prevail if there is no other evidence to counterbalance it. (iv) A general "awareness" that treatment is taking place, or acquiescence in that fact, is not sufficient. What is needed is "consent", and this involves a deliberate exercise of choice. I add, as Miss Broadfoot and Miss Bazley and Miss Segal correctly submitted, that whether a person "did not consent" is ultimately a question of fact.'*

57. The FLA sets out the statutory framework for the jurisdiction of the courts of England and Wales. It is not an easy statute to construe. The provisions relevant to this case are as follows:

> *Part I Child Custody*
>
> *Chapter I – Preliminary*
>
> *1 Orders to which Part I applies.*
>
> *(1) Subject to the following provisions of this section, in this Part "Part I order" means —*

(a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order;

[…]

(d) an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children —

(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but
(ii) excluding an order varying or revoking such an order;

[….].

Chapter II – Jurisdiction of Courts in England and Wales

2. Jurisdiction: general.

(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless —

(a) it has jurisdiction under the Hague Convention, or
(b) the Hague Convention does not apply but —

(i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or
(ii) the condition in section 3 of this Act is satisfied.

….

(3) A court in England and Wales shall not make a section 1(1)(d) order unless —

(a) it has jurisdiction under the Hague Convention, or

(b) the Hague Convention does not apply but —

(i) the condition in section 3 of this Act is satisfied, or

(ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.

2A Jurisdiction in or in connection with matrimonial proceedings or civil partnership proceedings.

(1) The condition referred to in section 2(1) of this Act is that the proceedings are proceedings in respect of the marriage or civil partnership of the parents of the child concerned and —

(a) the proceedings —

(i) are proceedings for divorce or nullity of marriage, or dissolution or annulment of a civil partnership, and

(ii) are continuing;

...

3 Habitual residence or presence of child.

(1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned —

(a) is habitually resident in England and Wales, or

(b) is present in England and Wales and is not habitually resident in any part of the United Kingdom,

.....

42 General interpretation of Part

I. […]

(2A) For the purposes of this Part proceedings in England and Wales or in Northern Ireland for dissolution, annulment or legal separation in respect of the civil partnership of the parents of the child shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of eighteen (whether or not a dissolution, nullity or separation order has been made and whether or not, in the case of a dissolution or nullity order, that order has been made final).

(4A) Any reference in this Part to proceedings in respect of the marriage or civil partnership of the parents of a child shall, in relation to a child who, although not a child of both parties to the marriage or civil partnership, is a child of the family of those parties, be construed as a reference to proceedings in respect of that marriage or civil partnership; and for this purpose "child of the family" —

(a) if the proceedings are in England and Wales, means any child who has been treated by both parties as a child of their family

[…];

58. The reference to 'relevant date' is defined by section 7(c) of the Act which for present purposes means the date of the application.

59. The phrase 'in connection with' in section 2(1)(b)(1) of the Act ("the matrimonial jurisdiction"), has been considered in a number of authorities; and has not always been easy to construe and apply.

60. Moylan LJ considered the question in obiter comments in *Lachaux v Lachaux* [2019] 2 FLR 712 at [187]:

'The courts should take a broad view as to whether the question arises in or in connection with the other proceedings. In broad terms all that is required is that the parties to those proceedings are 'the parents of the child concerned', that the proceedings are taking place or did take place in England and Wales, and that one or other or both of the parents seek a s.1(1)(a) order because their marriage or civil partnership is being or has been dissolved. The reason the court can take a broad view is because this provision only applies if neither BIIA nor the 1996 Hague Convention apply and because s 2A(4) balances the broad scope of s 2(1)(b)(i) by giving the court the power not to exercise this jurisdiction.'

61. Poole J considered *Lachaux* and analysed other recent first instance authorities in his authoritative judgment in *Re A (Jurisdiction: Family Law Act 1986) [2021] EWFC 105* where the applicant father was seeking a section 8 order relying on the matrimonial jurisdiction. Despite 4 years having passed since decree absolute, the father argued that his application 'was in connection with' those matrimonial proceedings. Poole J swiftly rejected the mother's contention that a "close temporal link" was a necessary condition for the exercise of the matrimonial jurisdiction as being too narrow and restricting of the jurisdiction. He considered there were three theoretical approaches available:

20. Hence, discarding the notion that a close temporal link is a necessary condition, there appear to me to be three different approaches that might be taken to determining whether the issues in the application arise in connection with the divorce proceedings:

i) *There must be a clear causal link between the issues raised and the divorce proceedings.*

ii) *There needs to be some connection between the issues raised in the application and the divorce proceedings that goes beyond the mere fact that the divorce proceeded in this jurisdiction. The connection may exist due to one or more factors such as proximity in time, an overlap in the relevant facts or*

subject-matter, a causal link, or some other matter. However, there is no necessary condition and the sufficiency of any factors to establish a connection will be a question of fact and degree.

iii) *All that is required is that there are issues of child arrangements raised by the application and the courts of England and Wales have previously assumed jurisdiction in divorce proceedings between the parties who are parents of the child or children concerned.*

For the reasons that follow I adopt the second of these three approaches.

21. On the face of it, "in connection with" is a different requirement from "caused by": it does not connote a causal link between the divorce proceedings and the later application. Nor do I read Moylan LJ's use of the word "because" as importing a requirement of a causal link. To do so would be contrary to the "broad view" approach he advocated. For the reasons given by Bodey J in J v U, it will almost always be difficult to find a causal link between divorce proceedings and a later s.8 application – they are applications for different forms of relief. In my judgment, Moylan LJ was simply highlighting that there must be some form of connection: the term "because of" merely highlights the need for there to be a reason for the application that is connected with the matrimonial proceedings. The object of the statutory provisions, enacting the recommendations of the report of the Law Commission and the Scottish Law Commission, was to preserve the jurisdiction of the courts to make "custody orders" (welfare orders) in proceedings for divorce, including until the child is 18, and even if the parents or child become habitually resident outside the jurisdiction. As the report stated,

"Our main reason for reaching this conclusion is the impossibility of devising any general rule to the contrary effect which would not sometimes operate against the interests of the child's welfare or against those of the parents. If, notwithstanding the fact that there are or were divorce proceedings, those divorce proceedings have no connection at all with the

question raised by the s.8 application, then s.2(1)(b)(i) is not satisfied. The mere fact that jurisdiction as to welfare issues is preserved in proceedings for divorce, and that welfare issues concerning a child are the basis for the s.8 application, does not mean that the reason for the s.8 application can be found in the divorce. In particular, if, during a period of years since a decree absolute, child arrangements have been settled by consent or court order, then the connection between the divorce proceedings and the s.8 application is likely to have been broken. In such circumstances, the reason for any welfare application is not connected to the matrimonial proceedings: the s.8 application has not been made "because of" those proceedings."

22. The requirement for a clear causal link is too stringent and not consistent with the broad view advocated by Moylan LJ in Lachaux. On the other hand, the words "in connection with" do require something more than the bare fact that there are or have been divorce proceedings within the jurisdiction involving the parents of the child concerned. There must be one or more factors that establish a sufficient link between the divorce and the s.8 application, be they temporal, factual, causal, or something else. The reason for the application should be connected to the matrimonial proceedings. The implications of there being no requirement for a link between the welfare application and the matrimonial proceedings was discussed by Mostyn J at first instance in Lachaux, by Bodey J in J v U, and by Parker J in AP v TD [2010] EWHC 2040 (Fam)."

62. On the facts, Poole J found, at [25] that

"the father's application did not arise in or connection with the matrimonial proceedings. There is no factual, temporal, causal or other connection. The application has not been made because the marriage has been dissolved. It does not offend against the principle that the power to make welfare orders within divorce proceedings should be preserved, to find that there is no connection between the divorce proceedings and the application in this case."

63. It is common ground that section 2A(4) of the 1986 Act (referred to by Moylan LJ in *Lachaux*) is not applicable on the facts of this case. That section gives the court a power not to exercise its jurisdiction because, broadly, it would be more appropriate for welfare orders be made in another jurisdiction. There is no alternative jurisdiction available in this case.

64. The parens patriae part of inherent jurisdiction is potentially available in this case because all the children are British nationals. The inherent jurisdiction, by its very nature, has not been statutorily defined and may potentially be used in a wide range of circumstances. However, its exercise is restricted by sections 1(1)(d), 2(3) and 3(1) of the 1986 Act, which prevent the court exercising an inherent jurisdiction to make orders relating to the care of and contact with children not habitually resident or present in England and Wales. That provision does prevent the court from making an order for the return of British children to this jurisdiction – see *A v A [2014] AC 1* at [28] and *Re B [2016] AC 606* at paragraphs [52] (per Lord Wilson) and [58] (per Baroness Hale).

65. Baroness Hale in *Re B* in what were strictly obiter comments, but with which the majority approved, observed that:

"*there is strong reason to approach the exercise of the [parens patriae] jurisdiction with great caution because the very nature of the subject involves international problems for which there is an international legal framework to which this country has subscribed.*" at [60].

66. Nonetheless she concluded at [62]

"*The very object of the international framework is to protect the best interests of the child ... Considerations of comity cannot be divorced from that objective. If the court were to consider that the exercise of its inherent jurisdiction were necessary to avoid [the child's] welfare being beyond all judicial oversight ... we do not see that its exercise would conflict with the principle of comity or should be trammelled by some a priori classification of cases according to their extremity.*"

67. Lord Sumption, in his minority judgment, emphasised 3 points. First, that the exercise of the jurisdiction was discretionary. Second, that it should not be exercised in a manner which cuts across the statutory scheme in the FLA. Third, there needs to be a danger or other extreme facts justifying its exercise; he did not regard as peril the unwillingness of a state to recognise the status of a same-sex partner of the mother.

68. In *Re M (A Child) [2020] EWCA Civ 922* Moylan LJ carefully scrutinised all of the obiter comments in *Re B* when allowing an appeal against the decision of the judge to exercise the parens patriae jurisdiction to order a 13 year old British citizen, who had lived the past 12 years of her life in Algeria, to be returned to England for "*an assessment to be made in a place of safety as to her best interests and living arrangements*" (paragraph 1).

69. At paragraph 94 he considered that when considered with the obiter comments of Lord Sumption, the obiter comments of Baroness Hale were not intended as a test or guide but as reasons why the court should take a cautious approach to the exercise of the parens patriae jurisdiction. At paragraph 105 he concluded that

"*there must be circumstances which are sufficiently compelling to <u>require</u>* or *make it necessary that the court could should exercise its protective jurisdiction. If the circumstances are sufficiently compelling then the exercise of the jurisdiction can be justified as being required or necessary, using those words as having, broadly, the meanings referred to above*" (emphasis in original).

70. He then at paragraph 106 referred to one final factor which was the restriction in the 1986 Act on the exercise of the inherent jurisdiction being used to give care of a child to a person or provide for contact.

71. He summarised his conclusions at paragraph 108, which in my judgment summarises the test I need to apply in this case:

"*In summary, therefore, the court demonstrates that it has been circumspect (to repeat, as a substantive and not merely a procedural question) by*

exercising the jurisdiction only when the circumstances are sufficiently compelling. Otherwise … I do not see, in practice, how the need for great circumspection would operate."

The oral evidence

72. The first witness I heard was the applicant. She appeared to me have a relaxed and laid back personality, but is clearly articulate and intelligent. She spoke well and her answers were clear and generally supportive of her case. However, she was keen to impress on me that she considered herself the children's mother and that they were her sons. Understandably she wanted to accentuate her involvement with the children's conception and birth but she had to candidly admit that a lot of the available documentation did not assist her case. In places her answers were significantly lacking in detail. It became clear to me that she was not the organiser and even the decision- maker in the children's lives. She was not able to provide a lot of detail about either the fertility treatment the respondent undertook or the management of the children's lives. This ranged from day to day organisation to major decisions about whether they would live or be educated. I appreciate that often she was being asked questions about events some 8 years or even 14 years ago, but I was left with the impression that she was not as heavily involved as she would have me believe. I suspect that was because she is now desperate to resume a relationship with the children and understandably wanted me to know how important her role in their conception and lives had been. I accept in part the criticism made of her by Ms Renton that when she explained matters which didn't quite fit with her narrative, she tended to fall back on reliance on latent homophobia and racism which did not really ring true. That said, I do not think that in cross examination she knowingly told me anything that she knew was false.

73. She told me that she and the respondent had made a joint decision as a couple to have children. She very much wanted children and was herself part of a large sibling group. She denied that she had played no role in the conception process or in the selection of a suitable sperm donor. She was able to give vivid evidence about her presence of the birth of the elder children and how happy

she had felt. I accept she would have wanted to be at the birth of some of the younger children had her father's terminal illness not intervened. I have no doubt that she loves the children and provided them with good quality care.

74. The respondent gave evidence next. She too was clearly intelligent and articulate but appeared to be more driven than the applicant. I think that she was the more powerful personality of the couple and was the one likely to make the major decisions both about their relationship and the children's upbringing. Her evidence to me was generally more precise and factually detailed than that of the applicant's. However, mirroring the applicant, she was keen to downplay and understate the involvement of the applicant in the children's lives in a way which did not always ring true. I suspect she is very keen to ensure that the applicant is not able now to interfere with her own care of the children and the management of their lives. To adopt the phrase used by Mr Tyler, I think she did at times indulge in 'case-building' in the way she pushed her own narrative to enlist the support of others, including Witness 6 who gave evidence to me and the lawyer presently attached to the fertility clinic. However, I do not accept Mr Tyler's submission that such 'case-building' damaged, still less destroyed, her own credibility.

75. There is one aspect of Mr Tyler's attack on her credibility which I will deal with here. In March 2022 the respondent sought the release of her file from the fertility clinic. I have read several email exchanges between her and the clinic's current staff, including the lawyer, Ms K. She was not the lawyer at the time of the respondent's treatment. When fertility records were first disclosed they were duly exhibited to the respondent's statement dated 18 May 2022, helpfully prefaced by an index prepared by her own solicitors. The records disclosed barely mentioned the applicant, save for a couple of references to her as a partner of the respondent. The documents strongly supported the respondent's case that she had been a single parent seeking fertility treatment to assist in the conception of children.

76. The applicant was not satisfied that complete disclosure had been made so the parties agreed to make a joint approach to disclose their complete file to both

parties: this agreement was duly recorded as a recital to the order of Mr Garrido QC dated 13 July 2022.

77. When that file was disclosed to both parties, it transpired that 2 documents containing a reference to the applicant as the respondent's partner had not been included in the first tranche of records. Furthermore, a record of a phone conversation in 2012 after the birth of the younger children which had been disclosed in an earlier tranche, now contained at the end of the first paragraph a completely new sentence stating that the respondent's partner is well and continues to be a professional sports player. This was over 2 years after the respondent says her relationship with the applicant had ended.

78. When these discrepancies were first put to the respondent she was flabbergasted and at a loss to come up with an explanation. At first she explained that she had simply printed off the documents in order to read them more easily. She had then scanned them to her solicitor who had duly provided an index and exhibited them to her witness statement.

79. On the next morning of the final hearing she filed, with the consent of the applicant and with my permission, another statement attempting to explain what had happened. When she had received them in March 2022, she explained that she asked her wife to convert the PDF file received into a Word document. When this didn't work she then asked her wife to select any reference or page on the documents containing the applicant's name. The respondent then reviewed these passages and believes she must have pressed the wrong button on her keyboard which deleted the selected parts of the documents. When she was recalled and further cross-examined, she denied that she had deliberately tried to doctor the documents or mislead the court. She explained that she was relieved that there were no documents showing that the applicant had consented to the treatment. While she understood that this case also concerned the question of the parenting of the children, she insisted to me that she thought the major issue was one of consent.

80. I have considered this particular issue in some detail because it is the high water line of Mr Tyler's attack on the respondent's credibility.

81. I do not know whether pressing the wrong button on a keyboard would have deleted the phrase or even page but I accept Ms Renton's description of it being, at the very least, a plausible explanation. The respondent told me she was a technophobe which is why she asked her wife to convert the document into a Word document in the first place. I observed the respondent having some difficulty navigating the laptop which contained the electronic witness bundle. I have described that she was flabbergasted, I do not think her response was that of a guilty person having been caught out. When I review the totality of her oral evidence, I do not think she was lying to me about what had happened with the fertility records and I do not accept that her credibility is so badly damaged that I cannot safely accept anything she says as true or that I should mechanically always prefer the applicant's evidence. I accept her evidence that when she first reviewed the records and pressed the wrong button, she was relieved that there was no document signed by the applicant giving her consent to any of the fertility treatments.

82. In my view, I must carefully scrutinise every piece of evidence given by the parties to assess its truthfulness, accuracy and reliability, particularly as often the events or conversations being described occurred some time ago. I must then consider the totality of the evidence before reaching my conclusions on the main factual issues in this case.

83. I next heard from the applicant's witnesses. Witness 1, Witness 2, Witness 3 and Witness 4 all played the team sport referred to above, partly with the respondent but mainly the applicant. I can take them all together. They were called to support the applicant's case that she was and acted as if she was a parent to the children. I can accept their evidence in so far as it goes, bearing in mind they are now friends of the applicant and gave evidence to support her. They all described the parties as normal civil partners whose outward appearance was that of a normal couple with children. However, I accept that they made assumptions about the couple which, when scrutinised, were based on impressions and what they understood to be the nature of their relationship and the parenting of the children. They barely have any relationship any more with the respondent but, in varying degrees are friends, even close friends now with the applicant. Strikingly they never recall any child, or either party,

refer to or call the applicant 'Mum' and, with one exception, don't recall the use of the term 'wife.'

84. Much the same points can be made about the last witness called by the applicant. Witness 5 initially met the parties when looking after the older children at nursery. She then looked after all of them in July 2014 before travelling out to the relevant country in the UAE to work for the respondent for a couple of years. She told me that everyone assumed the parties were 2 mothers. She couldn't remember whether she had assisted the children in sending the applicant Mother's Day cards in either 2016 or 2017. She was not able to explain why the nursery records have made no mention of the applicant. While I think generally she was trying to assist the court, I must be cautious about the accuracy of all her recollections from many years earlier. She has remained friendly with the applicant.

85. The respondent then called Witness 6 who conducted the children's christening on 2 November 2014. I have no doubt that he was telling me the truth as he recollected it; but I also agree with Mr Tyler's point that his written evidence very closely resembles the language used by the respondent in her emails to him when she was attempting to solicit his assistance as a witness in this dispute. This cannot be mere coincidence and must have informed his recollection. I am therefore not entirely convinced that his recollection, although honest, is reliable. In particular, he very honestly accepted that his church did not accept same-sex relationships and, I infer, same-sex parenting.

86. The last witness I heard from was Witness 7 who was called by the respondent. She was a nursery teacher for the older children; later she worked for the respondent's parents in a different role before becoming a child carer for the respondent's brother and children. She does not remember the term 'mum' used in respect of the applicant or 'wife.' As with the applicant's witnesses, she was recalling impressions and conversations from 10 years ago and, while generally honest and straightforward, she had been asked by the respondent to give evidence for her.

Analysis of the issues to be determined

87. The respondent submits that I should not conflate the issue with consent under section 42 with issues of how they managed their relationship. While I hope I will not, the evidence for both issues constantly overlaps.

88. It is nonetheless convenient to start my analysis with this issue with some reflections on the nature of the parties' relationship. Both parties caution me against using an approach based on "Occam's Razor" and suggest it is exactly what the other is doing. Both parties accept that their relationship was not entirely standard, normal or conventional. Many relationships are not. It is important in my judgment to avoid misconceptions about what 'normal' and 'conventional' arrangements look like. All the oral witnesses in this case have their own conception of what a 'normal' or 'conventional' civil partnership looks like and have attempted to craft their evidence from their own perspective as participants in that relationship or friends or former friends looking into that relationship after several years' reflection.

89. Having met in 2005, the respondent recalls that the applicant proposed to her in a restaurant on 8 August 2006 some 3 months prior to their civil partnership ceremony. She had told the applicant about an abusive relationship with a man which I think had recently ended.

90. The respondent stresses the transactional nature of the relationship: that the applicant wanted to play the team sport referred to above professionally for Team GB, needed a British passport and couldn't get one without a UK civil partnership. She stresses this factor as a reason why the parties entered into a parental responsibility agreement for A. She says that the applicant suggested adoption as an alternative to parental responsibility because that would also assist her ambition of British nationality. The respondent says they both rejected the suggestion of adoption because it would give the applicant equal rights which had never been their plan.

91. The respondent told me that she thought the parental responsibility agreement would enable the applicant to care for the children if she died. She claimed not to have researched the effect of an agreement. I don't accept this, as the

respondent is not the sort of person to enter into and register a formal agreement about her children without fully appreciating the consequences: on her evidence she clearly knew the effect of the applicant adopting the children.

92. The transactional theme continues in her explanation as to why, after discovering the applicant was having an affair in 2009-2011, it was mutually convenient for the applicant to have both a place to live and financial support from the respondent while it was convenient for the respondent to have readily available and good quality child care from the applicant. However, she doesn't deny there were instances of intimacy after she discovered the applicant's affair, right up to the time in 2012 when she met her current wife.

93. The respondent told me that the applicant's passion for her sport meant she was abroad for some time particularly during the period from 2009 up to 2011. This required the employment of nannies, although in my view, neither is inconsistent with the applicant playing a significant part in family life.

94. The applicant denies that the transactional nature of the relationship played any part of her thinking. She denies that adoption was ever discussed as it was always their joint intention for the applicant to 'get' parental responsibility. However, her assertion suggests that both parties were concerned that without a parental responsibility agreement, the applicant would have no status or rights in respect of A.

95. The applicant stresses the romantic nature of their relationship but without giving any concrete examples: there are no descriptions of romantic moments, presents and messages given and received. I have very little information about their civil partnership ceremony. I am not even sure there was a party. I have seen no photographs of the event. None of the other witnesses give any detailed evidence about the event. The applicant also disagrees with the respondent's evidence about the extent that she was abroad.

96. In my view many relationships have what might be termed a transactional element to them. It is common ground that for a significant part of their relationship, they lived in a home owned by the respondent's parents. It is clear to me that the respondent, either from her employment or through the

assistance of her parents, was the main financial provider for the family, although I accept that the applicant did make a more modest financial contribution from teaching sport. I don't consider it is necessary for me to have to make findings on each and every element of their relationship or the full extent of its transactional quality.

97. I note there is barely any evidence of the parties or the witnesses calling themselves 'wives' or even such other terms of endearment. Both parties have produced a snapshot of each other's social media messages. It is not necessary for me to refer to them at this stage of my judgment because, as both parties are keen to submit, they can be interpreted and construed in a number of different ways. I again bear in mind the passage of time.

98. What is a relevant part of the parties' relationship is its impact on the children and the way they were cared for and lives managed. The applicant submits that I should consider the issue of 'psychological' parenting as authoritatively described and explained by Baroness Hale in *Re G (Children) Residence: Same-sex Partner) [2006] UKHL 43, 2006] 1 WLR 2305* at paragraphs 35 and 37. The difficulty I have in doing so is that while I have plenty of evidence from the parents on the issue, I have no reliable information from the children's perspective as to how they saw matters. I do not know their wishes and feelings and I have no independent or professional assessment of how they experienced the role of the applicant. I do have Ms Coyle's statement about A but that only concerns recent steps taken by the applicant to exercise her parental responsibility which A, according to Ms Coyle, resents. There is little information about the children's perspective of whether or not the applicant is their 'psychological parent'. In any event, I do not need to make a ruling on this part of the applicant's case.

99. It is only necessary for me to focus on the evidence which bears on the jurisdictional issues I have to determine which in my view is as follows:

i) Is the applicant a parent within the meaning of section 42 of the HFEA 2008;

ii) if not, are these children to be considered individually and collective as a 'child of the family' within s42(4A) of the FLA 1986.

iii) Are the applications 'in connected with' the proceedings for the dissolution of the civil partnership.

iv) Are there are any facts relevant to whether or not I should exercise the parens patriae jurisdiction.

Consent and child of the family

100. As her written evidence makes clear, the applicant initially thought she had signed documents for the fertility clinic giving her consent to the respondent's fertility treatment. I am satisfied that she did not. I consider it far-fetched to find that the fertility centre would have purposely destroyed or suppressed such documents. I am also satisfied that the respondent is the sole owner of the biological material generated by the fertility treatment and, so far as the clinic was concerned, all decision making was carried out by her.

101. The fall-back position of the applicant is, as I understand it, that the law of the state in the US where Clinic F is based did not require a formal consent from her for the treatment to proceed. The same can also be said of section 42 of the HFEA.

102. All that the documents contain is what are, in my judgment, passing references to the applicant as the partner of the patient which seems to be as part of the respondent's social circumstances and do not show that consent was required from her or given.

103. I did not find the applicant's evidence about her role in the process, at the time of each treatment, particularly convincing. She said she was fully involved. However, she showed, in my judgment, a remarkable lack of basic knowledge of the fertility process undertaken by the respondent for any of the children's conceptions. In her statement she confused IUI (intrauterine insemination) with IUD (intrauterine device – a type of contraception). In her oral evidence she was not able convincingly to explain her error. In addition, she was unaware which of the children had been conceived by IUI and which by IVF

(invitro fertilisation). This has a significant impact on how the sperm and eggs are harvested, used and stored and how embryos were created and stored. The respondent explained in great detail, and which I accept, how that after her miscarriage she was compelled to re-consider the type of conception she would attempt for the younger children because of the potential shortage of sperm. She specifically wanted children who were all genetically full siblings and who therefore had the same sperm donor. A's sperm donor was no longer donating by the time of the miscarriage which I accept worried the respondent, as IUI uses far more vials of sperm than IVF and generally is accepted to have a lower success rate than IVF. While the applicant was aware of the miscarriage, she appears to have no knowledge of its impact on the respondent's fertility planning, which I found surprising.

104. The applicant described how she assisted the respondent in the selection of the sperm donor by looking at lots of photographs which each potential sperm donor had provided of themselves as a baby. The applicant's only vivid evidence of the process was her description of the beautiful eyes the selected donor had as a baby. The respondent told me the selected donor had astigmatism and was short sighted. I doubt whether either would have been apparent from the baby photographs. The respondent told me, and I accept, that for her the far more important factors was the educational profile and whether or not the donor had genetic conditions which would affect the children. The applicant knew, rather vaguely, that the sperm donor was of mixed heritage with some Italian ancestry, while the respondent was able to tell me each ingredient of his racial make-up together with the facts that he was the Head of Pharmacology at his employer's firm and was allergic to penicillin. Generally, the respondent's evidence contained all the detail I would expect from somebody heavily involved and invested in the fertility process to have known.

105. Neither party's evidence suggests any evidence of any discussion as to which of them would be genetic or gestational mother. While the applicant asserted she wanted children, there was never any suggestion by either party that any

consideration was given to the applicant becoming a genetic or gestational mother.

106. The respondent was registered as a private patient with her GP from July 2003 (before she had even met the applicant) until the move to the UAE in 2014. The same GP was also the children's registered doctor until the move. The GP confirms that he looked after the respondent throughout the fertility process, her pre-pregnancy care and, probably, when the children were babies. He says that while aware of the applicant, she was not his patient; and that so far as he was aware, the respondent was a single parent both before and after the children's birth.

107. The applicant could not challenge the respondent's assertion that the children's next of kin was the respondent. The GP records for the period when the children were living in England show that for the younger children, their single parent and next of kin was just the respondent. However, those records also refer to actions of the parents (plural) in bringing two of the children in for coughs and snotty noses in May 2012. The applicant's name, albeit misspelled, appears as the father's or partner's name for one of the younger children's records. I also note that one of the children was brought into the local hospital by his nannies in December 2014. I have no medical records for A.

108. The respondent produces social media referring to 'my children,' announcing the birth of 'my boys' and showing 'my boys'. The applicant produces photographs of a Mother's Day card, probably prepared by Witness 5 in 2016 or 2017 after the children had moved to the UAE. They are written to 'R' not 'Mum'. The respondent denies any knowledge of sending the card. However either Witness 5 or someone on the respondent's household thought it a nice gesture for the applicant who was then living away from the family and was no doubt missing the children.

109. The respondent says she organised the children's birthday parties. She produces a message in March 2014 from the applicant thanking her, the respondent, for organising a few special few days for a special little boy. She also thanks her (the applicant's) friend for making the cake. On the

other hand the applicant's witnesses told me that they always saw both parties hosting and participating in the children's birthday parties.

110. The nursery records for some of the younger children for 2013 do not record the applicant at all, whereas as relatives of the respondent are mentioned. However, no records have been produced for A and I accept I may not have a complete record.

111. The applicant refers to an exchange of messages between a friend of hers (who did not given evidence to me) and the respondent in April 2015, where the respondent does not contradict a reference made by the friend to 'R' as the children's mother as well as the respondent. The context shows the friend angry at the respondent's replacement of the applicant both in her affections and in the lives of the children. The respondent assures the friend that her (new) wife will not replace the applicant and makes reference to how awful her family have been and the huge challenges faced by her and the applicant. I do not read the exchange as an acceptance or admission that the applicant is the children's mother; but it does hint that the respondent's family was not always accepting of the applicant and her relationship with the respondent.

112. The applicant produces a photograph of a birthday cake showing "Happy Birthday R aka Mom". The cake is shown with photographs of all the children and the accompanying message shows it to date to May 2015. The respondent explains that this was a joke when the children had referred to the applicant as a stand-in mum for the respondent when she had been away. I think this is unlikely.

113. The parties dispute the reason for the children being given their various Christian names on their birth certificates. The applicant says that names were chosen because of their connection with members of both of their respective families. In particular one of A's middle names and one of the younger children's middle name were Christian names of the applicant's father. The respondent admitted that the name used as one of A's middle names was the name of the applicant's father but says she chose it because it was a beautiful name and also that or her grandfather. The respondent says she didn't know that the applicant's father's

name was the same as one of the younger children's middle names and told me that it was chosen because her maternal grandmother had a similar name and her brother had been given a similar but masculine construction of that name after their maternal grandmother. I note that on the order of service produced for the christening contains the name of the applicant's father, together with 3 other names of the respondent's family.

114. The respondent explained that she changed her surname from the hyphenated R-T at her civil partnership and that was why she agreed to this name on A's certificate. She then says she 'uncoupled' the name of R from her and A's surname so that it became a further Christian name for the other, younger children on their birth. She told me that the applicant, while part of her life, was not part of her family.

115. In respect of the names, I found both the apparent lack of knowledge and opposition of the applicant and the explanations of the respondent surprising and rather unconvincing. I accept that the applicant's view of what names the children should be given was a factor in their selection, even though I expect the respondent ultimately made the decision. I find it hard to accept that the respondent would have selected the surname of a best friend for a Christian name for all of the children if the applicant had not been part of the children's family.

116. A visited the USA as a baby but the younger children have not visited the homeland of the applicant; neither have they met the applicant's extended family. The applicant says she tried to organise a recent trip for the children to USA of which the respondent denies any knowledge. I doubt whether it was ever seriously contemplated by the applicant as likely to happen as she would have known the respondent was likely to object.

117. I have viewed a short video of the Christening of the children on All Souls Day in2014. Although only a 25 minute snapshot of various events of the day with a soundtrack, it shows a happy family celebration. The children present as extremely attractive in their immaculate formal clothing and well coiffured hair. The youngest two children are still babes in arms and are each carried to the font individually by the applicant and the respondent. This is

compelling evidence which supports of the applicant's case, as the video clearly shows them both as equals in the children's lives. The video does not show the vows taken by the parties.

118. The baptism certificates show the respondent as mother and the applicant as guardian. The god parents for all of the children are all named on each child's certificate. The applicant was not involved in the arranging of the event; the respondent wished to hold a ceremony before she and the children left for the UAE. Neither party is particularly religious and neither had attended church recently. The respondent selected both Witness 6 as the particular celebrant and the venue to honour her recently departed and much-loved grandmother. I note the baptism certificates do not contain any reference to the children having 'R' in their names.

119. The applicant told me that she believes that the inclusion of the title of 'guardian' on the certificate was to avoid the vexed and potentially embarrassing issue of same-sex parenting and the non-natural method of the children's conception and birth. She contends this was a happy compromise between her status as 'parent' and her as godparent which disguised her true parental role. The respondent contended that the applicant's role was to be a 'spiritual guardian' in sharp distinction to being a parent. Witness 6 could not shed any light on the deployment of the term, preferring to emphasise that he would always welcome all children, whatever their background, to the sacrament of holy baptisms. I confess that, although not professing any type of theological expertise, I have never before encountered a 'spiritual guardian' in this context.

120. As the service was on All Souls Day, the names of recently departed members of the children's family are printed on the last page of the order of the service. Those names included 3 relatives of the respondent, including her grandmother, and the applicant's father.

121. The respondent attempts to explain away the involvement of the applicant at the christening by praising and complementing the applicant's role in her life. The applicant was, she says, her best friend, despite her affairs, and had stood

by her during difficult times which included the death of her grandmother and her mother suffering a disabling stroke. She did not therefore want to hurt her feelings by denying her a prominent role at the ceremony.

122. It is common ground that H, the respondent's current wife, did not attend the baptism ceremony even though the respondent told me that she decided in late 2013 that she was going to emigrate to a country in the UAE by the end of 2014 – so a month after the christening. She told me she had already decided her future was with her current wife which was something understood by the applicant.

123. The applicant told me that she thought she was going to the UAE very much as part of the family. However, she was quite vague when trying to explain to me what plans she had made for life in the UAE. As events unfolded, it appears she left the UAE in the summer of 2015 (after taking out the youngest two children) on good terms with the respondent. She does not appear to have made any attempt to question the children remaining in the UAE in a household which would no longer include herself.

124. On the other hand, it is clear that the respondent wanted the applicant to continue to have a role in the children's lives, even though their personal relationship had ended and she had formed a permanent relationship with another woman. She recognised the past role of the applicant in the children's lives and considered it important for the children for their relationship with the applicant to be maintained. The respondent confirms the applicant's role in a letter to the applicant's employer dated 20 October 2015, stating that the applicant was to have "*full access to the children during their school holidays and it is expected she spend minimum of 50% of their total holiday time and birthdays looking after the children*." She says this was done to assist the applicant secure the necessary leave and was not an admission that she was a parent.

125. While there are some disputes as to exactly how long the children spent with the applicant and the reasons why, I do not need to resolve those disputes. The children had extensive time with the applicant in the UAE when the respondent was away working or holidaying abroad (in Africa and Japan).

They had long periods of time with the applicant in England during the sweltering UAE summer. While some of the time was spent with the respondent's parents and family friends, in my judgment both parties' evidence points to the applicant being in loco parentis. If the respondent had not wanted the children to spend time with the applicant, I doubt whether it would have happened.

126. Sadly, at some point in 2019 the parties' relationship deteriorated. The respondent contends that a reference by the applicant or possibly her new wife to the children having '4 Mums' during their summer visit in 2019 caused real issues for the children and that they asked to come home early. This was the last summer they spent with the applicant. The Covid-19 lockdown appears to have been a factor for there being no summer contact in 2020 although I have not investigated whether this was the real reason or masked the deteriorating relationship between the parties. I have no information from the children's perspective as to why contact broke down and I have no real insight from Ms Coyle's statement. There was some contact when the applicant visited the UAE over Christmas 2020 but this appears to have been more limited than in previous years.

127. The children did not attend the applicant's marriage in August 2021. The applicant contends they were invited. The respondent denies that she even knew about the wedding until she received a message from a third party. Although she has not produced any written proof, the applicant says she had reserved a room for them and had even arranged for formal clothing for them. I am not going to make a finding as to the reasons why the children did not attend. It is indicative of the parties' deteriorating relationship.

128. The applicant played no part in the decision-making for A's return to England in September 2021 as a boarder or in the selection of his public school. She was not been involved in his education there, the respondent preferring to have family friends as his English support during exeats and for school contact purposes. When the applicant tried more recently to intervene, it appears from Ms Coyle's statement that A did not react well. He has tried to prevent her having any information about his education and has blocked the applicant on his social media. He has not seen the applicant since December 2020 having refused to see the applicant when she visited in December 2021.

129. For her part the applicant has accused the respondent of 'alienation'. I am quite sure this is an over-simplistic view of the respondent's actions but without information about the children's own experiences, it would be wrong to speculate further.

130. The children last saw the applicant for a single day when the applicant flew out to the UAE in Christmas 2021. There does not appear to have been any remote or indirect contact this year.

Conclusion on consent issue

131. I have found the issue of consent to be finely balanced. This is partly because of the way section 42 of the HFEA is drafted. Given that the pre-condition of the fact of the parties' civil partnership at the relevant time is fulfilled, there is a statutory presumption which can only be displaced by the proof of a negative: that there was no consent to the conception. Although in this case the burden of displacing the presumption rests on the respondent, in other cases it could be on 'W' to displace the burden if, for example, she did not want to be a parent. It is also apparent that the mere fact of the parties being in a civil partnership at the relevant date is not by itself, a sufficient reason for her to become a parent.

132. It seems to me that there are, at least 3 possibilities contemplated by section 42:

i) There is clear evidence that 'W' (the applicant in this case), has expressly consented to the fertility treatment, perhaps by signing documents, and so the presumption of consent does not operate;

ii) There is clear evidence that 'W' has positively objected to the treatment, perhaps because the parties had separated but remained in a civil partnership;

iii) Either W or the mother (as the case may be) has produced some material which displaces the presumption and successfully proves the absence of W's consent

133. In my judgment there is no evidence that the applicant has either positively

objected to the treatment of the younger children (born on or after 6 April 2009) or that she has clearly consented to the treatment. To use the language of Sir James Munby P, there is evidence that the applicant did not consent: the respondent says at no time did the applicant consent which I find credible. I am not entitled to use the presumption as a 'makeweight'. Although I am not directly concerned with the issue of consent to the treatment in respect of **A**, it is relevant to what happened for the conception of the younger children.

134. Having carefully considered and weighed all of the evidence, I conclude that there was no 'deliberate exercise of choice' by the applicant but only an awareness or acquiescence of the decision taken by the respondent. My primary reasons are as follows:

i) I accept the respondent's evidence that the applicant did not fully participate in the whole process.

ii) I do not accept the applicant's account of her involvement. I found it vague and lacking in detail.

iii) There is no record or mention of her in the fertility records of her having consented although I do not accept that the consent can only be proved by some formalised document, pro-forma or otherwise: there is therefore no question of the absence of a written document conclusively proving that the applicant did not consent

iv) I am satisfied that the respondent was quite determined to proceed with the treatment regardless and without reference to the views of the applicant.

v) The presence of the applicant at the birth of the eldest children and the presence of her name was a consequence of their relationship and nothing more.

vi) Had the applicant consented, she would have been registered as a parent on the children's birth certificates.

vii) It is common ground that by the time of the treatment for the younger children, the applicant had had an affair with another woman of which the respondent was aware and, for separate reasons the applicant had

spent time away.

viii) Prior to the children's removal to a country in the UAE, there was never any question that the applicant needed to consent, or would be entitled to object, to the children moving to the UAE, or to stay there once she returned to England.

Conclusion on 'child of the family' issue

135. I do not accept Ms Renton's submission that I must read 'child of the family' in section 42(4A) of the FLA 1986 as being restricted to a child of both parents. There would then be no reason for the inclusion of section 42(4A). In my judgment the reason for the inclusion of this provision is to extend the families covered by the matrimonial jurisdiction under section 2A of the FLA beyond those where both parties to the civil partnership were the legal parents of the children. Moreover, exactly the same term is used, for a similar reason, in the Matrimonial Causes Act 1973 which, by section 52(1)(b) of that Act, includes not only a child of both the parties but also "*any other child ... who has been treated by both of those parties as a child of the family*." In my judgment it is no coincidence that the definition under both statutes is identical and I see no reason in principle why any child should be treated differently depending on which statutory scheme is being invoked.

136. In my judgment all the children are to be treated as a "child of the family" within the matrimonial jurisdiction in the FLA 1986. My primary reasons are:

i) The parties entered a parental responsibility agreement for A. I do not accept this was merely to make arrangements for his care if the respondent died prematurely.

ii) While she may not have been a mother or parent, I accept the applicant's evidence that shows that the applicant, the respondent and the children were a family. The applicant effectively played the role of a step-parent. Her role was different to that of a best friend.

iii) The children were given the applicant's surname and other names significant to her.

iv) I accept the respondent's evidence that the applicant provided emotional support to the respondent and gave care to the children; but I reject her attempt her to portray this as merely transactional in return of board and keep.

v) The video of the children's baptism in 2014 shows a family event involving the applicant and respondent and all the children as a family.

vi) The respondent would not have agreed the extensive arrangements for the children to spend time with the applicant had she not been a significant person in their lives.

vii) The respondent would not have written the letter to the applicant's employer in October 2015 if the applicant had not been part of the children's family.

The exercise of the matrimonial jurisdiction

137. Ms Renton contends that section 2A of the FLA is not applicable and that as this case involves a Part 1 Order my first 'first port of call' in this case, post Brexit, should be the 1996 Hague Convention: see Baroness Hale in *Re A (Children) (Jurisdiction: Return of Child) [2014] AC 1*. Like this case, that case concerned an issue about jurisdiction between England & Wales and a state, Pakistan, which was not a party to the EU (relevant at the time) or the

Hague Convention. Baroness Hale was clear that the 'segue' into that domestic jurisdiction at the time was under Art 14 of BIIa – see paragraph 59 of *Re A*. As there is no equivalent of Art 14 in the 1996 Hague Convention, Ms Renton argues that the FLA is no longer applicable. She prays in aid dicta of Peel J in *H v R [2022] EWHC 1073 Fam* when he was considering the relevant date for determining a question of habitual residence under the 1996 Hague Convention.

138. I disagree with Ms Renton's submissions on this issue. It is clear to me that where the Hague Convention does not provide jurisdiction, the courts of England and Wales are free to apply the jurisdictional alternatives provided by the FLA 1986: that is the plain wording of Part 1, particularly sections 2 and 2A. In my view the decision of Peel J confirms the position that if the 1996 Hague Convention does not apply, the provisions of domestic law under the FLA 1986 are to become applicable.

139. A far more difficult issue is to determine whether the matrimonial jurisdiction under section 2A of the FLA 1986 is applicable because there is some connection between the applications made by the applicant and the earlier proceedings dissolving the civil partnership. I have set out the 3 possible approaches described by Poole J.

140. Ms Renton argues that the dissolution proceedings in 2016 were far too long ago to be connected to the applications before me. During her oral submissions she placed great weight on the need for there to be some temporal connection even if she did not go as far as inviting me to take a strict temporal approach. It would in my view wrong to take such a narrow temporal approach. I respectfully follow the reasoning of Poole J as to why a strictly temporal approach should not be adopted. Ms Renton submits that whichever approach of Poole J, I take, there is an insufficient connection between the children applications and the earlier civil partnership proceedings. She further contends that the applicant's recent application to set aside the consent order was a device which was ultimately dismissed summarily with costs. I agree with Ms Renton that the application's recent set aside application has no impact on the decision I have to take.

141. Mr Tyler invites me to take an even broader approach than any of those adopted by Poole J. He relies heavily on the absence of any other available

forum because of the attitude taken by the law of the UAE. He argues that I should 'read down' the phrase 'in connection with' so that the children are not left in 'legal limbo', with there being no available forum for legitimate issues raised by the applicant about the children to be determined.

142. He refers me to 4 cases where the court has taken such a broad and purposive approach to the interpretation and application of statutory provisions and the common law that it has effectively re-written statutory provisions and binding authority:

i) In *Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135* Sir James Munby held that a non-extendable statutory time limit under section 54 of the HFEA 2008 for the application of a parental order in a surrogacy case should be read so as to accommodate an application made over 2 years late. There is no plain statutory wording allowing any extension of time. This was a non-contentious case where the result would have extremely serious and life-long consequences for the child concerned, going to the heart of the child's identity. He justified his ruling on two bases: firstly on a common law rule allowing the court to look purposively at a statutory procedural requirement where the reading in of proposed words was compatible with the underlying thrust of the legislation and did not go against the grain of the legislation; and secondly the Art 8 rights of the child's right to family life and private life throughout his life.

ii) *X v Z (Parental Order Adult) [2022] EWFC 26* where Theis J applied the same reasoning as the former President to an application made for a parental order out of time. She also adopted a broad interpretation to the phrase 'home with' to secure the parties' protected rights under Article 8. She too was dealing with a non-contentious case.

iii) *Re X [2020] EWFC 39* where Theis J allowed an application for a parental order to be made on application by a widow and her deceased husband who was the intended father of the subject child. The statutory wording on a plain construction did not cater for a dead applicant. Again this was a non-contentious case where allowing the application

would be a justified and proportionate to the aims of the HFEA 2008 and to the need to protect the rights of the child.

iv) *S v S (No. 3) (Foreign Adoption Order: Recognition) [2016] EWHC 2470 (Fam)* where MacDonald J held that a strict application to one of the requirements of an otherwise binding authority (*Re Valentine's Settlement 1965 Ch. 831*) concerning the domicile of the applicants would be an unnecessary and disproportionate interference with the Art 8 rights of the child and the applicants.

143. Ms Renton's riposte is that it would be impermissible and wrong to read down the statute in the way Mr Tyler contends. She observes that each of the four authorities relied upon by Mr Tyler were non-contentious. She refers me to another decision of Sir James Munby P on section 54 of the HFEA 2008, *Re Z (A child) (surrogacy: parental order) [2015] EWFC 73* where the application for a parental order was made by a single applicant where section 54 on its plain reading seemingly required an application to be made by two people. The former President refused the application because it was clear that such a 'reading down' would be contrary to a 'fundamental', 'cardinal' or 'essential' feature of the legislation and the Parliamentary intend behind it. By way of analogy Ms Renton contends that the 'read down' of the phrase "*in connection with*" proposed by Mr Tyler goes completely against the both the plain words and fundamental jurisdictional scheme of the FLA.

144. In my judgment, the appropriate approach for me to take, for the reasons given by Poole J in *Re A* which I gratefully adopt, is his second approach at paragraph 20 of his judgment. Applying this approach, I do not find any 'matter' which connects the applications before me and the civil partnership proceedings other than the fact that they both involve the same parties, the same children of the family and are before the courts of the same jurisdiction. There was no application or even a dispute over the children in or at the time of those proceedings. There is no temporal connection. These proceedings are brought because after 3 years of agreed child arrangements, the parties have, for whatever reason, fallen out and can no longer agree as to what arrangements for contact should now be made. I have not speculated as to

those reasons but they were not present at the time of the dissolution. In other words, I am satisfied the applications now before the court have not been made because the civil partnership has been dissolved.

145. The fundamental peg for the acquisition of the court's jurisdiction in the FLA 1986 is the child's habitual residence at the relevant time, in line with Art 5 of the 1996 Hague Convention. There is also jurisdiction based on a child's presence at the relevant time or under the matrimonial jurisdiction as outlined above. Parliament has not introduced into the matrimonial jurisdiction scope for consideration of wider welfare interests of the children concerned or a factor about the availability of another suitable jurisdiction in another state or the lack of it. I accept that I have a general duty when making any decision about children, including their jurisdiction, to consider their best interests as a primary consideration – see Art 3.1 UNCRC and *ZH v (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166. The difficulty here is that these are highly contentious proceedings and for the reasons outlined above, I am lacking the relevant information to form a view on best interests. Given the contents of Ms Coyle's statement about A and my doubts about whether this a case involving the 'alienation' of the children, it is not immediately obvious to me that their best interests require me to 'read down' the FLA so as to make this country's courts the appropriate forum, where a plain construction seemingly suggests otherwise.

146. I consider that introducing a caveat or saving provision to enable the court to find that the matrimonial jurisdiction is available would cut too far across the purpose of that jurisdiction, as analysed above.

147. In these circumstances and despite Mr Tyler's interesting but novel arguments, I find that this court does not have jurisdiction under the 'matrimonial' jurisdiction to entertain the applications made by the applicant.

Jurisdiction based on A's presence at the date of the application

148. In my judgment I have jurisdiction to entertain the application for a child arrangements order under section 2(1)(b) and 3(1)(b) of the FLA 1986 because

this is a section 1(1)(a) order A is not habitually resident in any part of the United Kingdom but was present on the relevant date in England and Wales.

149. I do not accept that I must 'read in' to the statute an additional requirement that I can only exercise jurisdiction if I consider that it is necessary for A's protection. This requirement is only relevant to consideration of whether to make a section 1(1)(d) order under the inherent jurisdiction when section 2(3)(b)(ii) is applicable. I will consider the inherent jurisdiction further below.

150. As this jurisdiction only becomes applicable because either the court does not have jurisdiction under the 1996 Hague Convention or the Convention does not apply, I see no warrant to restrict the exercise of the 'presence' jurisdiction by reference to Article 11 of the 1996 Hague Convention, as Ms Renton submits.

The exercise of the parens patriae jurisdiction

151. I fully accept that because the state of the children's habitual residence does not recognise same-sex parenting, there is no jurisdiction that the applicant can use to secure contact to the children. While that may often be a necessary pre-condition for the exercise of the jurisdiction it cannot, in my view, be a conclusive reason. The applicant is effectively seeking an order for contact, even if she initially seeks a welfare assessment of the children's best interests. To accede to this application would be ignore the statutory restriction on my jurisdiction.

152. Furthermore I have no evidence that in the UAE the children are in need of any protection. I pose the question: against what? Echoing Lord Sumption's minority judgment in *Re B*, the only real answer is that the children need protecting from the refusal of the UAE to entertain any application by the applicant. In my judgment the circumstances do not require this court to exercise jurisdiction to protect these children.

Conclusion

153. In my judgment the only jurisdiction the court has in this case is in respect of A because he was present in England and Wales when the applications were

made.

154. Plainly the court in exercising its jurisdiction will make A's welfare its paramount consideration. There is material in Ms Coyle's statement which suggests that A would not wish the court to exercise its jurisdiction by making any order about him in favour of the applicant. He is now in his early teens. However, I have not received submissions from the parties on A's welfare and by a fine balance I do not think it would be fair to dismiss the application in respect of him without doing so. Without giving either party any encouragement, if either of them wishes me to consider what directions are required in respect of A's welfare, I will direct that party to make written submissions and for the other to reply. In those circumstances, I will need to consider what, if any, role A himself should play in any welfare consideration of his best interests, in accordance with the earlier direction of the court.