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IN THE FAMILY COURT  
Sitting at the Royal Courts of Justice  
**[2021] EWFC 119**

No. ZC20P01011



Royal Courts of Justice  
Strand  
London, WC2A 2LL

Friday, 16 July 2021

Before:

MRS JUSTICE THEIS

**(In Private)**

B E T W E E N :

(1) W

(2) X

Applicants

- and -

(1) Y

(2) Z, THE CHILD (Via his Children's Guardian, Ms Doyle)

Respondents

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MS CANTOR-FREEDMAN appeared on behalf of the Applicants.

THE FIRST RESPONDENT was not present and not represented.

MS STANLEY appeared on behalf of the Children's Guardian.

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**J U D G M E N T**

MRS JUSTICE THEIS:

### **Introduction**

- 1 The court is concerned with an application for a parental order in relation to a young boy Z, now sixteen months of age. The applicants are Mr W and Ms X. The first respondent is Ms Y. She is the gestational surrogate who carried Z, following a surrogacy agreement entered into between the parties on 18 June 2019 through the New Life Surrogacy Agency (the Agency), which is based in Tbilisi, Georgia.
- 2 As a result of orders made previously by this court, Z was joined as a party to these proceedings, and is represented by Cafcass Legal through his Children's Guardian, Ms Doyle.
- 3 The central issues the court is concerned with at this hearing is the focus on two particular matters in relation to the section 54 criteria. Firstly, whether the applicants who are in a platonic relationship, satisfy the requirement in section 54(2)(c) that they are two persons who are living as partners in an enduring family relationship and secondly, whether there are any particular features of this case that raise public policy issues, such that would prevent the court making a parental order.
- 4 It is clear that this application has taken some time to reach a final hearing, but as Ms Stanley pointed out during submissions at this hearing, it is extremely important for the parental order reporter appointed in cases such as this (including when her role changes to become the Children's Guardian) and for the court to carefully consider these applications. By their very nature, they affect the fundamental legal status and relationship in a life-long way between Z and the applicants. Therefore, it is critically important that if the court considers that further inquiries are needed, or further information is required to be put before the court, those steps should be taken.

### **Relevant background**

- 5 Turning briefly to the background to this matter. Both applicants have known each other since about 1999/2000 when they met in Kiev, they both attended university there. They remained friends and met again more recently in December 2017, when Mr W, who by then had moved to London, was on holiday back in Georgia.
- 6 Both of the applicants were born in Georgia and until about 2000 lived there. In 2001, Mr W came to this jurisdiction and has been largely based here since then. Ms X worked and was based in Georgia until more recently, although spent two summers in the United Kingdom in 2002 and 2003.
- 7 Mr W initially came here to do his degree, that was followed by his Master's and since about 2004/2005, has been working in the banking sector. Ms X has been working in marketing and currently works for a United States company with a marketing role, although obviously has been undertaking that role remotely more recently.
- 8 They renewed their friendship and their relationship in December 2017. They both describe having a strong desire to have a child together, even though their relationship was not an intimate one. They decided in those circumstances to look at surrogacy and made an appointment with the international patient coordinator at the Agency based in Georgia. This was done jointly, as the evidence demonstrates, and they signed an agreement with that

agency, including a power of attorney, enabling that agency to sign documents on behalf of the applicants.

- 9 Ms X stated that the address in London which was put on that form, was part of their joint intention for the child born as a result of any surrogacy arrangement, to be brought up in the United Kingdom.
- 10 Both applicants state that whilst they were aware that surrogacy was not available to single people in Georgia, they answered each question they were given honestly, and were not asked if their relationship was a sexual or an intimate one at all. They therefore say that they dealt with the position transparently with the surrogacy agency in relation to fulfilling their joint wish to be able to have a child together.
- 11 The applicants jointly chose the egg donor and the surrogate. Mr W described meeting the surrogate mother in February 2020, just before Z's birth. He understood she had been a surrogate before, and was fully aware of the documents which would be necessary for her to sign to support the application for a parental order that was anticipated would be made here. The applicants were kept updated during the pregnancy by the pregnancy coordinator who was allocated by the agency, and in their joint statements the applicants described their joy when they first met Z following his birth.
- 12 Following Z's discharge from the clinic in Tbilisi after his birth, the applicants and Z stayed in Mr W's apartment in Tbilisi. They had the support of Mr W's mother, but limited other visitors because by that time the global health pandemic was beginning to affect all countries, and there was caution in relation to the number of visitors.
- 13 Mr W had to return back to London in March 2020, due to his work commitments and the complexities raised by the travel restrictions that were likely to be brought in place. Z remained in Tbilisi in Georgia, being cared for by Ms X and Mr W's mother. It took about three months for Z's birth certificate to be produced in September 2020 because of the difficulties caused by the restrictions and the health pandemic. This enabled the passport application to be able to be made to Her Majesty's Passport Office on 15 October 2020, for the reasons caused by the global pandemic there were delays in processing that application. Z's passport was not received until February 2021. He came to this jurisdiction on 22 April 2021, to the accommodation where the applicants live with him and that is where he has remained.
- 14 The difficulties in travelling between the jurisdictions was affected by the Covid restrictions. Mr W in fact returned to Georgia in September 2020, at the time when the birth certificate was available. Both Mr W and Ms X came to this jurisdiction on 23 November 2020 to prepare the flat in London for Z's arrival, not anticipating the further delays that would be encountered, not only by the passport delays, but also by the further restrictions as a result of the worsening position with the pandemic.
- 15 The first hearing in this case took place in January 2021 and as it was adjourned until April 2021, Ms X went back to Georgia to be able to resume the care of Z, who had been looked after by Mr W's mother during the period between November 2020 and January 2021. Ms X remained caring for him until Mr W went out to Georgia and they were all able to come back to this jurisdiction in April 2021.
- 16 The C51 application for a parental order was initially made by Mr W as a single applicant on 13 August 2020. It was resubmitted as a joint application on 13 January 2021. The matter was first listed before me on 28 January 2021, when Z was joined as a party to the

proceedings. Directions were made for a hearing on 27 April 2021, which was adjourned to a hearing today with directions for further evidence to be filed.

- 17 The court now has three joint statements signed by the applicants dated 18 January 2021, 5 March 2021 and 8 June 2021, as well as two detailed reports from the parental order reporters. Initially Ms Roddy's report dated 18 January 2021 set out her concerns then in relation to the circumstances and the further evidence that was required. Subsequently, the parental order reporter role was taken on by Ms Doyle, and she became the Children's Guardian when Z was joined as a party. Her report is dated 29 June 2021.
- 18 Both Ms Roddy and Ms Doyle have had extensive contact with the applicants. Ms Roddy on 20 November 2020, 6 and 13 January 2021 and Ms Doyle on 12 March 2021. All of those were by way of remote communication save that Ms Doyle was able to arrange a home visit to the family home in London on 28 May 2021.
- 19 In addition, the court has a letter dated 15 April 2021 in relation to Ms X's immigration position. Essentially, Ms X is here under a time-limited visa. Whilst this application is governed and driven by Z's welfare needs that letter makes clear is that if this court does make a parental order it may enhance the likelihood of Ms X being able to secure her immigration position here by way of an application for leave to remain. I make it clear this court is only and primarily concerned with Z's welfare needs. What, if any, outcome there is to any application which is made in relation to Ms X's immigration position will be entirely a matter for the relevant Secretary of State.

### **Legal Framework and evidence**

- 20 The court is extremely grateful for the very helpful and full skeleton arguments which have been provided, not only by Ms Cantor-Freedman on behalf of the applicants, but also by Ms Stanley on behalf of the child. The legal framework within which the court is considering this application is section 54 of the Human Fertilisation and Embryology Act 2008. If the criteria set out in that Act are met the court needs to consider whether making a parental order will meet the life-long welfare needs of Z, having regard to the matters set out in section 1 of the Adoption and Children Act 2002.
- 21 In relation to the section 54 criteria, there is no issue that sections 54(1), (3), (4), (5), (6) and (8) are met. I can deal with them relatively briefly. The evidence establishes that Z was carried by the respondent surrogate and the biological connection between Z and one of the applicants, namely Mr W, as a result of the DNA test which is in the court bundle.
- 22 Secondly, the court needs to be satisfied that Z had his home with the applicants at the time when the application was issued, and at the time when the court is considering making the order. From the history I have just set out, it is clear Z has had his home largely, save for the period between November 2020 and January 2021, with either one of the applicants or both of them.
- 23 The court, in considering whether Z had his home with the applicants at the time when the application was issued, needs to take a wide and purposeful construction of this provision. It is quite clear from the information that the court has that the applicants and Z's Article 8 rights to family life had been established. They were having to navigate the difficulties that had been caused as a result of the Covid restrictions in being able to manage, including Mr W being able to continue with his work and the delays that had taken place regarding Z's birth certificate being produced in Georgia and, also, the delays in the subsequent passport application being processed.

- 24 When considering the evidence as a whole, Z had his home with the applicants at the time when the application was issued, whether that is taken as August 2020, when he was in Georgia, or in January 2021, when he remained in Georgia. When one of the applicants was not physically present with Z, they remained in very regular contact with Z and had responsibility in relation to the care which was being provided for him. I am therefore satisfied in the circumstances of this case that criteria is met.
- 25 The court also needs to be satisfied that both of the applicants are over eighteen years of age, and they are. Mr W has a domicile of origin in Georgia. What is submitted on his behalf is that he now has a domicile of choice in this jurisdiction. In considering whether that is established, the court needs to consider whether what has been demonstrated is an intention to permanently and indefinitely reside in this jurisdiction.
- 26 Whilst it is right Mr W does still have contact and connections with Georgia, namely some of his family are still there and he chose to be part of a surrogacy arrangement in Georgia. However, from the evidence the court has, in particular what is set out in the second joint statement dated 5 March, he has made his life here. He set out the detail in relation to the education he has undertaken here, the work he has done here following completing his Master's, and also the purchase of properties here, not only the property he lives in at the moment, but other property as well. He pays, through his employment, taxes here and his pension is based here. He became a British citizen in September 2010, and he set out at the end of his statement dated 5 March 2021 as follows,
- "I would like to say that I spent the best years of my life in the United Kingdom. I have a strong emotional attachment to the country, which gave me a good education, amazing career, and investment opportunities. Endless possibilities to meet diverse and interesting people and make friends. With Z growing up in the United Kingdom, my attachment to this country will become stronger over time. Ultimately, it is my wish and desire to spend the last days of my life in this country which I love so much, and which gave me so much to look for, for all these years."*
- 27 Having considered the evidence I am satisfied he has a domicile of choice in this jurisdiction. The evidence demonstrates he has formed an intention to permanently and indefinitely reside here. This is where his family life will be, both in the short and long term.
- 28 The next requirement concerns the question of consent. The court has notarised written consents from the respondent surrogate mother dated 7 August 2020. It was identified by Ms Stanley that the English version of the Form A101A and the translated version in Georgian had a difference; namely that Ms X's name was added into the bottom part of the consent in the Georgian version, which was not in the English version.
- 29 The court was able to deal with that when Mr W gave oral evidence to the court today, which I accept, where he was able to interpret from the Georgian version what it said. It confirmed exactly the same as in the English version, but with the additional name of Ms X. I am satisfied that that is what the Georgian document says, and there is no need for any further delay for an English translation. I am fortified in that by a number of other parts of the evidence.
- 30 Firstly, the C52, which was translated into Georgian, is the acknowledgment of service of the application and was signed by the respondent surrogate mother on 21 January 2021. That

has both applicants in that application, and post-dates the consent of the 7 August 2020. Secondly, the reference in Ms Roddy's report at paragraph 51-53 of her conversation with the respondent surrogate on 18 January 2021, where she made it quite clear she had no objection or any observations to make as to whether, in fact, the consent was to the applicants jointly having a parental order or a sole application. I am therefore satisfied that that consent can be relied upon by the court.

- 31 Mr W has forwarded emails to the court today to demonstrate that the respondent surrogate is aware of the hearing today. There is nothing to suggest that the consent recorded in the documents in August 2020 and January 2021 has changed in any way. I am therefore satisfied the respondent surrogate consents to this court making a parental order.
- 32 Turning briefly then to the question of payment. This was a commercial surrogacy arrangement which was entered into in a jurisdiction where such arrangements are permitted. It has been helpfully set out in the applicant's first statement. The payments that were made to the respondent surrogate during the period of the pregnancy and up until February 2020 totals £15,850. Secondly, payments that were made to the agency total £17,460 plus a figure which seems to be in dollars of \$2,500.
- 33 It is clear that an element of these payments would be other than for expenses reasonably incurred. In considering whether the court should authorise those payments, the court needs to consider the circumstances in which the surrogacy arrangement was entered into, the level of payments made, whether the applicants acted in good faith or not and whether there is any suggestion that they sought to get around the authorities.
- 34 The level of payments which have been made are not significantly different than levels of payments that have been authorised by this court in similar surrogacy arrangements. There is nothing to suggest that this arrangement was other than a voluntary arrangement. The applicants have acted in good faith, and there is no suggestion they have sought to get round the authorities. In the circumstances in this case the court can authorise that element of those payments pursuant to s54(8).
- 35 Turning to the issue in relation to section 54(2)(c), as to whether the applicants have an 'enduring family relationship'. *F v M* [2016] EWHC 1594 Russell J confirms this is a question of fact for the court. As has been set out in the extracts the court has been referred to from that judgment, namely paragraphs 18, 27-28 and 29, the references in that decision to the debate that took place in Parliament prior to the HFEA 2008. For example, in paragraph 27 in relation to an issue raised, namely "*There is absolutely no necessity for a couple, whether same-sex or different-sex, to be in an intimate relationship to get the benefit of many of the clauses that we have discussed.*" The Minister of State responded in the way set out at paragraph 28 of the judgment, including this critical passage:

*"The Government are prepared to continue with the arrangement whereby the family division of the High Court would take the decisions on what made for an enduring relationship that was suitable and in the best interests of the child for a parental order to be made."*

As Russell J observed at paragraph 29, "*It is clear therefore that Parliament intended that this court is to decide whether a relationship is or is not an enduring family relationship.*"

- 36 It is right that I have been referred to other cases such as *Re X* [2015] 1 FLR 349, where it can include situations where parties are living in separate households, and where parents have been divorced and therefore, are unlikely to be in a continuing sexual relationship.

Also, the decision of *Re A-B* [2016] 2 FLR 466, where the parties were separated in acrimonious circumstances which resulted in subsequent Family Law Act injunctions.

- 37 It is a question of fact. In this case, the court is able to conclude that the applicants' relationship is one where it is an enduring family relationship for a number of reasons:
1. The three statements filed by the applicants demonstrate the level of commitment they have to each other and to their wish to be able to continue with the arrangement they agreed prior to the surrogacy arrangement being entered into, namely, to have a child to be able to bring up together within their relationship.
  2. As a matter of fact, Z has had his home together with the applicants, albeit not always physically in the same jurisdiction, since his birth. He has remained in their care.
  3. The parental order reporters, Ms Roddy and Ms Doyle, have been able to undertake a number of detailed interviews with the applicants and at no stage in their interviews have they noted any suggestion other than the relationship the applicants have is as they have described.

- 38 Ms Cantor-Freedman refers in her skeleton argument to Ms Doyle's report where having noted a bond between them during her home visit she states:

*"Having visited the home and observed the dynamic between Z, Ms X, Mr W and A [Z's nanny], it appeared that Z was comfortable with all adults who clearly adore him."*

Later in her report:

*"From my observations of the evidence before the Court, they are in an enduring family relationship in which as platonic friends, they have formed a partnership to commission Z's conception and raise him together."*

- 39 I am satisfied in the circumstances of this case on the evidence the court has this criteria is met.

- 40 Turning finally to consider the issue in relation to public policy. As Ms Stanley sets out in her skeleton argument, in the case of *J v G* [2014] 1 FLR 297, I set out at paragraph 21 as follows,

*"It is therefore necessary for the court to consider the public policy matters as identified by Hedley J in *Re X and Y* and *Re S*, but with the understanding that the court is only likely to refuse parental orders in the clearest case of the abuse of public policy where otherwise the child's welfare requires the order to be made."*

- 41 Ms Stanley, supported by Ms Cantor-Freedman, submits that threshold is not met in this case. Whilst there was a concern at the early stages of these proceedings as to whether there had been transparency and frankness with the Georgian authorities, it being recognised Georgian law does not permit single applicants to have children by surrogacy. The applicants' behaviour, however, has been consistent with their intention and their arrangement of wanting to be able to have a child together, to be able to bring that child up, albeit within a platonic relationship setting. This has been demonstrated by the applicants' commitment, in particular by Ms X, to Z in providing his care, not only in Georgia but since their arrival here in this jurisdiction.

- 42 There has been extensive contact with the parental order reporters over a period of time including, importantly, the home visit by Ms Doyle on 28 May 2021. There is nothing to suggest there is any concern regarding the applicants' relationship, their relationship with Z or anything to suggest the information which was provided to the Georgian authorities should cause the court any concern.
- 43 Whilst it is right there is some evidence that lacks clarity, for example, in response to Ms Roddy Ms X said she had not considered whether she could have a biological connection to the child they wanted to bring up. She also set out the reasons as to why she gave the London address in the surrogacy arrangement. Further, the evidence indicates that Mr W has been the main point of contact for the agency, which may be considered unusual bearing in mind that Ms X remained living in Georgia prior to Z's birth.
- 44 There is nothing to suggest that this information was given to deceive the authorities in Georgia and the events since Z's birth, has confirmed the arrangement the parties have entered into by the demonstrable evidence of their commitment they both have to the agreement they reached, namely, to have a child and bring him up together.

### **Welfare**

- 45 The welfare evidence in this case is clear. It has been considered over a period of time, and in my judgment, all points one way. As Ms Doyle notes in paragraphs 28 and 29 of her report as follows,

*"On the evidence that I have reviewed and following further inquiries, it is evidenced that Z's home has been established in England with Mr W and Ms X. They have both shown a commitment to him since birth, and there is no information before me to question this. The parenting arrangement they have come to is likely to be tested. Not only should the parents move on to establish their own romantic relationships and, perhaps, further children, but Z will also have questions about the way in which he was created, conceived and the nature of the relationship between his parents. The unit that they have created for Z is a family relationship which is enduring, and the intended parents are committed to providing Z with honest and age-appropriate explanation about his creation, which is the best way to ensure that he feels safe, secure and develops a positive sense of who he is."*

- 46 Having considered the HFEA 2008 criteria and the welfare checklist, I recognise that Mr W and Ms X commissioned the surrogacy with the purpose of becoming joint parents. I have identified no safeguarding concerns and assess that conferring joint parental responsibility and the extinguishing of the parental rights of the surrogate is in line with Z's short and long-term welfare interests. Z's welfare was carefully considered by Ms Roddy in the initial parental order report, and I do not depart from her analysis.
- 47 I am satisfied on the evidence Z's life-long welfare needs can only be met by this court making a parental order. That order will secure, in a lifelong way, Z's legal parental relationship with both of these applicants, which I am satisfied will meet his welfare needs.
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