



Neutral Citation Number: [2023] EWFC 214

Case No: OX17/2023

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2023

Before :

MRS JUSTICE THEIS DBE

Between :

	E	<u>Applicant</u>
	- and -	
	R	<u>1st Respondent</u>
	- and -	
	L	<u>2nd Respondent</u>
	- and -	
	H By Her Children’s Guardian, Emma Huntington	<u>3rd Respondent</u>

Mr Andrew Powell (instructed by **Laytons LLP**) for the **Applicant**
First Respondent did not attend and was not represented
Second Respondent appeared in person
Ms Eva Holland Cafcass Legal for the **3rd Respondent**
through her Children’s Guardian
Ms Kelly Wise (instructed by **the Local Authority**) for the **Adoption Agency**

Hearing: 19 October 2023
Judgment: 28 November 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 28th November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
MRS JUSTICE THEIS DBE

This judgment was delivered in private. 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, 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. This application for a step-parent adoption order pursuant to s 51(2) Adoption and Children Act 2002 (ACA 2002) concerns a child, H, now age 2 years. She was born following a surrogacy arrangement in Argentina entered into by her intended parents, E and L, with R, the gestational surrogate. R was not married at the time of the embryo transfer and H was conceived using L's gametes and a known donor egg. The step-parent adoption application is made by E. The respondents to that application are L, R and H, through her Children's Guardian.
2. Although it is accepted E and L could apply for and satisfy the criteria under s 54 Human Fertilisation and Embryology Act 2008 (HFEA 2008) for the court to make a parental order, they seek to secure the legal parent status for E through a step-parent adoption. The application for a step-parent adoption is supported by L, R, H's Children's Guardian and the local authority, through its adoption agency.
3. The court is extremely grateful to Mr Powell and his instructing solicitor, Mr Spearman. They are representing E pro bono. E, the other parties and the court have greatly benefited from their expertise in this area. Their written and oral submissions set out with admirable clarity the issues in this case and I have no doubt their support in this case has been significant for this family.

Relevant background

4. L is in his 40s and E is in his 50s, were both born in Argentina. E has lived in the UK since 1993, and L since 2005 and they are both British Citizens. E also has Italian citizenship.
5. The applicants have been in a relationship since 2000, they had a civil union in Argentina on 9 December 2004 and entered into a civil partnership in this jurisdiction in 2021. They have both lived together in this jurisdiction since 2002 and both acquired British citizenship in 2010.
6. The surrogacy arrangement that resulted in H's birth was through a licensed clinic in Argentina. E and L knew R prior to the surrogacy arrangement, she was a close friend of the family. The egg donor is a cousin of E's and she signed documentation on 30 December 2020 that she has no filial bond between herself and the child pursuant to section 577 of the Argentine Civil and Commercial code. R signed documentation giving up her parental responsibility, including a document on 25 August 2022 that she had no filial bond between herself and H pursuant to section 577 of the Argentine Civil and Commercial code.
7. E and L were present at H's birth in Argentina and she was immediately placed in their care. H is recognised in Argentina as the child of E and L. E and L have remained in regular contact with R, keeping her updated about H and they meet up at least once a year. They also remain in contact with the egg donor and meet her at wider family gatherings or events. E and L returned to this jurisdiction with H when she was 6 weeks old.

8. At that time they did not realise that they needed to take any other steps to secure their legal position with H in this jurisdiction. When they did understand that further steps should be taken, they decided to pursue an application to adopt.
9. The local authority were given notice of the intention to adopt on 3 October 2022. As part of their enquiries the local authority visited the family on 24 October 2022 and 22 December 2022.
10. The adoption application is dated 27 February 2023. The primary motivation to apply for adoption rather than a parental order is that an adoption order is more likely to be recognised in Italy, which will enable H to apply for EU citizenship. The applicants have been informed by the Italian consulate that an adoption order is the *'best and quickest'* way for this to be done in Italy. Although their initial application was a joint application this has now been amended to a step-parent adoption by E, the non-biological intended parent who is an Italian national. The Italian legal advice E and L have received states that a parental order would not be able to be registered in Italy in the same way as an adoption order.
11. H was joined as a party to the proceedings on 27 April 2023. Directions were made by this court on 27 April 2023 and 12 June 2023. On 27 April 2023 a child arrangements order was made. The matter was listed for hearing on 19 October 2023 when the court had the benefit of hearing submissions from the parties. Directions were made for further information regarding the birth certificate that would be issued if the court made a step-parent adoption order and updated advice from E's Italian lawyer.

Legal framework

12. The current position in this jurisdiction regarding E's legal status with H is that he is not a legal parent, but does have parental responsibility by virtue of the child arrangements order made on 27 May 2023. L and R are H's legal parents. L has parental responsibility by virtue of the child arrangements order dated 27 April 2023 and the order dated 19 October 2023 pursuant to section 4 Children Act 1989.
13. The step parent adoption application is made under s 51(2) ACA 2002 which provides *'An adoption order may be made on the application of one person who has attained the age of 21 years if the court is satisfied that the person is the partner of the parents of the person to be adopted'*.
14. In addition s 46 (3)(b) ACA 2002 specifies *'in the case of an order made on an application under s51(2) by the partner of a parent of the adopted child, does not affect the parental responsibility of that parent'*.
15. In accordance with s 67(2) ACA 2002 if an adoption order is made the child is to be treated *'as the child of the relationship of the couple in question'*.
16. The effect of s46(3)(b) and s67(2) ACA 2002 is that a step-parent adoption order being granted to E will effectively extinguish the parental responsibility of any other person apart from the parent who is the partner of the applicant. So, R will lose parental responsibility and L will retain parental responsibility for H.

17. The adoption preliminary requirements set out in the ACA 2002 relevant to this application can be summarised as follows:
- (1) S 42(3) – the child must have his home with the applicant at all times during the period of six months preceding the application. H has lived with the applicant since birth.
 - (2) S 49(3) – the applicant has been habitually resident in this jurisdiction for a period of not less than one year ending with the date of the application. E has lived here since 1993.
 - (3) S 49(4) – the person to be adopted has not attained the age of 18 years on the date of the application. H was 1 year old at the date of the application.
 - (4) S 51 (2) – the applicant is over 21 years. E is in his 50s.
 - (5) S 52 – parental consent. R is H’s legal mother in this jurisdiction and has provided her written consent to this application in form A104 executed by a notary public on 22 June 2023, so complying with rule 14.10 FPR 2010.
 - (6) S 44 (2) and (3) – notice of intention to adopt must be given to the local authority no more than 2 years or less than 3 months before the date of the application. Notice was given on 3 October 2022, 4 months prior to the application dated 27 February 2023.
 - (7) S 42(7) – the court may not make an adoption order unless it is satisfied the local authority have had sufficient opportunities to see the child with the applicant together in the home environment. In this case there have been two home visits, observation at court, and nursery and health visitor references provided.
 - (8) S 44(5) and rule 14.11 Family Procedure Rules 2010 require the local authority to prepare a report of their investigation into the prospective adopter. Three reports have been prepared in this case.
18. If these requirements are met the paramount consideration of the court is the child’s welfare, throughout its life (s1(2) ACA 2002) and the court should have regard to the welfare checklist (s1(4) ACA 2002).
19. The Court of Appeal in *Re P (Step-Parent Adoption)* [2014] EWCA Civ 1174 held that with regard to a step parent adoption, the approach of the European Court of Human Rights in *Soderback v Sweden* [1999] 1 FLR 250 should be applied. McFarlane LJ (as he then was) set out at paragraph [48]

“Where an adoption application is made by a step-parent, the approach of the ECtHR in Söderbäck v Sweden should be applied according to the facts of each case. In doing so the following central points from the judgment in Söderbäck are likely to be important:

a) There is a distinction to be drawn between adoption in the context of compulsory, permanent placement outside the family against the wishes of parents (for example as

in Johansen v Norway) and a step-parent adoption where, by definition, the child is remaining in the care of one or other of his parents;

b) Factors which are likely to reduce the degree of interference with the Art 8 rights of the child and the non-consenting parent ['Parent B'], and thereby make it more likely that adoption is a proportionate measure are:

i) Where Parent B has not had the care of the child or otherwise asserted his or her responsibility for the child;

ii) Where Parent B has had only infrequent or no contact with the child;

iii) Where there is a particularly well established family unit in the home of the parent and step-parent in which 'de facto' family ties have existed for a significant period.

20. Furthermore, in discussing the different context of each case, which vary from a fully opposed public law stranger adoption, to an adoption within the child's de facto family unit, McFarlane LJ noted at paragraph [62]:

"The reason why context is important is that, in each case, it is necessary to evaluate the proportionality of the intervention in family life that is being proposed. For the child, and for the child's welfare throughout his life, there will be a qualitative difference between adoption by strangers, with no continuing contact or legal relationship with any member of the birth family, on the one hand, and an adoption order which simply reflects in legal terms the reality in which the child's family life and relationships have been conducted for some significant time. In ECHR terms, no adoption order will be justified in terms of its interference with family life rights unless it is 'necessary' and 'proportionate', but in assessing those factors the degree to which there is an interference will be relevant".

21. The matter of P was referred to by the Court of Appeal in *Re L (A Child: Step Parent Adoption)* [2021] EWCA Civ 801, in which King LJ noted at paragraphs [48-49]

"48. In summary, the combination of Söderbäck and Re P serve to emphasise that there is an important qualitative difference in the degree of interference with the Article 8 rights of a child and any non-consenting parent as between so called stranger adoptions on the one hand and step-parent adoptions on the other.

*49. The critical difference as between stranger adoptions and step-parent adoptions was summed up by McFarlane LJ at para. [47] (set out at para. [43] above) when he said that a stranger adoption is only justified when 'nothing else will do' whereas step-parent adoption involves a lower degree of interference and may be more readily justified. It follows that the test in a step-parent adoption is lower. It is not an order of last resort and the 'nothing else will do' test found in *Re B (a child)* [2013] UKSC 33, [2013] 2 FLR 1075, at [104], [130], [198], [215] ('Re B') is not the correct test. The fact that the interference of a step-parent adoption is less extreme may render adoption proportionate in a case where the proposed adopter is a step-parent in circumstances where it may not be where the applicant is a stranger."*

22. It is accepted an alternative route to secure E's legal parental relationship with H, bearing in mind H was born as a result of a surrogacy relationship, is through a joint application by E and L for a parental order. For the court to consider making such an order the requirements under s 54 Human Fertilisation and Embryology Act 2008 ('HFEA') would need to be met. They can be summarised as follows:
- (1) A biological link between at least one of the applicants and the child and that the child was not carried by one of the applicants. (s54(1))
 - (2) If a joint application the applicants are married, civil partners or in an enduring family relationship (s54(2)).
 - (3) The application is made within 6 months of the child's birth, although the court can consider applications made later (s54(3); *Re X (A Child)*(*Surrogacy: Time Limit*) [2014] EWHC 3135 (Fam)).
 - (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. (s54(4)(a))
 - (5) At least one of the applicants is domiciled in this jurisdiction at the time when the application is made and when the court is considering making a parental order. (s54(4)(b))
 - (6) The applicants are over 18 years. (s54(6))
 - (7) The surrogate (and her husband, if relevant) consent to the court making a parental order. (s54(7))
 - (8) The court authorises any payments made other than for expenses reasonably incurred. (s54(8))
23. If those criteria are met the court can make a parental order if it considers the child's lifelong welfare needs are met by making that order in accordance with s1 ACA 2002. A parental order was devised specifically for children born as a result of surrogacy arrangements.

Submissions

24. Mr Powell, on behalf of E, states what he seeks is to secure an order that secures his legal parent relationship with H in this jurisdiction and enables H to acquire Italian citizenship by virtue of having an Italian parent. Both E and L consider that aspect to be an important part of her identity and life story, as well as H having the practical benefits that EU citizenship would bring.
25. Mr Powell recognises the conventional order that would be sought in these circumstances would be a parental order and the relevant criteria for making such an order would be met, however the application to pursue a step-parent adoption order is founded in advancing H's welfare needs. There is no statutory obligation imposed on intended parent(s) to apply for a parental order, although it is accepted that is the order that secures the optimal legal relationship with the intended parents and best reflects the circumstances of children born as a result of a surrogacy arrangement.

26. Family life clearly exists between H, E and L. Making a step-parent adoption order would, Mr Powell submits, secure the Article 8 rights of the applicants and H, which includes their respective identities. There is a positive obligation on the State to respect both family life and private life and when considering the child's lifelong welfare needs the court can include the potential of a child to be able to secure the nationality of an intended parent.
27. Mr Powell recognises the caution the court may have about making an order in circumstances where it may be intended to be used in a way that does not give the full picture. He submits that the reality in this case is E has a legitimate entitlement to apply for a step-parent adoption order and, submits Mr Powell, meets the necessary requirements. The court is required to consider the application on its merits, having regard to H's lifelong welfare needs.
28. Mr Powell submits the continued evolution of what constitutes a 'family' within an international context and jurisdictions where certain family units might not be recognised is not unheard of and will continue to change over time (e.g. *S (Parentage and Jurisdiction) [2023] EWCA Civ 897*). Mr Powell acknowledges that a step-parent adoption order would not reflect H's life story as accurately as a parental order, although it would reflect what E and L intended. That is that they each be recognised as H's legal parent and that she should have the ability to obtain the citizenship of each of her parents. Therefore, on the facts of this case, the benefits of making a step-parent adoption order significantly outweigh the practical benefits of H being made the subject of a parental order.
29. Ms Wise, on behalf of the adoption agency, fully supports this application. The reports filed pursuant to rule 14.11 Family Procedure Rules 2010 (FPR 2010) recommend the order is made.
30. On behalf of H's Children's Guardian, Ms Holland, in her thorough and well-crafted written and oral submissions, submits H is in an established family unit with E and L. R has not cared for H nor has she or wishes to assert her parental responsibility for her. On the contrary, R fully supports an adoption order being granted. The welfare checklist is carefully addressed in the Children's Guardian's report. H has had her home with E and L since birth and has known no other care givers. It is with them that she has formed her primary attachments and she recognises them as her parents. The observations of H with E and L was of "*reciprocally loving relationships, where she anticipated that her needs would be met*". H enjoys a secure, loving home with E and L and views them both as her fathers. She is thriving in their care, making excellent developmental progress and presents as a happy, confident and active child. E and L intend to be entirely open with H as to the circumstances of her birth, and they intend to have a life-long connection with R and have regular contact with the egg donor.
31. The Children's Guardian's conclusion is set out in her report, as follows:

"The positive Annex A reports accord with my assessment of the family. [E] and [L] present as loving and attentive parents, for whom [H] has adopted the central position in their lives. They are ably meeting her global needs and [H] presents as a happy, much loved child who is thriving in their care. I consider that [H's] welfare needs would best be met by securing her legal parentage".

32. Following the hearing on 19 October 2023 the applicant provided further information to the court. The Registrar General confirmed that in the event of a step-parent adoption order being made the newly issued birth certificate both the names of the biological father and the step-parent will appear. This will replace the original birth certificate, which can only be used for information purposes and cannot be used for any official purpose. The applicant's Italian lawyer has confirmed that the names of E and L appearing on a birth certificate is capable of registration in Italy. The lawyer has stated that such an adoption measure that '*does not include or indicate references to surrogacy is required*'.

Discussion and decision

33. Although the more conventional order to reflect the joint intent and endeavour of creating and having a child via surrogacy is a parental order, there is no requirement for a parental order to be applied for. Particularly if there are identified welfare benefits that support a different order being made, as a step-parent adoption differentiates between H's fathers in a way that a parental order would not. Whilst this does not affect H's lived experience, it does not fully reflect the circumstances of her birth in the way a parental order does.
34. It is right that either order will remove the parental responsibility held by R, secure the legal parent relationship between H, E and L which will reflect the de facto family relationship them. L is H's legal parent and has parental responsibility by virtue of this court's order. The making of a step-parent adoption order in favour of the E will extinguish the parental responsibility of any other person (in this case R) apart from the parent who is the partner of the applicant (in this case L) by virtue of s46(3)(b) and s67(2) ACA 2002.
35. By making the step-parent adoption order it would have the effect of transforming the legal status of the child with the result that both E and L would be recognised as legal parents, both with parental responsibility with the added welfare benefit of recognising E's Italian heritage, her sense of identity and the family culture. The evidence demonstrates they are an international family; spending time in other countries and experiencing other cultures form a significant part of their shared identities. E and L identify H as being a child with Italian heritage, her name includes an Italian name and it is a heritage E strongly identifies with. In the particular circumstances of this case the making of a step-parent adoption order is more likely to enable that heritage to be recognised in a tangible way for the benefit of H.
36. On the particular facts of this case the making of a step-parent adoption order will secure and safeguard, now and into the future, the established central relationship, legal and factual, between H and E and L and is the order that secures H's lifelong welfare needs, with identified welfare benefits. Any suggestion that a step-parent adoption order may not fully reflect H's background in the way a parental order would is met by the powerful evidence in this case. It demonstrates E and L are clear about the importance of H understanding from an early age her background and the circumstances of her conception. As a result of the secure ongoing meaningful relationships that exist between the relevant adults, in particular with R and the egg donor, their role in H's background will be an integral and lived part of H's life going forward. H's lifelong welfare and identity needs are best met by the court making a step-parent adoption order in favour of E.