



Neutral Citation Number: [2022] EWFC 129

Case No: ZC22P00521

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2022

Before:

MRS JUSTICE THEIS DBE

Between:

	X	<u>1st Applicant</u>
	- and -	
	Y	<u>2nd Applicant</u>
	- and -	
	B	<u>1st Respondent</u>
	- and -	
	G (Through His Children's Guardian Mark Verity)	<u>2nd Respondent</u>

Ms Natalie Gamble (NGA Law) for the 1st and 2nd Applicants
Ms Shabana Jaffar (Cafcass Legal) for the 2nd Respondent
The 1st Respondent did not attend

Hearing date: 28th October 2022

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

Approved Judgment**Mrs Justice Theis DBE:****Introduction**

1. This matter concerns an application for a parental order in relation to G, now age 3 years. The applicants are Mr X and Mr Y. They seek a parental order to secure their legal parental relationship with G in this jurisdiction. The respondent to the application is Ms B, the gestational surrogate who carried G. Ms B is Mr Y's sister.
2. Although committed to co-parenting G, Mr X and Mr Y do not live together although they spend a lot of time together. Mr X is married to Mrs X and remains living with her.
3. G has been joined as a party to these proceedings and is represented through his Children's Guardian, Mr Verity, and Ms Jaffar, from Cafcass Legal.
4. The court is indebted to Ms Gamble, on behalf of the applicants, and Ms Jaffar, on behalf of G, for their excellent written documents setting out the relevant legal framework and how it should be applied in this case.
5. Although the arrangements in this case have been described as unconventional, the court needs to remain focussed on the relevant legal framework and G's lifelong welfare needs.
6. At the conclusion of the hearing the court made a parental order, with reasons to follow. This judgment sets out those reasons.

Relevant Background

7. Mr Y is 58 years and Mr X 61 years. They were both born in the United States. Mr X married Mrs X in 1986. They wished to have children, but that was not possible.
8. Mr and Mrs X separated for about six months in 2007, during that time Mr X met Mr Y. Following a brief intimate relationship, they remained in contact and formed what they describe as a close and loving bond, albeit their relationship was platonic. They discussed having children and decided to proceed with a surrogacy arrangement. This was discussed with and had the support of Mrs X.
9. Following further discussions with the wider family Mr Y's sister, Ms B, agreed to be a gestational surrogate and Mr X's niece, Ms C, the egg donor. The necessary procedures were undertaken at a fertility clinic in New York and embryos created with Mr Y and Ms C's gametes. Following an embryo transfer to Ms B the pregnancy was confirmed. G was born, Mr Y was present at the birth, Mr X was present via video calls. Mr X was able to meet G when he was two weeks old. Mrs X was also involved in meeting G. The applicants had not secured a pre-birth order in the State where G was born so only Mr Y's name is on G's US birth certificate.
10. Following G's birth he has spent time with both Mr Y and Mr X together and separately in their respective homes. Whilst Mr Y is regarded as the main carer, so Mr X can work and provide financial support, they very much 'co-parent', jointly making decisions about G's day to day and longer term care. Mrs X is clear that whilst she has a close

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and loving relationship with G she does not seek any legal rights or responsibilities in relation to G.

11. Due to G's age it has been possible to date for him to move between the two homes in different jurisdictions. The plan from next year is that G will be based living in this jurisdiction, Mr Y plans to move here. This is so G can start school here and will live between Mr Y and Mr X's homes.
12. Mr Y and Mr X only recently became aware of the need to apply for a parental order, and promptly made the application the court is dealing with.
13. The court has detailed statements from both Mr Y and Mr X and, more recently, a joint statement. Following directions made by this court Mr Verity was appointed the parental order reporter and his detailed report is dated 12 October 2022. Directions made by the court on 14 October 2022 joined G as a party to the proceedings and he is represented by Cafcass Legal, through Mr Verity, his Children's Guardian.

Section 54 Human Fertilisation and Embryology Act 2008 (HFEA 2008)

14. Before the court can consider whether G's lifelong welfare needs require the court to make a parental order, it is necessary to consider whether the relevant criteria under s54 are met.
15. Some of the criteria are readily established. G was carried by Ms B and DNA evidence establishes that Mr Y is his biological father (s54(1)). Mr Y and Mr X are both over 18 years (s54(5)) and Ms B has given her consent to the making of a parental order freely, unconditionally and with full understanding (s54 (6),(7)) and she has been notified of this hearing. Finally, the payments that have been made to Ms B other than for expenses reasonably incurred (\$25,000) can in the circumstances of this case be authorised as they are not disproportionate to the expenses, this was a voluntary arms-length agreement where all parties had access to legal advice and there is no suggestion any party acted other than in good faith.
16. The criteria that require closer scrutiny are:
 - (1) Whether the applicants are living as partners in an enduring family relationship (s54(2)).
 - (2) Whether the court should permit the application to proceed as it was made more than six months after the birth of G (s54(3)).
 - (3) Whether G had his home with the applicants at the time when the applications were made and when the court is considering making the parental order (s54(4)(a)).
 - (4) If the s54 criteria are met, whether the making of the parental order will safeguard G's lifelong welfare bearing in mind the circumstances of this case.

Enduring family relationship

17. Section 54(2)(c) provides the applicants must be *'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'*.

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18. There is no statutory definition other than what is set out above. It is a question of fact to be considered on a case by case basis, as was made clear from the Parliamentary debate at the time the provision was being considered (see *P and B v Z* [2017] 2 FLR 168 [16],[17] and [19]).
19. Ms Gamble submits there are three essential requirements in this provision: the applicants must be *'living as partners'*, they must be in a *'family relationship'* and that relationship must be *'enduring'*.
20. Ms Gamble makes the point that the applicants do not need to be living together, what is required is that they are *'living as partners'*. The court considered this issue in *Re DM and LK* [2016] EWHC 270 (Fam) in circumstances where the applicants were in a relatively new relationship, had made the joint decision to have children but had not lived together, caused mainly by their commitments to children from previous relationships. In those circumstances the court considered this requirement was met, noting at [41]
- 'On the information the court has it is clear the applicants are in a committed relationship, their intention is to remain in that relationship and as soon as circumstances permit, to live together full time. They spend such time as they are able to together, remain in regular contact when they are not together and are obviously committed to each other and X.'*
21. Ms Gamble also submits there is no requirement for the applicants to be in an intimate relationship, or not to be married to anyone else. The court does and should have the capacity to recognise new and diverse family structures.
22. Having considered the evidence in this case it is clear the decision to have a child and the arrangements outlined above was very much a joint decision derived from the strength and nature of the relationship between Mr Y and Mr X founded on their wish to co-parent. This is what they have done since G was born, with the support and involvement of Mrs X when required. They are known to G as 'Daddy' and 'Papa'. Their actions both before and since G's birth have been very much a partnership, albeit they are largely living in separate households which G easily and readily moves between.
23. The evidence demonstrates that Mr Y and Mr X have a *'family relationship'*. They have known each other a number of years, initially the relationship was intimate, more recently it has settled into a committed and loving relationship. Mr X describes it as follows *'Our relationship was initially an intimate one but is now largely platonic although we love and support each other very much'*. Mr Y describes it in the following way *'We continue to love, support and respect one another and our dreams. When I mentioned to [Mr X] that I wanted to have a child, he immediately said that he would do everything to help make that a reality and he has been there for every step of the way, not only financially but emotionally. He is a fantastic parent to [G] and is everything I imagined he would be'*. In his report Mr Verity notes that from a welfare perspective the applicants could be considered a *'family unit despite not having had the relationship history of family life together that is common to more conventional applications. [G] calls [Mr Y] "Daddy" and [Mr X] "Papa" (and his wife has a familiar name based on her first name), and they have been consistent and particular*

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in ensuring they co-parent, which I expect [G] will have sensed, and so are likely to continue to do so. [G] sense of family life will be consolidated’.

24. As to whether the applicants’ relationship could be described as ‘*enduring*’ it has been in existence for 15 years, albeit they have not lived together during that time and Mr X has remained living with his wife during the majority of that time. Although unconventional, it is a long established loving and committed relationship.
25. Having considered the terms of s54 (2) (c), the need to be alert not to read any requirement that is not there into the primary legislation and that the question of whether a relationship meets the statutory criteria is a question of fact to be considered in the light of the circumstances in each case, I am satisfied in this case the evidence establishes this criteria is met. To an outsider the nature of the applicants’ relationship may be described as ‘unusual’ or ‘unconventional’ but the court must remain focussed on the statutory requirements. In my judgment, the applicants are ‘*living as partners in an enduring family relationship*’. They are in a long term committed relationship with each other that has been in existence for a number of years. Whilst it is right Mr X has remained married and living with his wife, the existence of that relationship has not detracted from the evidence the court has of the way Mr Y and Mr X operate as committed and loving partners, particularly in relation to the way they have made the decision to have a child, the steps they have taken to do that and what they have done following G’s birth. Mr X is arguably in two relationships that could meet this definition but there is no requirement for any relationship within this definition to be exclusive, although it is a very relevant factor the court needs to take into account in assessing the evidence. I agree with Mr Verity that the applicants are very much a family unit even though they have not had the relationship history of family life together that is common to more conventional situations. They do not live together, the statute does not require that, but they are living as partners in a committed and loving relationship that has been established and maintained over a number of years. Its early focus was their relationship, more recently it has been their joint decision to have a child and the steps they have taken together to achieve that, what they have done following G’s birth and their plans for their relationship going forward, with G at the centre. Although unusual, this relationship established by Mr Y and Mr X co-exists with Mr and Mrs X’s marriage in the way described in the evidence. Mrs X is wholly supportive of the relationships that exist.

Timing of the application

26. S 54 (3) requires the application to be made within six months of the child’s birth. The application in this case was issued three years after G’s birth. In their statements the applicants describe that they only recently became aware of the need for a parental order when they sought legal advice. Once they became aware of the need to make an application it was promptly made. For the reasons set out by Sir James Munby in *Re X (A child)(Parental Order: Time Limit)* [2014] EWHC 3135 it is possible for the court to consider applications made after the six month limit. In this case there will be no prejudice to any third party if the application is permitted to proceed. If it isn’t permitted there will be significant prejudice to G and the applicants, as they would be denied the opportunity to secure an order that has a fundamental impact on the child’s identity, namely who he is and who his parents are. There is no suggestion in this case of any abuse of public policy and there was no untoward delay once the applicants became aware such an application was required.

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27. The application should be permitted to proceed.

Child's home with the applicants

28. S 54 (4) (a) requires '*At the time of the application and of the making of the order (a) the child's home must be with the applicants...*'. There have been a number of cases that have considered situations where a child was not living with both the applicants in one home either at the date of the making of the application or the date of the order, or both. Ms Gamble has very helpfully summarised them as follows:

(1) Following the applicants separating - In [Re X \(a child\) \(surrogacy; time limit\) \[2014\] EWHC 3135](#) the intended parents were separated and living in separate homes. Munby P ruled that [paragraph 67]: "*X had his home with the commissioning parents, with both of them, albeit they lived in separate houses. He plainly did not have his home with anyone else.*" This rationale was subsequently followed in [Re A and B \(No. 2 – parental order\) \[2015\] EWHC 2080 \(Fam\)](#) and in [K v L \(2019\) EWFC 21](#).

(2) Where the applicants were in a relationship but had never lived in the same home - In [Re DM and LK \[2016\] EWHC 270 \(Fam\)](#) a parental order was made in favour of applicants who had never co-habited (although were planning to do so); in [Re X \(a child\) \(2018\) EWFC 15](#) a parental order was made in favour of applicants in a platonic marriage who had never co-habited and had no intention of doing so.

(3) Where the children were living separately from the parents but in a home provided by them - 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 in India but were not living with them.

(4) Following one of the applicants dying - In [A v P \(2011\) EWHC 1738](#), the applicant father died during the course of a parental order application, so that the child (who initially lived with both applicants) only had his home with the applicant mother by the time the order was made. In [Re X \(2020\) EWFC 39](#) the applicant father had also died, although this time during the course of the pregnancy (so that the child did not have her home with him either at the date of the application or the order).

29. In each of those cases, for different reasons, the child was not living with both applicants in one home at the relevant time but in each case the court took a purposive approach in interpreting this requirement. As Sir James Munby P stated in *Re X (ibid)* the child had his home with the applicants albeit they lived in separate houses, noting the child '*plainly did not have his home with anyone else*' [67].

30. The same situation applies here. G has his home with the applicants between their two homes, on occasion they spend time when they are all together. G does not have his home with anyone else other than with the applicants and it is the only 'home' G has known.

Domicile

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31. S 54 (4) (b) requires at least one of the applicants to be domiciled in this jurisdiction at the time of the application and at the time when the court is making the order. Both applicants were born in other jurisdictions. Mr X asserts that his domicile of choice is in the UK. He moved to the UK in 2009 and in 2014 decided to make this jurisdiction his permanent home. He naturalised as a British citizen in 2015 and has lived in this jurisdiction since 2009. He has purchased his home here, his work is all based here, the majority of his assets are here and he describes in his statement how he has integrated into the community here. His intention is to remain living here. Mr Y intends to move to the UK on a permanent basis and their joint plan is for G to be educated and brought up in this jurisdiction being co-parented by both of the applicants.
32. A summary of the relevant considerations for the court to consider are set out in *CC v DD [2014] EWHC 1307* at paragraphs [22] and [23] and I bear those considerations very much in mind. The burden is on Mr X to prove that he has formed the intention to permanently and indefinitely reside in this jurisdiction. I accept his evidence that this is his intention, it is supported by the tangible steps he has taken to date and his plans for the future, supported by Mr Y's evidence and plans and their joint plans for G.

Welfare

33. The s 54 criteria having been met it is necessary for the court to consider whether G's lifelong welfare needs will be met by the court making a parental order. In doing so the court needs to have regard to the welfare checklist set out in s 1 (4) Adoption and Children Act 2002.
34. For the preparation of his report Mr Verity undertook a number of interviews with the parties and others who he considered relevant. He met the applicants initially by video and then in person shortly afterwards. On a separate occasion he observed them both with G and then later that same day he observed Mr X at home with Mrs X and G. He was able to have a conversation in private with Mrs X that day. He spoke with Ms B by video link and more recently had further conversations with the applicants together and separately.
35. As a result of those extensive enquiries the court can have considerable confidence in his insightful and perceptive welfare analysis in his report. The relevant parts include the following:

"[G] is too young to be aware of this application or to express his view about the decision the Court needs to make for him. In my view he will have developed a secure attachment to both [Mr Y] and [Mr X] (and to [Mrs X]), who have separately and together cared for him for all his life, and so would wish that shared care to remain in place."

A little later in his report he states

"[G's] needs are those of any other child of a similar age. He needs to be cared for in a nurturing, stable and safe environment where his emotional, physical and educational needs are met consistently by the important adults in his life. He needs to be encouraged to live a healthy lifestyle, should receive adequate and appropriate stimulation and be surrounded by unconditional love and acceptance with clear and consistent parental boundaries. [Mr X] and [Mr Y] have demonstrated that thus far they have been able to

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meet these requirements well given that [G] has moved to and from between two homes in two countries. They share the values of parenting.”

Concluding

“[G] has in my opinion been receiving a good standard of practical and emotional care, and all of his needs are in my view being met to as good a standard as can be achieved given the rather complex circumstances....they [Mr X and Mr Y] have been consistent and particular in ensuring that they co-parent which I expect [G] will have sensed, and so are likely to continue to do so....[Mrs X] has been content for her husband to maintain his relationship with [Mr Y] and for the two males to continue to raise [G] together, supporting them where needed.”.

36. G has the advantage in this case of a wider loving family, including Ms B who carried him and Ms C who has a genetic connection to him. The most recent statement from the applicants describes how G’s relationship with the wider family has developed and the transparency within both wider families about G’s own background. This openness will provide a solid foundation for G, as he starts to navigate his own genetic and gestational background.
37. The making of a parental order in this case will provide the secure lifelong benefits that a legal parental relationship provides, recognising and affirming the arrangements within a legal framework that spreads wider than the applicants and secures the wider family relationships. In this case Ms B was both G’s birth mother and his aunt. Following the making of a parental order she will remain his aunt, which more accurately reflects the relationship they have going forward, although not changing the factual background. Ms C will become G’s cousin in the event of a parental order being made, again supporting the relationship going forward without detracting from her role in G’s past.
38. Having considered the evidence from the applicants and Mr Verity’s detailed assessment in my judgment making a parental order will secure G’s lifelong welfare needs by conferring joint and equal legal parenthood and parental responsibility upon the applicants who are and always have been regarded by G as his parents. In addition, a parental order will secure the legal relationships with the wider family which, in the circumstances of this case, will help reflect G’s own particular and unique background.