IN THE FAMILY COURT
[2020] EWFC 81

No. ZC20P00084

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 13 August 2020

IN THE MATTER OF X
AND IN THE MATTER OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008

Before:

MRS JUSTICE THEIS

(In Private)

B E T W E E N :

(1) A
(2) B — Applicants

- and -

C — Respondent

REPORTING RESTRICTIONS APPLY

J U D G M E N T

(via MS Teams Conference)

A P P E A R A N C E S

MS N. GAMBLE (Solicitor, NGA Law) appeared on behalf of the Applicants.

THE RESPONDENT was not present and was not represented.

MRS JUSTICE THEIS:

Introduction

1 This is an application for a parental order under s.54 of the Human Fertilisation and Embryology Act 2008 in respect of a little boy X, who was born in 2018. The applicants are A and B.

2 X was born in country Z following a traditional surrogacy arrangement entered into between the applicants and the respondent, C, who gave birth to X. C is a national of country Z, is unmarried, was known to the applicants, and consents to a parental order being made.

3 The court has had the enormous benefit of the expert representation for the applicants, together with the extraordinarily perceptive and thorough parental order report undertaken by Jacqueline Roddy, the parental order reporter. Ms Roddy rightly raised a number of issues in her report about this application, which has required the court to request Ms Gamble to provide further information in relation to particular matters regarding public policy and the legal position in country Z.

4 The application for a parental order is dated 16 January 2020, I made directions initially in the case on 15 June, listing the matter for a final hearing on 3 August 2020. The 15 June order included a direction for the applicants to file a skeleton argument which addressed the legal position in the jurisdiction where X was born. Ms Gamble filed her detailed skeleton on 17 July and attached to that the expert evidence from the attorney from country Z, dated 9 July 2020.

5 At the hearing on 3 August I adjourned the matter to today, 12 August, directing that Ms Gamble should file further written submissions by 7 August addressing the issue of public policy. The court has now had the opportunity to consider that document, as has Ms Roddy, and the cases Ms Gamble referred to.

Relevant Background

6 I turn, briefly, to the background which is comprehensively set out in the statements of the applicants dated 5 and 8 June 2020. A was born in the United Kingdom, was educated here and worked here until about 2007. He then went to work with his uncle in country Y. He

remains there working in that business, although his longer-term plans are to return to this jurisdiction with his family, live here and for X to be educated here.

7 B was born in country Z, came to the United Kingdom with her first husband, who she subsequently divorced. She became a British citizen, having made the decision to remain living in the United Kingdom.

8 The applicants met by chance in the United Kingdom in 2011 when A was visiting from country Y. They married in 2013 and wished to have their own family. They sought the assistance of fertility specialists in the United Kingdom and abroad. Although they were aware of the option of surrogacy, they first wanted to pursue IVF. Sadly, B suffered a number of miscarriages. It was then the parties' thoughts turned to consider the possibility of surrogacy.

9 Soon after her last miscarriage B visited her family in country Z, staying with her sister. Whilst there her sister's nanny, C, who had worked for the family for a number of years, learned of the applicants' situation and, according to the statements from the applicants, offered to act as a surrogate on, effectively, an altruistic basis. As set out in the applicants' statements, they wanted to give her time to reflect on this very generous offer in the circumstances they describe.

10 B made contact with a a fertility clinic in country Z, and talked through the surrogacy process with them. In their statements the applicants state there was no discussion with them about the legality of surrogacy. According to them, there was no reference or recommendation for them to seek legal advice or prepare written agreements in relation to any arrangement. The applicants understood that once born the child would be registered as their child. As a result of those discussions, they understood that they would need to identify their own surrogate.

11 The applicants decided to take up C's offer. A attended the clinic to provide the sperm sample and for the embryos to be created using C's eggs.

12 The two embryos were transferred to C under the medical supervision of a doctor, one of the medical directors at the clinic. Subsequently a single pregnancy was confirmed. As A had been travelling between the United Kingdom and country Y at this time, B decided she

would move to stay in country Z to support C during the pregnancy. The arrangement they settled on was that they shared an apartment in country Z during the pregnancy until C moved to another apartment for the final weeks of her pregnancy. CC's own children stayed with her mother at her accommodation, about five hours away. That had been the arrangement that had existed when she was working for B's sister.

13 A returned to country Z although did not meet up with C due to what Ms Roddy described in her report as "the sensitivities around her carrying what was their shared genetic child". X was born at the hospital in country Z. B saw X at the hospital, A was able to observe him through the nursery window. X was discharged the following day with C and was passed immediately to the care of A and B. The hospital discharge documents record the applicants as the legal parents, and a birth certificate was subsequently produced in their names. The applicants state the hospital staff were aware B was not the birth mother.

14 C returned to her rented apartment where she received postnatal care and then returned back to her family home, before then going away again to work. Her own family are unaware of the surrogacy arrangement. B and C had occasional contact in the weeks after the birth, although C did not see X after his discharge from hospital. The applicants remained together for one week before A had to return to country Y to work. A maintained his relationship with X, with daily Facetime calls and regular visits from country Y to country Z before the travel restrictions caused by the Covid-19 pandemic prevented those visits taking place.

15 B has remained in country Z awaiting the outcome of X's British passport application. There has been some delay in this for the reasons outlined in A's statement. His first application did not provide a full account in relation to X's circumstances. That application was withdrawn, but after receiving specialist advice a further application was made, which is still being considered. Once the passport is issued, the plan is to live between country Y and the United Kingdom, as the applicants did prior to the surrogacy, until it becomes necessary for them to spend more time in the United Kingdom in relation to X's schooling.

16 The expert attorney from country Z has provided expert legal advice as to the surrogacy and family law position in country Z. The surrogacy arrangement the parties entered into is not permitted in country Z, although there is no express provision to prevent it. In Ms Gamble's

helpful skeleton argument, she summarises the position in relation to the expert's opinion as follows:

(i) XX is both a British and a citizen of country Z irrespective of whether the respondent or applicant mother is considered his legal mother.

(ii) Under the law of country Z X's legal parents are the respondent and the applicant father. However, the fact that X's birth certificate has been registered to reflect the applicants as his parents means that he enjoys the very strong presumption of being the applicants' legitimate offspring, assuming there is no challenge to the birth certificate.

(iii) The registration of X's birth recording the applicant mother as his mother rather than the respondent did, or may have, violated the law of country Z. If so, the applicants, the respondent and the clinic staff who facilitated the birth registration are all potentially implicated by conspiracy.

(iv) There is specific legislative provision allowing the criminal offence to be forgiven retrospectively if the applicants apply to adopt X in country Z. However, such a course is not available to the applicants given the applicant father would have to live with X in country Z for a substantial period of time before applying.

(v) It is possible that the respondent may have also violated the law of country Z.

17 The applicants' evidence is that the clinic and the hospital were fully aware of the surrogacy arrangement and at no stage did they inform the applicants that what they were doing contravened any domestic country Z law.

18 The court has two detailed statements from A and B, the parental order report dated 22 July, the detailed skeleton argument and the legal submissions in relation to public policy. It is against this background that the court is required to consider whether the requirements under s.54 are met.

The s 54 criteria

19 Taking them each in turn. First, under s.54(1) the court needs to be satisfied that there is a biological link between one of the applicants and that X was carried by somebody who is not one of the applicants. The evidence to establish the biological link with A is provided by the letter from the treating fertility doctor which is notarised. This confirms the IVF transfer of the embryo created using A's gametes to C. Ms Roddy, the parental order reporter, raised the issue of the different way the fertility doctor describes herself in the documents. The applicants were able to provide additional documents, namely ultrasound scans on letterhead papers that include both versions of the doctor's name, and they carry the same signature as to the notarised document. DNA testing has been considered but the logistics due to the travel restrictions meant that would cause a significant delay. Having seen the additional material from the hospital I consider this requirement is met through the notarised letter from the doctor that confirms the genetic connection with A, and that X was carried by someone who is not one of the applicants.

20 The second requirement under s.54(2) is the status of the applicants' relationship. They met in 2011 and married in this jurisdiction in 2013. Although they are currently living separately, due to their particular circumstances and the consequences of the health pandemic restrictions, they plan to be reunited as soon as they are able to.

21 Thirdly, under s.54(3) the application should be issued within six months of X's birth. There was a delay in the application being made in the way described by the applicants. They were unaware of the need to make this application and that once alerted to that promptly made the application. I accept the reasons they have given that the court should not preclude itself from considering this application as a result of the delay and their application should be allowed to proceed in accordance with the principles set out by the former President in the case of *Re X (a child) (Parental Order: Time Limit) [2014] EWHC 3135*.

22 The fourth requirement is that X should have his home with the applicants at the time when the applicants made their application in January 2020, and at the time when the court is considering making a parental order. The application was made on 16 January. At that time, B and X remained in country Z with A travelling between country Z and country Y, and with additional Facetime daily contact with X. Since the health restrictions in March of this year, they have only been able to have Facetime contact. However, I am satisfied that,

save for these health restrictions, they would have continued with their previous arrangement with regular contact and I consider, in the circumstances of this case, that X had his home with the applicants, with A visiting on an irregular basis at the time when the application was made in January 2020, and that he still has his home with the applicants now albeit that A at the moment is prevented from physically visiting them but remains in daily contact and very much part of X's family life.

23 The fifth matter is the question of domicile. A was born in this jurisdiction, so it is his domicile of origin. Although he has spent a considerable period of time, since 2007, out of the jurisdiction he clearly sets out in his statement the links he has retained here and his long-term intention to return back to this jurisdiction. That is supported by the applicants' plans in relation to X's education, for him to be able to be educated here and to base themselves here. So, whilst they may have limited financial assets here, I am quite satisfied A has not given up his domicile of origin due to the strong ties and links he has retained here.

24 The sixth matter is whether the applicants are over 18 years of age. They both are.

25 The seventh matter relates to the question of consent. The court needs to be satisfied C consents to this court making a parental order and has given that consent with full knowledge and understanding as to what that consent means in terms of her legal position in relation to X. The court has a signed, notarised and translated Form A101A Consent dated 27 February 2020, which confirms her understanding and agreement to the order being made. In addition, the court has additional information from Ms Roddy who was able to speak to C on 22 July for about an hour with the benefit of an interpreter. She confirmed to Ms Roddy that she is aware of the application, the hearing and confirmed that she did not wish to play any role in these proceedings. Ms Roddy discussed with her, appropriately, the effect of a parental order, including that it would extinguish her parental rights and she responded: "We already talked about that. I agree". She said she recalls signing the Form A101A on 27 February 2020 and was clear to Ms Roddy she volunteered for this arrangement, and B, whom she considers a friend, was someone she wanted to help. Ms Roddy concluded, having had that discussion with C, that she had provided full and informed consent. I agree with that evidence. The Form A101A is notarised, and supplemented, importantly in this case, by the insightful discussion Ms Roddy had with C, and so this requirement is met.

26 Turning, finally, to the eighth requirement under s.54 relating to any payments that were made, and whether they involved payments more than expenses reasonably incurred. As has already been set out, this was an informal arrangement that was not reduced to writing and the parties relied upon it on good faith and trust as a result of their pre-existing relationship.

27 In terms of the actual payments that were made, the evidence has demonstrated that over a period of three years and seven months, so starting before the pregnancy, the applicants paid a total sum in the local currency of country Z which is the equivalent of about £5,875. In addition, C was provided with housing, her food and other bills were paid. In their evidence, the applicants have equated the wage that C would have been paid as a domestic helper over the same period as just under half of the sum paid and so they acknowledge, in relative terms, she has received quite a considerable sum. They maintain that the driving force for C undertaking this arrangement was her willingness and offer to be able to do this for Mr & B. In her report Ms Roddy says as follows in relation to her discussions with C:

> "When asked about the moneys provided to her by the applicants, C was dismissive of any inference of this being a financial transaction, explaining: 'It was just for me to help them out. They are like my family'. Initially, C disputed that she had received moneys for acting as a surrogate, but I explained that Mr & B told me they had given her various sums of money over three and a half years. C explained that at certain points in her life she was struggling financially and they provided her with some financial support. When I explained that I understood she had received money to enable her to purchase a plot of land and build a house she explained her aunt sold it to her cheaply. She confirmed that there was not any financial agreement but they helped her financially.
>
> C appeared uncomfortable talking about money in relation to the surrogacy, and it was my view she did not wish to say anything that would imply that she had exchanged her services for money. C repeated that she acted in the spirit of altruism in effectively gifting the applicants the joy of a child. She views the money provided to her, which although considerable in country Z, are relatively low sums as gifts exchanged in friendship rather than directly in connection with this surrogacy."

28 The court is asked by the applicants to authorise payments made under s.54(8) in accordance with the principles outlined in the cases. Are the payments made disproportionate to the expenses reasonably incurred? Ms Roddy's view is that the sums did not serve to overbear C's will in providing her consent. C engaged willingly with Ms Roddy, was able to express

her views openly and freely about the arrangement and the circumstances. Ms Roddy supports the court being able to authorise these payments that have been made other than for expenses reasonably incurred.

Public Policy

29 As set out in Ms Gamble's skeleton argument, the issue in relation to payments and public policy have been considered in a number of cases, in particular the two decisions by Hedley J. In the case of *Re S* [2009] EWHC 2977 Hedley J expanded on the considerations that the court has at para. 7 of the judgment as follows:

> ". . . there is a problem for the courts of this country in that it raises the question of what the proper approach is where those who cannot do something lawfully in this country that they wish to do, go overseas do it perfectly lawfully according to the country in which the surrogacy is carried into effect and then seek the retrospective approval of this country for something which, as I say, could not have been done here. This clearly raises matters of public policy and those matters really relate to, as it seems to me, three things:
>
> (1) To ensuring that commercial surrogacy agreements are not used to circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country.
>
> (2) The court should be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas. That has been ruled out in this country and the court should not be party to any arrangements which effectively allow that.
>
> (3) The court should be astute to ensure that sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate."

30 Then, in 2010, Hedley J, in the case of *Re L (A Minor)* [2010] EWHC 3146 (Fam) at paras. 9 to 12, said as follows:

> "9. . . . What has changed, however, is that welfare is no longer merely the court's first consideration but becomes its paramount consideration.

> 10. The effect of that must be to weigh in the balance between public policy considerations and welfare (as considered in *RE X and Y* (supra)) decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making . . .
>
> 12. . . . I think it important to emphasise that, notwithstanding the paramountcy of welfare, the court should continue carefully to scrutinise applications for authorisation under Section 54(8) with a view to policing the public policy matters identified in *RE S* (supra) and that it should be known that that will be so . . ."

31 Within this context the court needs to consider the issue of public policy and, whilst there is no suggestion that the applicants have acted other than in good faith it may be said that they turned a blind eye to making inquiries about the position, perhaps fearing what the answer may be. By then they had endured enormous difficulties in fulfilling their wish to be able to have a family of their own. There is no suggestion that they were other than open with the clinic and the hospital in country Z who, as Ms Roddy observes, have exercised at least a tacit approach to the surrogacy. It is accepted this case involves a breach of the law in country Z when X's birth was registered, albeit unknowingly on the part of the applicants at the time, and the issues raised by the relative in balance of power between the applicants and the respondent. The issue is how much weight should the court give to these public policy concerns in the context of an application where the court is required by law to have regard to the lifelong welfare needs of X, in accordance with the provisions of s.1 of the Adoption and Children Act 2002.

32 Ms Gamble rightly makes the distinction when considering the recognition of foreign adoption cases and what is said about public policy in those cases, because in the case law relating to s.54 it has been made clear that public policy should outweigh welfare only in the clearest case of abuse of public policy, as set out by Hedley J in the case of *Re L*.

33 Ms Gamble has very helpfully taken the court to a number of the recognition of foreign adoption cases where the issue in relation to public policy has been considered. She has referred to the classic statement set out by the former President, Sir James Munby in the case of *Re N (a child) (recognition of foreign adoption) [2016 All ER (D) 53* at para. 129, when he said as follows:

> "For public policy in this context has a strictly limited function and is, in my judgment, properly confined to particularly egregious cases, as

> explained, compellingly and correctly, in the passage from *Dicey, Morris & Collins*, The Conflict of Laws, ed 15, 2012, para 20-133."

He had already set it out but it requires to be repeated with emphasis added so he quotes from it.

> "If the foreign adoption was designed to promote some immoral or mercenary object, like prostitution or financial gain to the adopter, it is improbable that it would be recognised in England. But, *apart from exceptional cases* like these, it is submitted that *the court should be slow to refuse recognition to a foreign adoption on the grounds of public policy merely because the requirements for adoption in the foreign law differ from those of the English law.* Here again the distinction between recognising the status and giving effect to its results is of vital importance. Public policy may sometimes require that a particular result of a foreign adoption should not be given effect to in England; but *public policy should only on the rarest occasions be invoked in order to deny recognition to the status itself*."

It is clear from that, that the emphasis in relation to issues of public policy should only be relied upon in the rarest of cases that are exceptional and ones that are, as he says, particularly egregious. This analysis was repeated by me in *Z v Y* (*A child, by their Guardian*) (the Secretary of State for Home Department intervening) [2020] All ER (D) 163 in the context of recognition of a foreign adoption case, where I confirmed the position set out in *Re N* that public policy objections should be limited to only exceptional cases.

34 In her helpful submissions, Ms Gamble has taken the court through the adoption cases that have considered this issue where public policy concern illegality or deceit. She makes the observation that none were refused on grounds of public policy. *A Council v M & Ors.* [2013] EWHC 1501 (Fam) was in the context of care proceedings relating to a five year old girl where the mother in those proceedings sought that court to recognise an adoption order that had been made in Kazakhstan, which had been obtained indirectly via the mother's US dual citizenship. At para. 82, Jackson J (as he then was) stated as follows:

> "While I share the concerns about the way in which the mother used her US nationality to subvert UK intercountry adoption policy and procedure, it has not been established that the process of which mother took advantage was unlawful, and in particular that any criminal offence was committed in bringing C to this country. The reality is that the mother took advantage of a loophole in the system whereby she was able to employ her status as a dual national of the US and the UK to her advantage. While this was reprehensible, I am not

> persuaded that public policy requires non-recognition in order to mark the court's disapproval of a process in which the administrative authorities in both jurisdictions cooperated. I agree with the authors of *Dicey, Morris and Collins* that something more exceptional is required before public policy is used to deny recognition to an adoption that might be in the interests of an individual child. None of the children in this case is responsible for the mother's actions and it is no part of the court's function to penalise the mother or to enforce international adoption standards if that might be at the expense of their interests."

The court recognised the order in the way that it described.

35 *Re V (A Child: Recognition of Foreign Adoption)* [2017] EWHC 1733 concerned a case where the applicants sought recognition of an adoption order that had been made in Nigeria, where there was evidence that they had misled the authorities about how long the child had lived with them in Nigeria prior to the adoption order being made. At para. 50 Pauffley J stated as follows:

> "50. The SSHD acknowledges that only in the rarest circumstances should public policy be invoked in order to deny recognition of a foreign adoption order. Within her Skeleton Argument, Ms van Overdijk suggested there remain concerns (unassuaged by the Applicants' further evidence) that the Nigerian court may have been misled by them in the sworn evidence filed in support of the Motion to adopt. If that is correct, then argues Ms van Overdijk, it would be sufficient to engage the public policy threshold for refusing recognition; and she suggested that I may wish to hear oral evidence if I were to be sufficiently concerned.
>
> 51. As I have already made abundantly clear, I do not accept that in their dealings with the Nigerian court, Mr and particularly Mrs W sought to deceive or to mislead in any way. They were entitled to put their trust in a lawyer who held himself out as an expert in achieving international adoptions. It must be assumed that he knew the requirements of the law; and unquestionably he was responsible for drafting Mrs W's Affidavit. In all of her dealings with Mrs M, the probation officer, Mrs W was transparent and entirely honest. Mrs M knew exactly when and for how long Mrs W had been in Nigeria and looking after V prior to the adoption hearing. The important factors for her (and for the judge) were the altogether pleasing 'bond' that had developed between Mrs W and V and his future best interests.
>
> 52. In my judgment, there is no public policy reason, none at all, for refusing recognition. Indeed, it would be an affront to public policy to refuse to recognise V's adoption order."

36 Finally, the court's attention is drawn to the decision of Bracewell J in *Re AW (Adoption Application)* [1993] 1 FLR at 62. In that case the applicants entered into a private adoption arrangement knowing it was unlawful, but knowing they were unlikely to be approved by a conventional adoption application in this country because of their advanced ages and health issues. They agreed to pay a pregnant woman £1,000 and arranged for her to give birth in Germany, so as not to alert the authorities here. They brought the child back here, failed to notify the local authority as they should have done, and then continued to lie about the truthful position for a period of about four years. Additionally, they sought to delay any legal proceedings so that by the time the court came to consider the matter the child had been with the applicants for a considerable period of time. Bracewell J dealt with the public policy considerations as follows:

> "I turn to public policy considerations. I find that the breaches of s.29 are particularly serious in this case, and that the breaches of s.57 are much less serious. I have to look at the conduct of the applicants in order to determine whether it would be appropriate to grant them relief. I am driven to the conclusion they knew that what they were doing was illegal. They had been deceitful, they entered into a scheme whereby the birth and handover and caring for the child were kept deliberately from the local authority, and in order to avoid statutory obligations. They deliberately failed to inform the local authority of the child's arrival as required by the Foster Children Act 1980. They have deliberately delayed the proceedings in order to allow a *status quo* to develop, and they have pulled the wool over the eyes of social workers, the guardian ad litem, and the doctors. They have endeavoured to manipulate Dr C and also Mr P.A. They have been deceitful in relation to the local authority and have either lied or deliberately concealed very important matters as to the arrangements surrounding A's arrival, their health, the problems, their marital stability and at one stage as to the nationality of A, who was thought to be Stateless. It was a placement designed to circumvent the Act with a campaign of deception. That is a very serious breach indeed, and there are strong arguments in this case which could lead the court to say that an order should not be made on grounds of public policy. This is one of those unusual and fortunately rare cases in which, in my view, the court would be fully justified in failing to sanction the breaches."

37 Having considered the evidence and the available orders, Bracewell J concluded that the court should make an order under the Adoption Act because doing so was in the best interests of the child who, by that time, had lived with the applicants for four and a half years and was well integrated within that family. She said at the end, and I quote:

"I have finally, and after much anxious concerns, reached the firm conclusion that I should authorise the breaches and make an interim order under s.25 of the Adoption Act. I do so for the following reasons:

(i) The Home Office have not wished to intervene on public policy issues.

(ii) The length of time A has been with this family, which is the only family she knows and hopefully will know in the future.

(iii) If the applicants are refused an order under the Adoption Act the only real option available to the court would be a residence order in favour of Mr & Mrs B. I do not consider that the conditions and the directions which I could impose could give the same degree of protection which I find she needs as the status of a protected child under s.32.

(iv) Refusal of an order under the Adoption Act would prevent the appointment of a testamentary guardian in the future. The ages of these parents bring them within the considerations of *Re W (A Minor: Adoption by Grandparents)* [1981] 2FLR 161.

(v) Refusing an order would prevent the chance of A having the same status as F, as her present age and state of understanding is not immediately so important but, as time goes by, it would increase in significance, but I agree with the professionals that, if possible, A should eventually be the subject of an adoption order to provide her with stability and security within her family.

(vi) The welfare concerns are such that it seems to me an interim order rather than an adoption order is appropriate to secure the welfare of A at the end of the day, and I have decided that welfare considerations must, in the circumstances of this case, outweigh questions of public policy. I agree entirely with the guardian ad litem as to the purpose of an order under s.25, and the objectives from Mr & Mrs B. I am happy to know that the guardian ad litem will remain involved in the case over a two year period which I impose, and her expertise gives me some hope for the future."

As Ms Gamble describes in her submissions, this is perhaps the clearest example of the court giving precedence to welfare over public policy.

38 Turning to the facts of this case. Ms Gamble relies on the following features to say that it does not reach the egregious or exceptional standard, as set out in the cases. First, there is no suggestion that this child was procured for financial gain or unlawful purposes. All the evidence points to X being a much loved and long awaited for child of the applicants. Secondly, the applicants have not sought to deceive the authorities. They have made their application for a parental order here to secure X's legal position with them in this jurisdiction. Thirdly, there is no evidence the applicants broke the law in country Z knowingly or deliberately. They relied on assurances given to them by the medical

professionals who said that they could be recorded on X's birth certificate. Fourthly, the imbalance of power and relative speed with which the arrangement was made should be balanced with the evidence of Ms Roddy in her discussions with C. Fifthly, the remedy available in country Z to rectify the position is not available to A, because he is not living there and so they are unable to take that option up.

Decision

39 I have carefully considered the circumstances of this case, in particular, the evidence that has been provided and the detailed written submissions. I have reached the conclusion that in the circumstances of this case the court should make a parental order in favour of the applicants in relation to X, for the following reasons:

(i) Save for the public policy issue, the requirements under s.54 are met, and the welfare considerations all point to an order being made as it will secure X's legal relationship with the applicants in the jurisdiction where it is intended that he will live and be brought up in a lifelong way.

(ii) If the order is not made, whilst A would be X's legal father, his legal mother in this jurisdiction would remain C, and he would have a different legal relationship with B through, for example, a child arrangements order. That, in my judgment, would not reflect X's reality, where he is being brought up by Mr & B as their child in their full time care, and he is unlikely to have any continuing relationship with C.

(iii) Whilst it could be said that the applicants perhaps turned a blind eye to asking questions about the arrangements in country Z, they were candid with the clinic about what the arrangement was going to be, and the clinic must have been aware what was going on. There is no evidence that those professionals took any steps to advise the applicants to take any further steps themselves. In addition, the hospital who were responsible for the registration of X's birth must have had some knowledge about the reality of X's birth circumstances, and what the actual position was. Whilst the actions of the medical professionals do not entirely absolve the applicants of responsibility it provides an explanation for what they did. The public policy considerations in this case

do not reach the exceptional or the egregious levels that have been described in the cases.

(iv) From the evidence the court has, it is clear from the discussions and the assessment that was undertaken of C that, despite the imbalance in the relationship between the applicants and the respondent, Ms Roddy did not get any sense that this had been an arrangement that had overborne her will, or that the financial circumstances of the arrangement had overborne C's will. Ms Roddy, through her very careful investigation and discussion with C, was satisfied that she had given her consent to this court making a parental order.

(v) It is obvious that X has thrived in the applicants' care.

40 Ms Roddy supports the order being made. She has said today that if the court can navigate a way around the position and find a way to make a parental order it is an order that, on welfare grounds, has her full support. By making that order it will confer joint and equal legal parenthood and parental responsibility on the applicants. It will trigger the issue of a British birth certificate for X confirming his identity as the applicants' child, and it will fully extinguish the parental status and parental responsibility of C under English law which, in my judgment, reflects the reality of X's life.

41 For those reasons I will make a parental order.

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CERTIFICATE

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