Neutral Citation Number: [2022] EWFC 34

Case No: ZC20P01192

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4/3/2022

Before:

MRS JUSTICE THEIS

- -

Between:

X and	
Y (Deceased)	**Applicants**
- and -	
W	**1st Respondent**
- and -	
Z	
(A Child by his Children's Guardian Kay Demery)	**2nd Respondent**

- -

Ms Dorothea Gartland and Mr Colin Rogerson (instructed by **Dawson Cornwell**) for the **Applicants**
Ms Shabana Jaffar (instructed by **Cafcass**) for the **2nd Respondent**
The 1st Respondent was not present

Hearing date: 9th December 2021
Judgment: 4 March 2022

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Approved Judgment

MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the child and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. The court is concerned with applications for a declaration of parentage and a parental order in relation to Z, now age 18 months. He was born following a surrogacy arrangement in Uganda entered into by X and Y with W. W was the gestational surrogate mother, who did not meet X and Y. Z was born at the he clinic that oversaw the arrangement. Tragically, before Z's birth Y unexpectedly died whilst in Uganda on an extended visit. Y assumed the care of Z after his birth, Z secured British Citizenship and a British passport and X and Z came to this jurisdiction in February 2021.

2. This matter has been delayed due to complications caused by restrictions resulting from the Covid 19 pandemic, both here and in Uganda.

3. X has had the enormous benefit of specialist representation from Ms Gartland and Mr Rogerson, supported by the expertise of Ms Jaffar from Cafcass Legal, who represents Z through Ms Demery, the Children's Guardian.

4. Considerable reliance is placed on the decision of this court in *Re X* [2020] EWFC 39 where in similar circumstances one of the intended parents died prior to the birth of the child. That case set out the route the court considered it was able, in those circumstances, to make a parental order, securing the child's lifelong legal parental relationship with the intended parents. In that case the intended parents were married. In this case X and Y were not married but had been in a relationship for a number of years which, it is submitted on the facts, was an enduring family relationship as required by s 54 (2) Human Fertilisation and Embryology Act 2008 ('HFEA 2008').

5. The court made the declaration of parentage and a parental order at the hearing on 9 December 2021, with reasons to follow. This judgment sets out the reasons for those orders.

Relevant Background

6. X and Y began a relationship in 2009 and started living together in 2010.

7. X was born in Uganda, had lived in this jurisdiction since 2003 and obtained her certificate of naturalisation in 2009. She has worked and been based here for nearly 20 years.

8. Y, also born in Uganda, had been living here since the early 1970's, and had indefinite leave to remain here. Y had been married with four children from that relationship, who are now young adults. X had also been married previously but with no children from that relationship.

9. X and Y wished to have children of their own. During their relationship they decided to consider surrogacy following X having experienced two ectopic pregnancies and unsuccessful IVF treatment.

10. In her statement X outlined how she identified the clinic, and the enquiries she made. She was informed by the clinic that their practice was to identify the surrogate and the intended parents would not meet her. The details provided to X and Y about W's

circumstances were her name, that she was unmarried and had her own children. With W's agreement they were given a copy of her identity card.

11. The evidence in the letter from the doctor who oversaw the necessary procedures at the clinic, sets out that the embryo transferred to Won 23 July 2019 was created by gametes from Y and a donor egg.

12. In December 2019 Y unexpectedly died in Uganda from a pulmonary embolism. X immediately went to Uganda and remained there until Z's birth. X assumed immediate care of Z following his birth. Following the necessary immigration procedure X returned to this jurisdiction with Z in February 2021.

Relevant statutory framework

13. A declaration of parentage pursuant to s 55A Family Law Act 1986 ('FLA 1986') is sought to ensure that Y's name is entered on Z's birth certificate.

14. Section 55A provides ***Declarations of parentage***

> *(1) Subject to the following provisions of this section, any person may apply to the High Court [or the Family Court] for a declaration as to whether or not a person named in the application is or was the parent of another person so named.*
>
> *(2) A court shall have jurisdiction to entertain an application under subsection (1) above if, and only if, either of the persons named in it for the purposes of that subsection-*
>
> *a. is domiciled in England and Wales on the date of the application, or*
> *b. has been habitually resident in England and Wales throughout the period of one year ending with that date, or*
> *c. died before that date and either-*
>
> *i. was domiciled in England and Wales, or*
> *ii. had been habitually resident in England and Wales throughout the period of one year ending with the date of death.*

15. In order for the court to make a parental order it has to be satisfied that each of the relevant criteria in s 54 HFEA 2008 have been met. In relation to this case they can be summarised as follows:

(1) There is a biological link between the child and at least one of the applicants and the child has been carried by someone other than one of the applicants (s54 (1))

(2) If the application is made by two people that they are married, in a civil partnership or an enduring family relationship (s54(2)).

(3) The application for a parental order should be made within six months of the child's birth (s54(3)).

(4) The child's home is with the applicants at the time of the application and when the court is considering making a parental order (s 54(4)(a)).

(5) At least one of the applicants or applicants is domiciled in this jurisdiction.

(6) The applicants are over 18 years (s54 (4)(b)).

(7) The respondent has given her consent at least six weeks after the birth of the child to the court making a parental order and such consent is given freely, unconditionally with full understanding (s54 (6) and (7)). Any form of written agreement executed outside the United Kingdom must be witnessed in accordance with rule 13.11 (4) Family Procedure Rules 2010.

(8) The court needs to consider whether it should authorise any payments made other than for expenses reasonably incurred (s54(8)).

Submissions, discussion and decision

16. In their excellent skeleton argument Ms Gartland and Mr Rogerson set out the relevant legal and factual analysis. Ms Jaffar, on behalf of the Children's Guardian, agrees with and follows their approach.

17. Turning first to the declaration of parentage, it is submitted this is required as it will assist with the registration of Z's birth with the General Register Office ('GRO'). In an email sent to the parties in *Re X (Parental Order: Death of Intended Parent Prior to Birth) [2020] EWFC 39* the casework office at the GRO set out that if the parents are not married the mother would need to apply to the court for a declaration of parentage to allow the father to be recorded on the birth certificate.

18. It is submitted the court has jurisdiction based either on Y's domicile in this jurisdiction or that he had been habitually resident here in the year prior to his death in December 2019. In her statement X sets out that when he died Y was visiting Uganda for an extended trip of about three months. She confirms his home remained in this jurisdiction, X remains living in it and his children from his previous marriage all lived here. Those factors point towards the habitual residence requirement being met.

19. On the information the court has it is clear Y was habitually resident in this jurisdiction in the year prior to his death. His life was fully integrated here, this is where his home was, where his partner, X, lived as well as his children from his previous marriage. His visit to Uganda was only intended to be short term.

20. The evidence the court has from the clinic demonstrates, on the balance of probabilities, Y's gametes were used to create the embryo transferred to W in July 2019, resulting in the pregnancy and Z's birth.

21. It is submitted the court has jurisdiction to make a declaration of parentage and Y is not displaced as Z's legal parent at common law due to the evidence that W was unmarried and the provisions of ss 35 and 42 HFEA 2008 do not displace Y as Z's legal father.

22. As in *Re* X (ibid), Z's Article 8 rights are engaged, particularly in relation to his identity. The declaration of parentage ensures his birth certificate accurately reflects his identity, which will secure his right to family life.

23. Turning to the criteria under s 54 it is submitted the court should keep in mind the matters set out in *A v P [2011] EWHC 1738 (Fam),* in particular at paragraph 22 when the court stated:

'The provisions of the Human Rights Act 1998 ("HRA 1998") are relevant. Ms Fottrell puts it in her skeleton argument in the following way:

(i) The court must read all primary and secondary legislation so as to give effect to the provisions of the Human Rights Act 1998.

(ii) The effect of s 3 HRA is that when considering the interpretation of legislation the court must have regard to not just the intention of Parliament but it should seek to adopt any possible construction which is compatible with and upholds convention rights. (R v A [2001] UKHL 25 para 44; Ghaidan v Godin-Mendoza [2004] UKHL 30 para 41)

(iii) Article 8 includes a positive obligation which requires the State to ensure that de facto relationships are recognised and protected by law (Marckx v Belgium 2 EHRR 330 para 31)

(iv) Article 8 requires the court to provide protection of the rights of children which are real and effective and not theoretical and illusory.

24. In *A v P* the court went on to consider Article 8 of the United Nations Convention on the Rights of the Child ('UNCRC') and stated at paragraph 28 the following:

'The concept of identity includes the legal recognition of relationships between children and parents. In ZH (Tanzania) v Secretary of State for the Home Department UKSC 2011 4 Baroness Hale considered that the courts in this jurisdiction and decision makers had to have regard to the key principles of the UNCRC, both in respect of Article 8 of the ECHR and in its application to decisions by authorities in this jurisdiction (paras 22 – 25). If the consequences of a purposive construction of s 54(4) is that the child's identity with his biological father is preserved and the child's identity is linked to both Mr and Mrs A the court may consider itself bound to arrive at such a conclusion on the combined reading of Article 8 ECHR and Article 8 of the UNCRC.'

25. It is submitted in the circumstances of this case X and Y were in an enduring family relationship, in accordance with the requirements of s 54 (2) (c) HFEA 2008. This relationship existed at the time the embryo was created and transferred to W in July 2019. Sadly, Y died before Z was born and before this application for a parental order was made. Whether or not there exists an enduring family relationship is a question of fact (see *re F & M (Child) (Thai Surrogacy) (Enduring Family Relationship)* [2018] EWHC 1594 (Fam) [24]-[29]).

26. This court is invited to follow the approach taken in *Re X* where the court felt able, in the circumstances of that case, to read down the requirements in s54 for two applicants (s54(1)), the status of the applicants relationship (s54(2)(c), the requirement for the child to have his home with the applicants at the time of the application, and the making of the order (s54(4)(a)) and for the applicants to be over the age of 18 years at the time of making the order (s54(5)).

27. It is submitted the court should follow what is set out in paragraph [58] of *Re X*

'In the circumstances of this case, the court can and should 'read down' s54 through the s3 HRA lens to include the additional provisions (underlined) to s54(1), (2) (4) and (5) as follows:

"S54(1) On an application made by two applicants (or on an application brought on behalf of two applicants who, but for the fact that one of the applicants has died after the conditions in s54(1)(a) were met, would have met the requirements of s54(1)(b) and s(54(2)) ('the applicants), the court may make an order providing for a child to be treated in law as the child of the applicants if

(a) The child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,
(b) The gametes of at least one of the applicants were used to bring about the creation of the embryo, and
(c) The conditions in subsections (2) to (8) are satisfied.

Section 54(2) The applicants must be (or in the case of an application where an applicant has died were immediately prior to the applicant's death)

(a) Husband and wife;
(b) Civil partners of each other, or
(c) Two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other

Section 54(3) – No amendment required.
Section 54(4) At the time of the application and the making of the order

(a) The child's home must be with the applicants (or in the case of an application where an applicant has died and the application is brought on his or her behalf by the surviving applicant, the child's home must be with the surviving applicant), and
(b) Either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.

Section 54(6), (7) and (8) – no amendment required."

28. The effect of this will mean, as set out in paragraph 60 of *Re X*, that:

'(1) It permits the court to make an order by reference to the HFEA, read through the HRA 1998 lens.

(2) It avoids the court having to consider whether s 1 LR(MP)A enables the applicant Mrs Y to bring a claim on behalf of Mr Y's estate, or whether the right to apply for a parental orders 'vests' before the child in question is born.

(3) This route confines the wider implications of the court's decision to similar surrogacy situations thereby avoiding the issues that may arise on other potential claims under s 1 LR(MP)A.

(4) Following such a course is justified and proportionate, recognising the unique significance of parental orders, highlighted by Munby P in Re X [2014] EWHC paragraph 54 as follows:

> *"Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family."*
> *Thereby recognising the rights engaged under Articles 8 and 14.*
>
> *(5) It means the applicants can remain as they are now, without the need for Mrs Y to be acting as executor to Mr Y's estate.*
>
> *(6) In the event the court accepts these submissions the child's birth certificate should record, in accordance with the relevant regulations, the fact that Mr Y died.'*

29. If the court accepts the approach outlined by Ms Gartland and Mr Rogerson, they submit the criteria in s 54 can be met in the following way.

30. The genetic link is established by the letter and more recent affidavit from the treating doctor, the fertility and IVF specialist at the clinic who oversaw the necessary procedures. I agree that evidence confirms Y's gametes were used to create the embryo transferred to Win July 2019 resulting in Z's birth.

31. The facts, as set out in X's statement, establish X and Y were in an enduring family relationship. They had been together a number of years, wished to have a child of their own, had jointly embarked on the surrogacy arrangement with the clinic based in Uganda and, but for Y's unexpected death, would have remained in the same relationship as existed prior to Y's death. In *Re X* the court made a parental order in circumstances similar to this where the applicants were married. It is submitted it would be discriminatory not to permit X and Y, in similar circumstances, save that they are an unmarried couple, to secure a parental order for the child born as a result of the surrogacy arrangement they entered into. The principles that underpin the purposive reading permitted in *Re X* apply equally in the circumstances of this case. I agree. On any view X and Y were in an enduring family relationship, they had lived together for a number of years, wished to have a family of their own, had undergone fertility treatment which was sadly unsuccessful and had jointly entered into the surrogacy arrangement with W.

32. The application was made within six months of Z's birth.

33. Z has had his home with X since birth, by definition including at the time when the application for a parental order was made and when the court was considering making a parental order. If the court permits the same purposive reading as in *Re X* this requirement is met. I agree.

34. It is submitted the requirement for at least one of the applicants to have their domicile in this jurisdiction at the time the application is made is met by X being able to establish a domicile of choice here, in accordance with the principles summarised in *Re Z [2011] EWFC 3181* at paragraph 13. I am satisfied X has met this requirement. As set out in her written evidence, X has lived in this jurisdiction for over 18 years, she became a British Citizen in 2009 and relinquished her Ugandan citizenship, has worked here since 2003, set up and run her business here, all her assets and financial resources are here and she pays taxes here. Her home is based here and she intends to bring Z up in this

jurisdiction and has no intention or plans to live elsewhere. It is clear she has demonstrated an intention to permanently and indefinitely reside in this jurisdiction.

35. X is over the age of 18 years.

36. Turning to the issue of W's consent. The circumstances of this surrogacy arrangement is that X and Y did not meet W. The evidence sets out that this is said by the clinic to be the accepted arrangements for surrogacy in Uganda. That position is supported by other evidence from X and Ms Isoto, an advocate who practices in Uganda. In the papers there is a signed form A101A dated 24 June 2020, more than six weeks after Z's birth. The signed document is in English and is witnessed by a notary public. The clinic have confirmed it was translated for W. In addition, there is a signed C52 Acknowledgement of Service dated 26 May 2021, again in English. This document confirms W's agreement to the court making a parental order. This matter was originally listed for a final hearing in June 2021 and the letter from the clinic dated 26 May 2021 stated W *'is aware of the court date…and understands that hopefully matters will be made final on that day. Please find enclosed the forms you requested signed by Surrogate Mother.'* This was a reference to the Acknowledgement of Service form.

37. According to the affidavit from the treating doctor at the clinic he states *'When women enter our program to be surrogates they understand that they will have no contact with the intended parents. We only hold a telephone number for [W]. Postal services are unreliable in Uganda and we do not have an email address for her. We have not been able to make contact with [W] since the UK court hearing in June 2021 despite several efforts. I believe her contact information has changed and we have no other means of contacting her.'* The evidence demonstrates all steps have been taken to contact W. This has included the Children's Guardian, Ms Demery, trying the telephone number, with no success.

38. The clinic have been candid in the position they find themselves in, the treating doctor at the clinic states in the letter dated 4 august 2021 *'We understand the requirements when applying for British citizenship and British passport for children born overseas through surrogacy arrangements; that the UK authorities expect to see evidence relating to the surrogacy, including the surrogacy agreement, details of the surrogate (including hr ID card and marital status) as well as providing her consent of the application. We also appreciate the reasons for this because, under British law, the surrogate is always seen as the legal mother at birth. However, the local position in Uganda, and specifically at our clinic differs from the above. When the surrogate mother consents to providing this service, she is assured of anonymity at all times, including after the birth of the child(ren) she has borne…I hope you understand the position and appreciate the difficulty if this conflicts with the legal position in the UK.'*

39. The position now is that despite the efforts of X, the clinic and Ms Demery it has not been possible to contact W directly or indirectly since May 2021 when the last documents were signed by her. All those documents indicate her consent to this court making a parental order. It is not suggested that any further adjournment would facilitate other steps to be taken to contact her. There is nothing to suggest the documents signed by her cannot be relied upon. Therefore having considered all the material that is available to the court, including the background to this particular surrogacy arrangement, the involvement and co-operation by the clinic and the

documents the court has I can be satisfied that W does consent to this court making a parental order.

40. Although W did know about the hearing in June 2021 it has not been possible to notify her of the hearings that have taken place since then for the reasons set out above. I am satisfied that no further steps can reasonably be taken and that I can dispense with the need for her to be notified of this hearing.

41. The final criteria under s 54 concerns any payments that have been made, in particular any that have been paid other than for expenses reasonably incurred. As set out in the letter from the treating doctor at the clinic the fee paid to the clinic was about 28 million Ugandan Shillings (about £5,600) to cover the costs associated with the surrogacy arrangements, such as IVF, egg donations. In the more recent statement from the treating doctor at the clinic sets out that the Respondent received 9 monthly instalments of 1.5 million Ugandan Shillings (about £300) for her living expenses with a final payment of 7 million Ugandan Shillings (about £1,414) following the birth. These payments were made in line with the surrogacy agreement signed by the parties on 26 August 2019.

42. Whilst the monthly sum was for expenses the final payment was intended to be compensation to W for the arrangement. The court is asked to authorise any element of these payments that are other than for expenses reasonably incurred. In considering whether it should do so it is necessary to consider whether the sum paid is disproportionate to reasonable expenses, whether the Applicants have acted in good faith or sought to get round the authorities or whether any issues of public policy are raised (see *Re WT (a child: foreign surrogacy arrangements) [2015] 1 FLR 960 [35]).*

43. The court has the benefit of a letter from Ms Isoto, an Advocate of the High Court of Uganda, She sets out that she is the author of a paper called 'National Approaches to Surrogacy: Uganda', which was delivered at a workshop on national approaches to surrogacy at the University of Aberdeen in 2011. The paper was not published but was quoted by the Hague Conference on Private International Law Preliminary Report of March 2012 on issues arising from international surrogacy arrangements. She sets out that surrogacy is well established in Uganda, there are no laws or guidance regulating surrogacy arrangements in Uganda and that it is usual for surrogates to receive between 6 – 10 million Ugandan Shillings. Birth certificates are registered in the name of male and female commissioning parents without a judicial/court process. In her updating statement X has provided some additional information about what the payments made in this case equate to, providing information of the minimum wage salary in Uganda as being 663,000 Ugandan shillings (about £140 per month) and the average monthly wage as being 2.6 million Ugandan Shillings (about £550 per month).

44. It is likely that an element of the modest payments made were other than for expenses reasonably incurred, although on the limited information the court has it is difficult to be precise. In circumstances where the Applicants did not meet W reliance is placed on the information provided by the clinic, supported by the information from Ms Isoto. The clinic have co-operated with the requests and enquiries for extra information and the surrogacy arrangement in this case falls within the financial and other parameters outlined by Ms Isoto. There is no suggestion the Applicants have acted other than in good faith and have not sought to get round the authorities. In the circumstances of this

case the court should, in my judgment, authorise any element of the payments that are other than for expenses reasonably incurred.

Welfare

45. The s 54 criteria having been met, the final matter the court is required to consider is whether making a parental order will meet X's lifelong welfare needs, having regard to the matters set out in section 1(4) Adoption and Children Act 2002 ('ACA 2002').

46. Ms Demery has filed two detailed and perceptive reports and was able to meet Z and X at their home. She describes X as Z's emotional and psychological parent and makes a clear recommendation that a parental order should be made.

47. I have no hesitation in accepting that recommendation. By making a parental order it will secure for Z his lifelong legal relationship with X and Y. That will reflect the reality for Z who has been cared for by X since his birth. This order will secure his identity, which will meet his lifelong welfare needs.