Neutral Citation Number: [2024] EWHC 2082 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 May 2024

Before :

Mrs Justice Knowles

- -

Between :

M(1) **F(2)** **(deceased)**	**Applicants**
- and -	
Y	**Respondent**

- -

Re XW (Parental Order: Death of An Applicant)

- -

Hearing date: 14 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 May 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.

The Honourable Mrs Justice Knowles DBE:

1. I am concerned today with a little boy called XW who was born in May 2023.

2. An application pursuant to section 54 of the Human Fertilisation and Embryology Act 2008 ("the Act") was made for a parental order by M and F in October 2023. F, however, unexpectedly and sadly, died in December 2023. XW was born in consequence of a gestational surrogacy arrangement in Nigeria to the respondent surrogate, Y.

3. Y has been told of this hearing and I am satisfied that she has been informed of not only the date of the hearing but also that the court might make a parental order today. I have seen the letter written by the applicant's solicitor sent to Y via the surrogacy clinic. Y responded to that letter sending her condolences to M and reaffirming her consent to the parental order being made. She confirmed that she gave her full support to the legal proceedings and that she agreed to "*completely transfer every parental responsibility to your client*".

4. I have read the bundle prepared by the applicant and the parental order report of CC dated 18 April 2024. I have read a very helpful and powerful skeleton argument produced by Mr Powell, counsel on behalf of the applicant. As Mr Powell identifies in his skeleton argument, the key issues that fall to be considered in this case in respect of s.54 are first of all s54(4)(a) home, s54(4)(b) domicile, and s54(6) consent.

5. The background to the case is helpfully provided in the case summary to the proceedings. In order to shorten this judgment, I read into my judgment paragraphs 2-23 of the case summary in their entirety. They helpfully set out the factual background which explains the events which took place both before and after the surrogacy arrangement was entered into:

   The first applicant was born in Nigeria. The deceased second applicant was born in London. The deceased second applicant holds British nationality.

   In 1987, the applicants met. They married in Nigeria in 1999. For 10 years they lived separately in Nigeria and this jurisdiction respectively until 2009, when the first applicant moved here. On moving, the first applicant moved in with the second applicant in their current home, which is a one-bedroom council property in south London.

   In May 2022, the applicants approached a clinic in Nigeria to assist them in a surrogacy agreement. In August 2022, the second applicant donated his gametes in Nigeria. A third-party egg donor was used for the embryo creation. The identity of the third party egg donor is unknown, in accordance with the practice of surrogacy arrangements in Nigeria.

   In September 2022, two embryos were implanted into the respondent. At the 12-week scan, confirmation of a successful pregnancy was confirmed. The applicants entered into a surrogacy agreement with the clinic after the successful implantation.

34 weeks into the pregnancy, the respondent was admitted into hospital as she required a transfusion. Three days later the respondent was readmitted into hospital with gestational diabetes and symptoms of malaria. As a result, the applicants changed their flights to be present for the early birth of XW.

XW was born in May 2023 in Nigeria. The applicants were present at XW's birth. After a short period in hospital, the applicants were able to take XW to their arranged accommodation in Nigeria. The applicants and XW were not able to return to this jurisdiction as XW required immigration clearance.

On 17 October 2023, a C51 was filed seeking a parental order in respect of XW. A supporting statement from the first applicant was appended to that application seeking the court's urgent assistance in making respectful requests to the Secretary of State for the Home Office (SSHD) and Foreign, Commonwealth and Development Office (FCDO) to assist in expeditiously processing any application made on behalf of XW.

On 24 October 2023, Mrs Justice Theis made an order on the papers and directed for:

i. *The applicants to file and serve a statement by 27 November 2023;*
ii. *A parental order reporter from Cafcass be allocated by 3 November 2023;*
iii. *A parental order report be filed by 22 January 2024; and*
iv. *The matter be listed for further directions and/or final hearing on 30 January 2024 before Mrs Justice Theis.*

On 28 October 2023, the order of Mrs Justice Theis was served on the SSHD and FCDO by the applicants' solicitors. On 30 October 2023, an application for a certificate of entitlement to British citizenship for XW was submitted to facilitate his travel to this jurisdiction. This application, as opposed to one for entry clearance, was deemed most suitable as it would be processed quicker and was a more straightforward procedure. On 11 December 2023, XW was granted a certificate of entitlement, as confirmed by the Government Legal Department in writing on that same day.

On 28 November 2023, the applicants' respective statements were filed with the court and served on the parental order reporter.

In December 2023, the second applicant sadly and unexpectedly passed away. The second applicant experienced chest and stomach pains, and he was admitted to hospital where he subsequently died. As a result of the second applicant's death, the first applicant and XW remained in Nigeria to engage with the culturally appropriate burial procession.

On 3 January 2024, the applicants' solicitors wrote to the court seeking permission for the final hearing listed for 30 January 2024 be relisted due to the fact that M and XW remained in Nigeria and because of the second applicant's death. Permission was also sought by the applicants' solicitor for the proceedings to continue following the second applicant`s death. On 24 January 2024, the court emailed the applicants' solicitor confirming that the hearing would re-listed in light of the circumstances.

6. *On 29 January 2024,* Mrs Justice Theis made an order on the papers and directed for:
   i. *The proceedings to continue notwithstanding the second applicant's death;*
   ii. *The filing of the parental order report is to be extended to 29 March 2024; and*
   iii. *The 30 January hearing shall be adjourned and relisted on 10 April 2024 before Mrs Justice Knowles.*

   In February 2024, the first applicant and XW arrived in London from Nigeria.

   On 1 March 2024, the court sent the applicants' solicitors an email informing them that the hearing on 11 April 2024 would need to be adjourned. A new hearing date was proposed and the matter was listed on the 14 May 2024 before me.

   On 6 March 2024, the parental order reporter met the first applicant and XW. On 7 March 2024, the parental order reporter emailed the court requesting an extension for filing the parental order report in light of the new hearing date. The following day the court confirmed a new filing date of 29 April 2024.

   On 18 April 2024, the parental order report was filed with the court and the applicants' solicitors. The report confirmed that a parental order to the first and second applicant (posthumously) would meet XW's needs. The report considered that this jurisdiction was the first applicant's domicile of choice and that she intended to remain living here with XW. The first applicant was described as meeting all of XW's needs and was committed to caring for him and ensuring he reached his full potential.

   On 1 May 2024, the applicants' solicitors wrote to the respondent to inform her of the upcoming final hearing and the likelihood of a parental order being made at that hearing. This letter was first sent by the first applicant via a WhatsApp message to the clinic, who act as intermediary between the applicants and respondent. On 5 May 2024, the applicants' solicitor sent the clinic the letter by email also for the sake of completeness. On 6 May 2024, the clinic emailed the applicants' solicitor with the respondent's reply confirming that she had received, read and understood the contents of the letter as sent.

7. I turn now to s. 54 of the Act which outlines the criteria for the making of a parental order. I will first address those that are satisfied, and which are factually uncontroversial.

8. Section 54(1) provides that XW must have been carried by a surrogate and that the sperm or the egg of one of the applicants was used to bring about the creation of the embryo. XW was conceived by IVF using a donor egg and F`s sperm. I have seen the DNA test result that shows F to be XW`s father. The procedure was undertaken at a clinic in Lagos.

9. Section 54(2) requires the applicants to be, amongst other categories, either husband and wife or civil partners. M and F married in 1999 in Lagos, Nigeria. I note that they were married after a long pre-marital relationship.

10. Section 54 (3) requires that the applicants must apply within a period of six months following the child's birth. The application was issued by the court on 20 October 2023, and thus within six months of XW`s birth.

11. Section 54(5) requires both applicants to be aged 18 or more. I am satisfied that the applicants are over 18 years old. M is now in her 50s, as was F at the time of his death.

12. I now turn to s54(8) in relation to any payments made associated with the surrogacy. The applicants made payments amounting to £16,726.00 and I note that the clinic was responsible for paying this sum to the surrogate. The amount received is evidenced by invoices produced in the court bundle. As at today's exchange rate, Y received £4,851.44. The parental order reporter who has previous experience of surrogacy arrangements by this particular agency, stated that it was her understanding that the compensation payments for surrogacy arrangements were generally between £3000-£4000. This amount would be in line with the minimum wage in Nigeria and payments made by way of surrogate compensation in Nigeria. On production of the invoices, it has now been confirmed that the payments made to the surrogate as compensation were closer to £5000. Notwithstanding this minor discrepancy, I am satisfied, however, that these payments are lawful in Nigeria and were in accordance with the surrogacy agreement. There seems to be no abuse of public policy: the payments were necessary and proportionate and Y did receive the amount paid to her. Above all, when authorising the payments, I have taken into account that XW`s welfare is paramount. He needs a parental order to recognise and cement his place in his family. I thus retrospectively authorise the payments made.

13. I turn now to the remaining criteria in section 54, rendered more complex by F's untimely death.

14. Section 54(4)(a) relates to domicile . It requires the child's home at the time of making the application and at the time of making the order to be with the applicants. This was unproblematic as XW had his home with both of the applicants when the application was submitted in 2023. However, today, given the sad death of F, I need to consider the meaning of the word 'home' in light of the present circumstances. In the decided cases that address the meaning of the word "home", the court is required to adopt a purposive approach to the statute. The authorities make it clear that each case is fact specific. I note that there have been at least 16 reported cases where the court has taken a purposive approach to the meaning of the word "home". As summarised in the case of **X & Anor v B & Anor** [2022] EWFC 129, the court identified four circumstances where it has been required to take a purposive approach to the meaning of the word 'home':

    a. Where the applicants have separated;
    b. Where the applicants were in a relationship but never in the same home;
    c. Where the children were living separately from the parents but in a home provided by them;
    d. Following the death of one of the intended parents.

15. In Mr Powell's skeleton argument, he highlighted a fifth category of case where, following an application to the court for a parental order, the child dies before a parental order can be made and he referred me to an as yet unreported decision of Theis J from July 2023.

16. The court has previously resolved the problems caused by the premature death of one of the applicants by reading down the statute on a convention-based analysis. I read into this judgment paragraphs 21 to 26 of the skeleton argument submitted by Mr Powell on behalf of the applicants:

"In A v P (Surrogacy: Parental Order: Death of the Applicant) [2011] EWHC 1738 (Fam) Theis J summarised the submissions in relation to a positive obligation under article 8 on behalf of the applicant and the child [30]:

"Following the positive obligation identified by Marck v Belgium the court should seek to ensure that the child is in an equivalent relationship with each parent. The court is therefore seeking to protect the rights to respect to family life of the unit as well as each of the individual members. The rights of the child and his interests have '…primary importance…. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. Where the best interest of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them (ZH (Tanzania) v Secretary of State for the Home Department (ibid) per Lord Kerr SCJ para 46).

Only a parental order would have the effect of transforming the legal status of the child such that both commissioning parents are recognised as being the legal parents of the child."

*In **Re X** [2020] EWFC 39 the case concerned the death of one of the intended parents before the application could be determined. The court was clear that articles 8 and 14 ECHR were engaged –*

"88. X was not able to establish a family life with her biological father due to his premature death. However, as Munby P made clear in Re X, Article 8 rights refer not only to family life but also to private life and there is an obligation upon the State to respect both."

The State has a responsibility to ensure that it respects XW's right to a private life and that extends to ensuring he is provided with recognition of his identity as the child of his deceased father. In D, G v ED, DD, A, B [2015] EWHC 911 (Fam) at paragraph 39 Russell J stated that Article 8 rights include 'the right to adequate legal recognition of biological and social ties'. X currently has a birth certificate that names an individual (Mr Z) with whom she has no connection as her father.

Article 14 is also engaged on the grounds that XW's Convention rights should be secured without discrimination of any ground, including birth or other status. Here X is not able, without a parental order being made, to have a birth certificate that reflects the relationship and connection that he has with Mr and Mrs Y as his parents, solely by virtue of the circumstances of his birth through surrogacy." (at para 88-90)

It is submitted that Parliament cannot have intended that a child in XW's position should not have his relationship to his intended parents properly and clearly reflected in law.

That outcome would be entirely outwith the scheme of the Act and would discriminate against him in circumstances entirely outside of his or anyone else's control.

*The case of **A v P** is, in many respects 'on all fours' with the facts in the present case. In **A v P**, one of the applicants (the intended father) died after the application was made but before the order was made. Theis J made the order for the following reasons [§31]:*

> *(1) For the reasons outlined above no other order or combination of orders will recognise B's status with both Mr and Mrs A equally.*
> *(2) Article 8 is engaged and any interference with those rights must be proportionate and justified.*
> *(3) In the particular circumstances of this case the interference cannot be justified as no other order can give recognition to B's status with both Mr and Mrs A in the same transformative way as a parental order can.*
> *(4) To interpret s 54(4) (a) and 54(5) in the way submitted will not offend against the clear purpose or policy behind the requirements listed in s 54. It will not pave the way for single commissioning parents to apply for a parental order or orders being made in favour of those under the age of 18 years.*
> *(5) Mr and Mrs A were lawfully entitled to apply for a parental order when they made their application.*
> *(6) Such an interpretation will protect the identity of B and the family unit in accordance with Article 8 UNCRC.*
> *(7) It is clearly in B's interests that a parental order is made to secure his legal status with both Mr and Mrs A.*
> *(8) B's home was with Mr and Mrs A from the time of his birth up until the time of Mr A's death, thereafter he has remained in the care of Mrs A. But for Mr A's death B would have remained in the care of them both.*
> *(9) Mrs A is now 36 years and Mr A would have been 34 years.*

*In respect of XW`s article 8 rights, it is submitted that as well as the intended parents, XW had what can properly be considered to be an established family life, which becomes more established as time passes. From birth in May 2023 until the untimely death of the second applicant in December 2023, he enjoyed a family life with both applicants. This is clear from the applicants' written evidence. Further, as was noted in **D, G v ED, DD, A, B** [2015] EWHC 911 (Fam) article 8 rights include 'the right to adequate legal recognition of biological and social ties.'. Indeed, as Munby P noted in **Re X (A Child) (Surrogacy: Time Limit)** [2014] EWHC 3135 (Fam) -*

> *"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. As Ms Isaacs correctly puts it, this case is fundamentally about X's identity and his relationship with the commissioning parents. Fundamental as these matters must be to the commissioning parents they are, if anything, even more fundamental to the child. 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."*

17. Of course, in respect of XW's article 8 rights, I accept Mr Powell's submission that he too had an established family life with the applicants from the moment of his birth until the untimely death of F in December 2023, he enjoyed a family life with both applicants. That is absolutely clear from the written evidence before the court,

18. Secondly, there is a positive obligation on this court to respect both family and private life. I have an obligation to ensure the applicant's right to private family life is respected. This respect is extended despite F's death. XW should be afforded the optimum status in law as to his relationship with the applicants. Respect for family life requires acknowledging that his biological and social reality prevails over legal presumptions. Finally, XW is the biological child of the second applicant and that demands respect for his family life.

19. In circumstances such as these, Mr. Powell has invited me to accept that Parliament intended a sensible result (as per the approach taken by Munby P in **Re X (Surrogacy: Time Limit)** [2014] EWHC 3135 (Fam). It would be the antithesis of that intention for M to be prevented from being identified as XW's parent in law along with F.

20. From the moment of XW's birth until the death of F, he was an integral part of the family. If a parental order was not made, then as a child of both applicants, X's parentage would be unrecognised in law. This would have an unconscionable effect on XW's life. An adoption order would not reflect XW's life story. M does not wish to adopt XW as a single adopter. It would not be in keeping with what has occurred in this case. Even if she did qualify under s.54(a) for a parental order as a single person, that too would not reflect XW`s life story. It would deprive XW of his biological father and M from being recognised as his legal parents.

21. As Mr Powell reminded me, I have the benefit of F's short statement dated 28 November 2023, made three weeks before his death. In his statement, he endorses the statements made by M. Poignantly, the statement concluded, "*for the reasons in paragraphs 22 and 23 of M's second statement. I fully wish for a parental order to be made in respect of our son, XW".*

22. The second issue to determine is compliance with s.54(4)(b): the issue of domicile. It is a necessary requirement under the statute and is a question of fact. Mr Powell invited me to read down the statute and adopt an article 8 approach given F had a domicile of origin in this jurisdiction and that this subsisted for the purpose of the

application. However, I am not going to take this complex approach with respect to F's domicile. It seems to me that I do not need to do so in this case. Here, M lives in this jurisdiction and, in my view, on the facts of this particular case, I am satisfied that she has acquired a domicile of choice. She has indefinite leave to remain here. She has had that since 2018. She is entitled to British nationality and intends to apply for that in January 2025. M has lived and worked in London since 2009 and married F in 1999 who himself had British nationality. XW has dual nationality and has British and Nigerian citizenship. M confirmed to Ms Callaghan that she intends to live in London and raise XW here. M trained as a paediatric nurse and plans to return to work after a period of parental leave. She has a joint council tenancy and is in the process of transferring this into her sole name. Notwithstanding F's death, she was steadfast in her intention to return to this jurisdiction and resume life here. I am more than satisfied that she has abandoned her domicile of origin in Nigeria and acquired a domicile of choice in this jurisdiction. Thus, I am satisfied both limbs in s 54 (4) are made out in the circumstances of this case.

23. Finally, I turn to the issue of consent. It is, of course, as Mr Powell says, the cornerstone of the statutory criteria. Y signed the A101A form. It confirms she sought legal advice. It confirms it was signed in the presence of a notary and bears the seals of a notary public. It is thus in accordance with the procedural requirements of paragraph 13.11(4)(c) of the Family Procedure Rules 2010. The A101A form requires Y to sign this with full knowledge of what is involved in the making of a parental order. The form A101A shows that the surrogate consents to her status as a parent being extinguished as a matter of English law. The first applicant's solicitor wrote to the surrogate as I have indicated, informed her that the second applicant had died and that it was likely a parental order would be made at this hearing. I have indicated that Y, through the surrogacy agency, replied to the letter expressing her condolences and confirming that she did not wish to stand in the way against the extinguishing of her parental rights and transferring them to M. I am satisfied that her consent stands at the time of this hearing as it did at the time of the form A101A being signed despite the F's untimely death.

24. Thus, having satisfied myself that the statutory criteria are made out, I remind myself that I must look at XW's lifelong welfare, having regard to the welfare checklist in the Adoption and Children Act 2002. Parental orders are serious orders. Like adoption orders, they create a lifelong relationship between the applicants and the child going beyond childhood to adulthood.

25. The parental order report makes it clear that XW is thriving in M's care. He is plainly a much loved, much wanted and much cherished little boy. He needs a parental order to give permanency and security to his care arrangements in circumstances where no-one else other than the applicants sought to give lifelong care for him. I agree with Mr Powell's submission that it is fundamental to the welfare evaluation in this case that XW is recognised as a child of both intended parents and that, as a donor conceived child, his unique life story should be reflected legally. His parentage is woven throughout his identity which is integral to his overall welfare.

26. XW needs a full understanding of how he came to be born and will require support and love to deal with this information as and when it becomes known to him. I was

pleased to read in CC's report that M confirmed she would share the details of his conception and birth when he is old enough to understand this.

27. Standing back and looking at all matters in the round, and having satisfied myself that the criteria in s.54 of the Act are satisfied and that an order is concordant with A's welfare interests, I am pleased to make a parental order in this case to M and F.

28. For M, this is a very poignant moment. Today, there has been the creation of a legal and unbreakable bond which ties her and F to XW. She did not need a piece of paper to confirm that she and the F loved each other and loved XW but now there is a legal status which reflects to the world the love they had for one another and for XW. I offer her and XW my congratulations on what I know is a very difficult day.

29. That is my judgment.