



Neutral Citation Number: [2024] EWHC 3548 (Fam)

Case No: ZC23P01381

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2024

Before :

MRS JUSTICE GWYNNETH KNOWLES

Between :

YW **1st Applicant**

XW **2nd Applicant**

- and -
Ms A **1st Respondent**

P **2nd Respondent**

Laura Morley (instructed by Anthony Gold Solicitors) for the **1st applicant**

Andrew Powell (instructed by Bindmans LLP) for the **2nd applicant**

The 1st respondent did not attend and was not represented

Lina Khanom from Cafcass Legal for the **2nd respondent**

Hearing dates: 29 October 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 29 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE GWYNNETH KNOWLES

This judgment was delivered in private [and a reporting restrictions order OR transparency order is in force]. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Gwynneth Knowles:

1. I am concerned with P, a little girl, who was born in July 2023. The applicants are XW and YW. They have made an application for a parental order pursuant to s54 of the Human Fertilisation and Embryology Act 2009.
2. P was born in consequence of a gestational surrogacy agreement in Georgia to an unmarried surrogate, Ms A. The application for a parental order was made on 12 August 2023 and I gave initial directions on 3 November 2023. I will return to consider the procedural history later in this judgment.
3. Ms A is the only respondent. In accordance with the court's directions, she is aware of this hearing, and I am satisfied she knows that the hearing is taking place today. She has also been told that a parental order might be made today. I have seen a letter sent to Ms A by XW's solicitor which accord with my direction for her to be given proper notice. It was sent via the surrogacy agency. On 11 October 2023, the surrogacy agency confirmed it had contacted Ms A by telephone on 3 October 2023. She stated that she had no desire to be involved with the applicants, saying she had fulfilled her contractual obligations according to Georgian law and wished to have no further involvement with XW or YW.
4. I have considered a bundle of documents which includes a parental order report recommending the making of a parental order. I note P was joined as a party to the proceedings on 1 March 2024. Ms Odze is her children's Guardian.
5. The applicants have another child, a little boy called Q who was born in June, and is now aged 4 months old. He is P's full biological sibling.
6. YW is represented pro bono by Ms Morley, XW by Mr Powell, and P is represented by Ms Khanom at Cafcass Legal.
7. This case falls outside the vast majority of cases concerning children conceived and born by surrogacy outside of the jurisdiction of England and Wales because it has required close scrutiny as to whether there are welfare or public policy issues that militate against the making of a parental order.
8. In January 2024, YW was convicted and sentenced to a term of imprisonment for 2 years and 8 months for the offence of fraud. He was released subject to licence conditions which include a curfew and an electronic tag. The license will expire on 16 September 2026. Notwithstanding his conviction, YW and XW presented as a united and committed couple, seeking a parental order in respect of P.
9. I turn to briefly summarise the procedural history. The application was made on 12 August 2023. I gave initial directions for a report to be prepared and listed a hearing in January 2024. That hearing had to be adjourned due to delays in issuing P with a passport. The final hearing was adjourned to 18 March 2024 with adjustments to timetabling of evidence and the filing of a parental order report. Then, on 2 February 2024, Ms Odze filed a s16A risk assessment, setting out her concerns about YW's offending history, his previous children and XW's perception of risk. Ms Odze also made a referral to the local authority where the couple lived. Though initially withheld for reasons of confidentiality, the 16A risk assessment was disclosed to XW and YW on 19 February 2024. The local authority made safeguarding enquiries and said it would take no further action until YW was released and expressed its view that XW presented as no risk to P. On 18 March 2024, I conducted a directions hearing and listed the matter for final hearing today, directing the disclosure of documents from

criminal proceedings and the preparation of a child and family assessment from the local authority. I also made a Children Act 1989 lives with order in respect of XW as, at that time, YW was in prison and so nobody in this jurisdiction at liberty was able to exercise parental responsibility for P. The parties then applied for directions by consent, and I agreed for this hearing to be reduced from two days to one day.

10. Leaving the procedural history to one side, I will set out the background shortly. XW and YW had tried to conceive a child. They had three rounds of IVF which were sadly unsuccessful. They had eight embryo transfers, all of which failed. Following the last transfer, XW suffered an ectopic pregnancy which led to a diagnosis of infertility. They then considered alternative options to become parents, eventually choosing surrogacy. In June 2022, the applicants engaged a clinic in Georgia to assist them in a surrogacy arrangement. YW's gametes were sent to Georgia, and they signed a contract for the provision of a surrogacy service. They then conceived P from YW's gametes and an egg from an egg donor. Medical issues for the surrogate meant she gave birth some three weeks early. XW and YW arrived in Georgia shortly thereafter. P has been in the care of XW since then. YW returned to the UK on 3 August. Following the belated issue of P's passport, XW arrived here with P on 26 January 2024.
11. I turn to the criteria under s.54, some of which require closer scrutiny than others:
12. S54(1): P was conceived via IVF. She was carried by the surrogate and the sperm of YW was used. She is not related to Ms A, and I have seen DNA results confirming YW is P's biological father.
13. S54(2): XW and YW are husband and wife. I have seen a marriage certificate confirming they married in February 2017.
14. S54(3): the application form was received by the court on 12 August 2023, clearly within six months of P's birth.
15. S54(4)(a): P had her home with XW when the application was made. She has lived with XW throughout but not with YW from 3 August 2023 up to when he was released from prison in September 2024. On behalf of XW, Mr Powell's skeleton suggests the court should apply a straightforward and purposeful reading of s.54(4)(a). He submits that P had regular calls and contact with YW whilst he was in prison and has been in his care since he returned to the family home in the beginning of October 2024. I need to decide whether the very significant period where P was not in YW's care had any implications for the satisfaction of s54(4)(a). The case law requires this court to adopt a purposive approach with each case being fact specific. Further, the meaning of home should be interpreted broadly using the language of article 8 of the ECHR. Two case examples suffice:

- a. **A (A Child : Surrogacy: S.54 Criteria)** [2020] EWHC 1426 (Fam) Keehan J observed that:

“The term ‘home’ must be given a wide and purposive interpretation. The authorities make clear that the term is not and should not be restricted to cases where the applicants live together under the same roof. It is the plain intention of the parents that A will be cared for by both of them, albeit not necessarily, and not at present, on the basis of an equal shared care arrangement. Giving a wide and purposive interpretation of the word ‘home’, I am satisfied that A has his ‘home’ with the mother and the father.”

- b. In a case I determined, **Re Z (Parental Order: Child's Home)** [2021] EWHC 29 (Fam), I adopted a wide and purposive interpretation by making a parental order with respect to a child accommodated in local authority care at the time the application was made.
16. Mr Powell has drawn my attention to the lack of reported cases where one of the applicants has served a term of imprisonment. In these particular circumstances, and looking at matters in the round, I am satisfied YW's imprisonment is not a barrier to the making of a parental order under s54(4)(a) for the following reasons:
- i. When P was discharged from hospital, she was put in the care of both of her parents. P and XW had regular contact by telephone and facetime with YW whilst she and her mother awaited the issue of a passport;
 - ii. During his imprisonment, YW had regular contact with P, including direct contact in prison; and
 - iii. YW, once approved by the probation service, returned to the family home where he and XW are living with P as her primary carers.
17. For all of those reasons, I am satisfied that s54(4)(a) is made out.
18. S54(4)(b): this is plainly satisfied because XW has a domicile of origin in this jurisdiction which he has not surrendered.
19. S54(5): XW and YW plainly are both over the age of 18 years.
20. S54(6): this is the bedrock of the statutory provisions in s54 of the HFEA. It requires the court to be satisfied that the woman who carried the child has, freely and with full understanding of what involved, unconditionally consented to the making of the parental order. I have seen a copy of the form A101A. As it was signed outside the jurisdiction, Ms A's signature was notarised. As she did not sign the form within the first six weeks of P's life, the consent she has given is valid pursuant to s.54(7). On 18 July 2023, Ms A signed documents for the purpose of a passport application for P. At that time, Ms A made plain she was in agreement with the surrender of all her parental rights and for P to be returned to the United Kingdom.
21. Following YW's conviction, Ms A was informed of the same by telephone on 24 February 2024. Her position on consent remained the same and her consent has not been withdrawn. She has been further contacted this month, as I have described, and wishes to have no further involvement in proceedings.
22. S54(6) requires consent by the surrogate parent must have been freely and unconditionally given. It is a fundamental and crucial aspect of the statutory regime. I am satisfied Ms A has given her consent freely and with full understanding, having been informed of the relevant factors, namely XW's imprisonment and convictions after she signed form A101A.
23. S54(8): the applicants made payments amounting to just over £15,000 to the surrogate. These are evidenced in XW's statements and are in line with the surrogacy agreement. They made payments just over £35,000 to the surrogacy agency. All of the payments have been set out with commendable transparency. Ms Odze, the children's Guardian, is satisfied with the integrity and transparency of financial arrangements in this case. I too am satisfied that the payments made were lawful in Georgia and in accordance with the surrogacy arrangement. Secondly there has

been no abuse of public policy with respect to the payments. They were not at such a level to compromise the agency of Ms A.

24. Finally, and most importantly, P's welfare is paramount in respect of all matters. She needs a parental order to cement her place in her new family. I retrospectively authorise the payments to Ms A.

25. Before making a parental order, I need to be satisfied about P's welfare from a lifelong perspective, having regard to the welfare checklist. This exercise is rendered more complex by YW's convictions and past family life. Parental orders are serious orders, very much like adoption orders, which make lifelong changes to P's status going beyond childhood and into adulthood. The former President of the Family Division, Sir James Munby, in *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam) observed that:

"A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in Re J (Adoption: Non-Patril) [1998] INLR 424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences." Moreover, these consequences are lifelong and, for all practical purposes, irreversible..... And the court considering an application for a parental order is required to treat the child's welfare throughout his life as paramount:.... Parliament has therefore required the judge considering an application for a parental order to look into a distant future.

26. To adopt the Guardian's approach, a parental order has the most profound personal, psychological and emotional and in some cases cultural and religious consequences. These consequences are lifelong. When the court considers an application for a parental order, it must treat the child's welfare as paramount. The contents of Ms Odze's report make plain P is thriving in the care of the applicants. That is not the end of the story because of the matters to which I have already referred.

27. Turning first to YW's criminal convictions, PNC checks confirmed YW has 47 convictions and committed 81 separate offences between March 1988 and January 2024. On analysis, it is a prolific offending history which includes two offences of violence. He has committed offences as a juvenile and as a young adult. 43 offences relate to offences of dishonesty such as theft and burglary. On any analysis, they are significant. None of the offences were committed in respect of a child. YW has received a variety of criminal justice disposals ranging from fines, community service, drug treatment and probation orders. The forensic history is a clear risk to P's emotional wellbeing should YW offend again.

28. XW has struggled with now knowing the full extent of YW's offending. She has been clear that she feels he has changed for the better particularly since the trial for his most recent offence was reportedly pending for some 7 years.

29. YW has told the court he has changed and sought mental health support for his problems and that he understands the concerns. His previous probation officer confirmed to Ms Odze in her assessment that YW has changed and that XW's

support had been instrumental in that respect. The current probation order has confirmed she will refer YW for counselling. He is engaging fully with probation.

30. Secondly, checks revealed that there have been previous public law proceedings concerning YW's older children. I have read a series of heavily redacted documents relating to these proceedings. They reveal YW was domestically abusive to the mother of the children; and that they both used drugs and had mental health problems. YW was admitted to hospital for treatment of his mental health problems. He accepted he could not care for these children. Those children were placed with maternal relatives pursuant to a special guardianship order.
31. These factors are a cause for real concern. The child and family assessment by the local authority identifies a risk to P if YW offends again and notes that the possible use of drugs or poor mental health may negatively impact on his parenting. The recommendation is Early Help support. It identifies the need for both parents to be open with welfare services. Ms Odze expressed some concern that YW minimised these historic concerns. Nevertheless, Ms Odze recommends the making of a parental order. Her assessment is that XW is a protective parent and YW very much wants to be a safe parent. She states at paragraph 65 of her report:

“Throughout my involvement in this application, I have come to the same conclusion. Even though [XW] had in the past sought to under-estimate the seriousness of [YW's] past, I attribute it to the fact that she was not in possession of the full facts. Since the disclosures, she has been able to reflect on that information although she maintains that he is a changed man. This is partly true as there has never been any domestic abuse in their relationship and [YW] has abstained from taking drugs both of which are significant changes to be recognised and applauded. With professional assistance, [YW] will continue to make progress on other areas of his emotional needs. [XW and YW] now have two beautiful children, and they want to make sure that they will come to no harm. [YW] is committed to working with professionals and to access the support available to her from the Local Authority.”

32. On behalf of XW, Mr Powell submits there are welfare issues of magnetic importance which support the making of a parental order. He lists these as follows:
- a. The first applicant is the child's biological parent;
 - b. It is desirable for children born via surrogacy to have the optimal legal relationship with *both* of their intended parents. That is usually by a parental order or an adoption order;
 - c. If the joint application for a parental order is refused, the second applicant would not qualify for a single parental order under s54A as she is not genetically related to the child. In any event, were it possible, such an order would distort the child's relationship with a natural parent;
 - d. A family life exists between the applicants and the second respondent child;
 - e. This court granted a 'lives with' order in favour of the second applicant on 18 March 2024. The granting of the parental order will seek to solidify the social reality of the second respondent child;
 - f. There exists a positive obligation on the State to respect both family life and private life;
 - g. The State has a positive obligation to provide some form of legal recognition between children born via surrogacy and their intended parents that puts them on par with other parents;
 - h. Section 1(2) of the Adoption and Children Act 2002 demands that the court assess the child's lifelong welfare;

- i. When looking at the child's lifelong welfare, that must include the ability of a child to be able to acquire a legal relationship with their biological parent and their intended mother;
 - j. Although the first applicant is a legal parent by virtue of being a biological parent and the surrogate not being married, the absence of a parental order leaves the surrogate as the child's legal parent in this jurisdiction;
 - k. The second respondent child now has a genetic full sibling, Q, who was carried by the second applicant. As siblings, they will occupy an incongruent legal status with each other and their entire wider family unless and until a parental order is made. Although full biological siblings, they are currently legal strangers;
 - l. A single adoption order in favour of the second applicant would not reflect P's life story within this family unit and would only serve to exacerbate the legal incongruence between herself and her full sibling, Q.
33. All of these points are well made and I accept them. My focus must be on P's lifelong welfare. The jurisprudence makes clear that it is only in the clearest case of an abuse of public policy that the court should refrain from making a parental order. That is spelt out by Mr Justice Hedley in in **Re L (a minor)** [2010] EWHC 3146 (Fam):
- "What has changed, however, is that welfare is no longer merely the court's first consideration but becomes its paramount consideration. The effect of that must be to weight the balance between public policy considerations and welfare (as considered in Re X and Y) 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 supports its making... 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."* (my emphasis added)
34. I think it is important to emphasise that. The court should be careful to scrutinise public policy matters. Where public policy issues are at large in parental order proceedings, such as this case, this is usually in the context where intended parents or adopters have sought to evade authorities or concerns of exploitation relating to the surrogate. Neither of those factors arise in these proceedings.
35. Having reflected on the welfare analysis, I am content to make a parental order. This case does not reach the threshold described by Mr Justice Hedley. To decline to make a parental order would represent a serious and disproportionate interference with P's Article 8 rights, those of XW and YW, and those of Q. P would have a wholly incongruent legal status to that of her biological brother. Ms A would remain a parent though she has made plain she wants no involvement in P's life. P needs a parental order to give permanence and security to her care arrangements in circumstances where no one other than XW and YW seek to provide lifelong care for her.
36. P will need a full understanding of how she came to be born and will require support and love from her family to understand her birth story when it is made known to her. I was pleased to learn that the applicants intend to tell P about her birth story. This can only be of benefit to her emotional wellbeing and accords respect to P whose birth story is uniquely her own.
37. Standing back and looking at all matters in the round, I make a parental order in respect of P to the applicants.

