Case No: ZC20P00264

Neutral Citations : [2021] EWFC 103

IN THE FAMILY COURT

Date: Monday, 8th February 2021

Before:

THE HONOURABLE MRS JUSTICE KNOWLES

- -

Between:

A	**Applicant**
- and -	
B	**Respondents**
C	

- -
- -

MISS GAMBLE appeared for the **Applicant**

THE RESPONDENTS did not appear and were not represented

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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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.

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THE HONOURABLE MRS JUSTICE KNOWLES:

1. I am concerned today with a little girl called Z, who was born in in 2019.

2. The applicant in this matter is A. She has made an application pursuant to section 54A of the Human Fertilisation and Embryology Act 2008 for a parental order. This is because Z was born in consequence of an informal, altruistic surrogacy agreement in Wuhan City, China, to a married surrogate B. B and C, who is her husband, have been friends of A for about 20 years.

3. The application was received by the court on 19th February 2020 and I gave directions to facilitate this final hearing on 30th July 2020, when I also made a child arrangements order giving A parental responsibility for Z.

4. The final hearing had been intended to take place on 30th October 2020, but the report of the parental order reporter, Miss Jolly, raised concerns about legal matters pertaining to this case such that she felt unable to make a positive recommendation for the making of a parental order. Miss Jolly identified a need for further information on the issue of domicile and the need for expert information about the legality of surrogacy arrangements in China and Cambodia.

5. B and C are respondents to the proceedings and, in accordance with my directions, I am satisfied that they have been informed of the date of this hearing and told that the court might make a parental order today. I have seen an email to the respondents sent by the applicant's solicitor on 2nd February 2020 which accords with my direction for them to be given proper notice of this hearing.

6. I have read and considered a bundle of documents prepared by A's solicitor, Miss Gamble, and also a report by the parental order reporter, Toni Jolly, dated 16th October 2020, which supported the making of a parental order from a welfare perspective but raised the caveats to which I have already referred.

7. I held a hearing on 30th October and gave further directions on a number of issues and listed the matter again for further directions today. In an email to the court dated 4th February 2021, Miss Jolly confirmed her present view that Z did not need to be joined as a party to the proceedings and, subject to me being satisfied on the evidence available to the court, she recommended the making of a parental order to A.

8. This has not been an entirely straightforward case. First of all, in large part A was not well served by her former legal advisors, who had only the most rudimentary understanding of surrogacy law. Happily, since changing her solicitors and now being represented by Miss Gamble, an expert in this area, the court now has the benefit of additional evidence which I can confirm satisfies me that I should make a parental order today in relation to Z.

9. The complexities in this case arose because, firstly, there was a lack of clarity as to whether A was domiciled in this jurisdiction. Secondly, the legal basis in China upon which the surrogacy arrangement was entered into was unclear and, thirdly, the legal circumstances surrounding the embryo transfer, which took place in Cambodia, were also unclear.

10. It seems plain to me that this application for a parental order has been prompted, in large part, by immigration difficulties in that Z was refused a visa to accompany A to this country. The entry clearance officer did not believe A had a genuine personal relationship with Z as she was not her legal parent. A had explained in her interview for Z's visa that she had not physically given birth to Z. A's immigration lawyers in a letter to the court dated 27th January 2021 confirmed that, for the purposes of paragraph 319(h) of the Immigration Rules, Z would not be deemed to be A's daughter. Any further application under those Rules was bound to fail unless a parental order could be obtained.

11. Of course, a parental order has other advantages for Z which go beyond mere immigration purposes. It confers parental responsibility not just during a child's minority, but also cements a legal relationship going forward into adult life.

12. Finally, this is an unusual international surrogacy case as it involves an altruistic surrogacy arrangement rather than being a commercial surrogacy arrangement facilitated by a commercial agency.

13. I turn now to the criteria in section 54A for the making of a parental order. Section 54A(1) requires me to be satisfied that Z has been carried by a surrogate and that the egg of the applicant was used to bring about the creation of the embryo. Z was conceived by IVF, this procedure having been undertaken in a clinic in Cambodia. She was born via gestational surrogacy and she is not biologically related to the surrogate, B. I have seen DNA test results which show that A is the mother of Z. A stored her eggs at a clinic in Cambodia in 2012. An embryo was transferred at that clinic in late 2018 to B, who then became pregnant.

14. I required A to file expert evidence regarding the legal context of the surrogacy arrangements in Cambodia and in China. The expert report of Mr Stephen Page on Cambodian law, dated 18th January 2021 confirms that, although the Cambodian government issued a declaration (known as a prakas) prohibiting surrogacy in very general terms on 24th October 2016, there is in fact no law in Cambodia which expressly regulates or prohibits surrogacy and no criminal offence arises as a breach of the declaration or prakas. There have been prosecutions in connection with the practice of surrogacy in Cambodia which have relied on other laws concerning human trafficking. However, none of these laws apply to this case given that the parties and the birth were based outside the jurisdiction and the arrangement was not commercial. It is, therefore, very unlikely that any criminal offence was committed in Cambodia by either the applicant, the respondents or the clinic. I am satisfied with the conclusions drawn by the expert in his report.

15. The export report of Miss Ping Chen on Chinese law, dated 21st January 2021, confirms that there are currently no laws or regulations relating to surrogacy in China, although there are some regulatory rules which restrict medical institutions from implementing surrogacy arrangements. The birth certificate and registration information for Z establishes that the parent/child relationship between A and Z has been recognised and registered by the relevant authorities in the People's Republic of China. I am reassured on the basis of Miss Chen's expert report as to the legalities of Chinese surrogacy arrangements. I am thus satisfied that the criteria in section 54A(1) are satisfied in this case.

16. Section 54A(2) provides that A must apply for the order relating to Z during the period of six months, beginning with the day on which she was born. The application form, as I have already indicated, was received by the court on 19th February 2020. This was about a fortnight after the expiry of the usual six months deadline.

17. In the leading case of Re: X (A Child) (Parental Order Time Limit) [2014] EWHC 3135 the then President of the Family Division, Sir James Munby, considered a parental order application made some two years and two months after the child's birth. He held that, since parental orders went to the most fundamental aspects of status, Parliament must have intended that the deadline in section 54(3) was directive rather than mandatory. He said at paragraphs 55 and 57:

> "Where in the light of all this does the six-month period specified in section 54(3) stand? Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so. Parliament has not explained its thinking, but given the transcendental importance of a parental order, with its consequences stretching many, many decades into the future, can it sensibly be thought that Parliament intended the difference between six months and six months and one day to be determinative and one day's delay to be fatal? I assume that Parliament intended a sensible result."

Other cases before the court have permitted late applications: for example, in one case when the child was aged 3 years and in another when children were aged 5 and 8 years.

18. Though the case law relates to applicants who made an application prior to the change in the Act that permitted an application by a single person, I am satisfied that the case law holds good for A's circumstances and that I may permit an application made outside the six month time frame. I should do so whenever this is in the child's best interests, unless the case represents one of the clearest abuse of public policy. There is no abuse of public policy here where the application was marginally late and there is no suggestion of wrongdoing or deliberate delay on A's part. I am thus satisfied that section 54A(2) is made out.

19. Section 54A(3)(a) requires me to be satisfied that, at the time of the application and the making of the order, the child's home must be with the applicant. A is Z's biological mother and was present at her birth. She assumed immediate responsibility for her care and has remained responsible for her care ever since. Due to immigration difficulties A was in the UK in February 2020 when the application was made and is now present in the UK while Z has remained in China. She is cared for by A's sister, together with a nanny.

20. Case law establishes that a child may have its home with the applicant if the applicant is responsible for the child's care, even when the child does not physically share the same space. Thus, in Re: Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports) [2015] EWFC 90, a parental order was made in favour of applicants who at the time of the application had arranged a home for their children -

who had not yet been issued with UK passports - in India whilst the parents had returned to the UK.

21. I am satisfied that Z's home is with the applicant and that in these particular circumstances section 54A(3)(a) is met.

22. I turn now to the question of domicile for A herself, which is what I am required to consider by virtue of section 54A(3)(b) in that, at the time of the application and the making of the order, A must be domiciled in the United Kingdom, the Channel Islands or the Isle of Man. A asserts for the purpose of the application that she was domiciled here in February 2020 when she made the application.

23. The law on domicile in the context of parental order applications was summarised by Mrs Justice Theis in CC v DD [2014] EWHC 1307 and I read as follows:

> "…. the key principles relating to domicile are set out in a number of cases (in particular Barlow Clowes International Ltd (In Liquidation) & Ors v Henwood [2008] EWCA Civ 577 per Arden LJ at paragraph 8) and can be summarised as follows:
>
> i. a domicile of origin adheres unless the acquisition of a domicile of choice is proved to the required standard (balance of probabilities) by the person asserting such a change;
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> ii. to acquire a domicile of choice there must be both 'animo et facto' ie, a person must both reside in a new country and also form a sufficient intention to live permanently or indefinitely in that country;
>
> iii. acquisition of a domicile of choice is not to be lightly inferred; and
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> iv. important factors which are relevant in considering whether a person has formed the necessary intention are whether they intend to return to live in their country of origin on the happening of a realistically foreseeable contingency, and whether they are resident in a country for a general or limited purpose."

24. Theis J relied on prior case law which had considered the question of how a domicile of origin was superseded by a domicile of choice. In Udny v Udny [1869] LR 1 SC 441 it was made clear that, to acquire a domicile of choice which supersedes a domicile of origin, a person must settle in a new jurisdiction with a freely informed intention to reside there permanently or indefinitely. Lord Westbury said:

> "There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation."

25. The case law thus makes clear that what matters is not the length of residence but whether the individual's intention was clothed with the necessary quality to constitute the adoption of a domicile of choice.

26. In the surrogacy context, several cases have considered the domicile status of applicants who have settled in the United Kingdom from elsewhere. In each case the applicants were found to have adopted a domicile of choice here following a relatively short period of residence and, in most cases, without becoming British citizens and/or having leave to remain.

27. A case of particular importance is that of AB & Anor v GH (Surrogacy Domicile) [2016] EWFC 2063. The parents, through surrogacy, were granted a parental order by Mrs Justice Theis. She was satisfied that the applicant mother had both acquired a UK domicile of choice and, notwithstanding that she had subsequently returned to her country of origin where she was living at the time of the application, had not abandoned that domicile of choice.

28. The key legal principles that are relevant to this issue are set out in paragraph 5.15 of Miss Gamble's skeleton argument and I read from that document as follows:

    i) A's domicile of origin in China adheres, unless her assertion of the adoption of the domicile of choice in the United Kingdom is proved;

    ii) To prove the adoption of a domicile of choice, A must show residence in the UK with the intention to make the UK her permanent and indefinite home;

    iii) The standard of proof in relation to A's intention is the balance of probabilities and no more. The court must be satisfied that her assertion that she has adopted a domicile of choice in the United Kingdom is genuine;

    iv) No minimum period of residence is required. It is possible for her to have adopted a domicile of choice in the United Kingdom immediately on arrival if she had the requisite intention;

    v) In deciding whether A had the requisite intention to make the UK her permanent and indefinite home, the court must consider the nature and purpose of her move to the UK, whether it is for a fixed or limited purpose and whether it represents a freely chosen decision to settle permanently in the UK. Factors which have influenced the court in determining this test in other similar cases have included the choice to settle in the UK to raise a family here because the UK was more accepting of the applicant's family structure than the applicant's home country, a plan to raise children in the UK long-term and educate them here, actions taken to purchase property and/or furniture on arrival and, conversely, to sell or move assets from the applicant's home country and naturalising as a British citizen or having an intention to do so;

    vi) If A has established a domicile of choice in the UK at any point in time, she will not have lost that domicile unless she has both moved away from the UK and changed her intention to make the UK her permanent and indefinite home.

29. Applying the law to the facts of this case, A asserts she has a domicile of choice on or after 2nd July 2019 when she first came to the UK with the intention to make it her permanent home. Any time spent by her in China since that date has been forced on her by necessity given the issues related to Z's visa.

30. A has a longstanding connection with the United Kingdom since about 2007/2008, having lived in the United Kingdom for half the year consistently across the past twelve years. She has friends here in the Chinese community and has educated her younger son here at both primary and secondary school. She chose to move here for freely chosen personal reasons. She wanted a better life for herself and Z, especially as she feared prejudice in China by reason of her being an older mother to Z.

31. It is clear that she intends to have her home in the UK on a permanent basis. She says in her statement:

> "I can foresee no circumstances which would leave me wanting to give up my adopted home in the UK. I am retired from work and have invested a great deal in the UK to enable me to settle here. I will not need to return to China to care for my elderly relatives. My father has passed away and my mother is amply cared for by my three siblings who she lives next door to. I therefore fully expect to live out my days in the UK, which I now consider to be my permanent and indefinite home."

32. A has also obtained a tier one UK investment visa. The obtaining of that visa required a significant financial investment of £2 million, which required A to restructure her financial affairs and represented a very significant commitment. It gives her a right of residency in the United Kingdom and creates a path to her being able to obtain, in due course, indefinite leave to remain and then to naturalise as a British citizen. A is clear that she intends to follow this path. Her position is, therefore, comparable, though arguably stronger, than the parents in ZB v C [2012] 2 FLR 797 (Fam) who had not yet taken steps to obtain leave to remain and the parents in the AB case who had not taken steps to naturalise as British but confirmed their intention to do so once they could.

33. A asserts that, since she formed the requisite intention to settle in the UK permanently before she moved, she became domiciled here immediately on her arrival in July 2019. The authorities make clear that a domicile can be adopted immediately on arrival if the requisite intention is present and that no minimum period of residence is required.

34. Since that date A has had to travel back and forth between the UK and China because of the circumstances in which she unexpectedly and unwillingly found herself. The rejection of Z's visa in November 2019 came as a total shock and, as a result of her not being able to bring her daughter to the UK as she had planned, she subsequently had no choice but to manage her care in China. The time spent in China, I find, does not reflect a change or abandonment of her adopted domicile of choice in the United Kingdom.

35. I am satisfied that, although the circumstances of this case are unusual, A can satisfy me that she has a UK domicile of choice. I am satisfied of her evidence on a balance

of probabilities and I am satisfied that she has provided evidence to show that she has established a domicile of choice in the UK on or after 2nd July 2019. She has not subsequently lost or abandoned that domicile of choice as a result of the care she has had to give to her daughter in China whilst the legal and immigration issues for Z are resolved. I am satisfied that A has a domicile of choice in the United Kingdom.

36. Section 54A(5) and A(6) require me to be satisfied that the woman who carried the child and any other person who is a parent of the child but is not the applicant have freely and with full understanding of what is involved agreed unconditionally to the making of the order.

37. I have seen a copy of form A101A which was signed by the surrogate and her husband on 20th September 2020. In accordance with rule 13(11)(4)(c) of the Family Procedure Rules 2020, their signatures were duly notarised as this was an agreement executed outside the United Kingdom. B did not sign this form in the first six weeks after Z was born so the consent she has given is valid under law. I am satisfied that sections 54A(5) and 54A(6) have been complied with in full. I note that the respondents have, via an interpreter, confirmed their consent to the making of a parental order to Miss Jolly on 30th September 2020.

38. Section 54A(7) requires me to be satisfied that no money or other benefit, other than for expenses recently incurred, has been given or received by the applicant for or in consideration of the making of an order, any agreement required by section 54A(5) and the handing over of the child to the applicant or the making of arrangements with a view to the making of the order unless I so authorise.

39. This is, as I have already indicated, an unusual international surrogacy case because it involves an altruistic surrogacy arrangement rather than a commercial surrogacy arrangement mediated via a paid agency. A set out in her fourth statement how she and the respondent, B, have been friends for more than 20 years and how B offered to help her out of friendship and gratitude for the support A had given her over many years, but particularly in facilitating a qualification which allowed B to improve her life after they first met. As a result of the altruistic nature of her offer, B declined the applicant's offer to compensate her financially.

40. A explained that she therefore made no direct payments to B and her husband, but carefully ensured that she covered all B's costs associated with the surrogacy process by paying for services and products directly. This included paying for fertility and antenatal medical care, for travel and accommodation to Cambodia for the embryo transfer, for nutrition, clothes and makeup products which A purchased and sent to B and for a cleaner who A arranged and paid for to support B in the later months of pregnancy. A therefore covered B's costs and made sure that B did not incur any expenses.

41. For full transparency, A has also set out the gifts she made to B and her family during the course of the surrogacy process. These include gifts of around £100 each to B's children at Chinese New Year and paying for travel and pocket money for B's children, who traditionally visited A in her home during the school holidays. Those gifts are in line with what A would normally do in any event irrespective of the surrogacy.

42. In addition to this, A left a gift of £1,000 in B's closet following the birth as a gesture of her gratitude. This was a gratuitous gift made to B, neither requested nor expected by her and is not part of the arrangement made between them.

43. A's evidence is also consistent with what B told Miss Jolly, that she was never under any pressure to be a surrogate and had not been paid. In fact, she made clear to Miss Jolly she would not have acted as she did for money.

44. I am satisfied that no money or other benefit, other than for expenses reasonably incurred, have been made in consideration of this surrogacy arrangement. It was an altruistic arrangement and all monies paid were for expenses. The gifts that A made were modest, gratuitous and were not agreed between the parties and were thus not made in consideration of matters listed in section 54A(7). If I am wrong about that as a matter of law I have the power to retrospectively authorise the payments of those sums and I so do.

45. Finally, before I make a parental order I remind myself that in approving such an order I must look at Z's welfare from a lifelong perspective having regard to the welfare checklist set out in section 1 of the Adoption and Children Act 2002.

46. Parental orders are serious orders. They are most like adoption orders because they create lifelong legal relationships going beyond childhood and extending into adulthood. The contents of Miss Jolly's report make plain that Z is thriving and is a much cherished child. Miss Jolly has no doubt that A will provide Z with a happy and loving home.

47. Z needs a parental order to give permanence and security to her care arrangements in circumstances where no one else, other than A, seeks to provide lifelong care for her. Her current legal position is that A is not recognised as her legal parent, whilst the respondents are treated as her legal parents. This is at odds with Z's reality and with her welfare. B and C have not assumed any parental role in respect of Z and never intended to do so. A is Z's biological mother and has cared for Z continuously since her birth. She lacks a parent/child connection with Z in respect of inheritance, maintenance, legal guardianship and other important issues concerning her identity in the UK.

48. That lack of legal connection has, in this case, a very practical significance because it has prevented Z being granted a dependency visa she would otherwise have been eligible for as the legal daughter of a parent with a tier one residency visa. This has prevented A from bringing Z to the UK as she had planned and this has led to A and Z being separated to the detriment of Z's welfare.

49. I have already explained that the applicant's immigration solicitor has stated, and I accept, that until such time as a parental order is obtained any fresh application by A under the immigration rules to bring Z to this country will fail due to the fact that she is currently not deemed to be the legal parent of her daughter.

50. The applicant's immigration solicitor has also indicated that if a parental order is made it is hope that Z may be granted a visa to come to the UK in as little as three or four weeks' time.

51. For all those reasons, I accept there is an overwhelming welfare case for the court to make a parental order in this case. This will confer legal parenthood and parental responsibility on A in this jurisdiction, the place of her domicile and the place where she intends to raise Z. It will enable her to make an application for a dependency visa and, finally, it will fully extinguish the residual parental status and responsibility of B and C under English law, resolving the conflict between UK and Chinese law and reflecting the wishes of B and C.

52. I am satisfied that, looking at all matters in the round, the criteria in section 54 are made out. I make a parental order in respect of Z to A.

53. Finally, this is not part of my statutory consideration, but Z will need a full understanding of how she came to be born and will require support and love from her family to deal with this information as and when it is made known to her. A wishes to maintain a close relationship with B and C, as has been the case over the last two decades. This will be helpful for Z as she grows older. The circumstances of our birth are uniquely personal to each of us and it is, in my view, important that Z comes to know and understand these in the context of a loving home. I am satisfied that A will wish to do right by Z as far as knowledge of her birth is concerned. I wish them all the very best for the future and I hope in due course to be able to see Z myself. I have seen her on the video screen today, but I hope to be able to meet with her and A in person when circumstances permit.

54. That is my decision.

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