Neutral Citation Number: [2018] EWFC 86

Case No: FD18P00061 & ZC18Z00119

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2018

Before:

MRS JUSTICE THEIS

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Between:

X	**Applicant**
- and -	
Z	**1st Respondent**
- and -	
B (By her children's guardian, Jacqueline Roddy)	**2nd Respondent**

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Mr Andrew Powell (instructed by **Andrew Spearman of A City Law Firm**) for the **Applicant**
1st Respondent Did Not Appear
Ms Shabana Jaffar (instructed by **Cafcass Legal**) for the **2nd Respondent**

Hearing date: 21st November 2018

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Judgment Approved

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.

Mrs Justice Theis DBE:

Introduction

1. This matter concerns the adoption application in relation to B who was born in August 2017. She was born as a result of a surrogacy arrangement entered into in the Ukraine by the applicant, X, and her estranged husband, Y. The first respondent, Z, is the unmarried gestational surrogate who resides in the Ukraine. The second respondent is B, represented though her Children's Guardian, Ms Roddy.

2. The proceedings initially started as an application for a child arrangements order dated 2 February 2018, prompted by the need for X to have parental responsibility for B who required medical treatment.

3. Subsequently X decided to make an adoption application to secure her legal relationship with B. She is unable to make an application for a parental order as a sole applicant (see *Re Z (A Child) [2015] EWFC 73).* There is no effective opposition to the adoption order being made, although on the facts it will be necessary for the court to consider dispensing with the consent of Z pursuant to s 52 (1) Adoption and Children Act 2002 (ACA 2002).

4. This case has demonstrated the enormous complexities that can arise in the legal relationships between intended parents and children born as a result of surrogacy arrangements, particularly such arrangements which result in the child being born in another jurisdiction.

5. An added complication in this case has been caused by the separation of X and Y after the surrogacy arrangement but prior to B's birth. Following B's birth Y made it clear he wished to have no further contact or involvement with her.

6. Although X has cared for B since birth, initially in the Ukraine and since January 2018 in this jurisdiction she was, prior to the orders made in these proceedings, a legal stranger to B in this jurisdiction. In this jurisdiction her birth mother, Z, is her mother and Y her genetic and legal father. X was not regarded as a parent and did not have parental responsibility. Her de facto status was as a psychological parent, but that does not in itself vest her with a legal relationship or ability to legally make decisions concerning B.

7. Although this case is being heard over 10 years after the case of *Re X and Y (Foreign Surrogacy) [2008] EWHC 3131 (Fam)* which involved a surrogacy arrangement in the Ukraine the description by Hedley J in that case of the path to parenthood as being '*less a journey along a primrose path, more a trek through a thorn forest'* is as relevant today as it was then. Like Hedley J in 2008 this court shares the hope, once again, that the experiences in this case may alert others to the difficulties inherent in these surrogacy arrangements.

8. I am very grateful to both Mr Powell, on behalf of X, and Ms Jaffar, on behalf of the Children's Guardian, for their comprehensive skeleton arguments that have been of great assistance to the court.

Relevant Background

9. Due to the non-involvement of Y within these proceedings, other than to confirm at various stages he did not wish to take part in them, the history is to a large extent reliant on the account given by X.

10. X, age 50, was born here and describes herself as a child care specialist. She has extensive training and experience in child care and has for the last 18 years owned a business which runs two nurseries in the South East of England.

11. The evidence demonstrates that X had a recent history of an unsatisfactory relationship with another man where there were allegations that she had harassed him when they separated, X disputes this although pleaded guilty to harassment

charges in 2014 and no further action was taken in relation to a previous allegation. It appears X became increasingly anxious to have her own child. Within weeks of meeting Y online in early 2016 she reported she was pregnant with his child. She sadly miscarried and then embarked on IVF treatment which also was not successful.

12. X and Y married in 2016 and within a matter of weeks went to the Ukraine where they joined the 'Victoria Vita Surrogacy programme', which offered a fixed price for unlimited embryo transfers. For reasons which are not clear the written agreement entered into has not been part of the papers in these proceedings. According to X this agreement included terms that permitted the clinic to sign on Y's behalf. X reports they chose an egg donor and embryos were created using the donated eggs and Y's gametes. A surrogate was selected, and an agreement signed in June 2016. The subsequent embryo transfer was successful, she was carrying twins. Unfortunately, the surrogate first miscarried one child and then, later, the second. Before the second miscarriage, X had sought further IVF treatment in the Ukraine, which was also unsuccessful. During the course of that treatment, the applicant met the respondent surrogate mother, Z. Following the first surrogate's second miscarriage a further surrogacy arrangement was entered into with Z on 9 December 2016 and embryos were transferred to Z on the same day. This agreement is in the papers with what X states are the signature of the agency on behalf of Y. The pregnancy was confirmed in December 2016.

13. The evidence remains unclear precisely what, if any, knowledge Y had about the embryo transfer to the second surrogate in December. According to Y they had separated in November 2016, X says it was in early 2017. They both give different accounts for their separation. X alleges abusive behaviour by Y towards her that resulted in her need to involve the police, including them taking protection measures such an installing a panic alarm in her home. According to Y it was X who harassed him and in April 2017 the police took no further action in relation to the allegations made by Y against X. Either way they had separated by early 2017. There was a referral to Children's Services in early 2017 due to X's allegations about Y as there was a suggestion that the unborn child may live with Y. Following enquires they concluded there was no further role for them.

14. X issued divorce proceedings in June 2017 and the decree nisi was granted in August 2017.
15. B was born in August 2017 in the Ukraine and was placed in X's care. There is some evidence to suggest that B had health difficulties following her birth, required neurological surgical procedures on two occasions in the Ukraine and X reported difficulties in B's breathing. There is limited corroborative evidence about this treatment.

16. The fact of X and Y's separation at the time of B's birth caused complications, both in relation to registering the birth in the Ukraine and B coming to this country. To register the birth Y needed to agree to X registering the birth with her surname and give X power of attorney to make decisions without him being present. Once these were in place X was able to register B's birth in the Ukraine on 5 October 2017.

17. As a consequence of these difficulties X had to stay for a longer period than expected in the Ukraine. X had expected to be there for about 6 – 8 weeks and had budgeted accordingly. In fact, she was there for five months which caused her some financial difficulties. There were delays in securing a British passport for B due to the changed circumstances of X and Y. The initial application was refused. In October 2017 X returned to the UK for two weeks to try and make the application here, leaving B in the care of someone connected to the surrogacy agency in the Ukraine.

18. B came to this jurisdiction on 27 January 2018 following the grant of emergency travel documentation for B due to the death of X's father. X attended her father's funeral on 29 January 2018. She attended hospital with B on 31 January 2018 due to concerns about her breathing difficulties. As a consequence of the applicant's behaviour and inconsistencies in her account of B's medical history the hospital made a s 47 referral to the local authority where X lives. In fact, they were already aware of the case as X's solicitor had made a referral on 31 January 2018 for a private fostering assessment.

19. Due to the concerns raised at the hospital here about X's status to give consent for medical treatment X made an urgent application to this court. On 2 February 2018 Williams J made no order but recited that the court considered X had parental responsibility under Ukrainian law and as a consequence of Article 16 of the 1996 Hague Convention (Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respondent of Parental Responsibility and Measures for the Protection of Children) had parental responsibility here and could consent to medical treatment.

20. The application was listed before me on 6 February 2018 for further directions. I made a child arrangements order which gave the applicant parental responsibility in relation to B. I joined B as a party and listed a hearing on 9 March 2018 to consider Y's status in relation to B.

21. B was discharged from hospital on 8 February 2018.

22. Ms Roddy, the appointed guardian representing B first met X on 21 February 2018.

23. On 9 March I made directions which included Y and Z being given notice of the application, safeguarding checks being filed by Cafcass, a report from a Ukrainian lawyer regarding the status in the Ukraine of X, Y and Z in relation to B and disclosure from the police of their records.

24. Y signed a statement on 21 March 2018 confirming that he did not wish to be a party to the proceedings and his position had not changed since October 2017. Ms Roddy met with Y on 21 March 2018. Z returned the acknowledgment of service on the same date.

25. The local authority completed their child and family assessment on 22 March 2018 and recommended B remain in the care of X.

26. The Ukrainian expert report was received on 6 April 2018 from Yuri Sivovna of Pravochyn (Attorneys-at-Law), who confirmed the following as the legal position in the Ukraine:

    (1) X and Y are considered the mother and father of B;
    (2) X and Y have parental rights/parental responsibility in respect of B;
    (3) The birth certificate and the surrogacy arrangement do not put any restrictions on X or Y's ability to exercise parental responsibility;
    (4) Z has no rights or responsibilities in relation to B.

27. On 12 April 2018 X indicated she intended to make an adoption application. I made directions on that day in anticipation of that application and timetabled the matter to a further hearing in June 2018.

28. X issued an adoption application on 30 April 2018.

29. Further directions were made on paper on 13 June 2018 and 8 August 2018, leading to a hearing on 5 October 2018.

30. The local authority adoption report was filed on 31 August 2018 and supported an adoption order being made.

31. On 7 September 2018 Her Majesty's Passport Office ('HMPO') and the Secretary of State for the Home Department ('SSHD') were given notice by X's solicitor of the adoption application and the order made on 8 August 2018 directing them to be given notice. Neither have responded to those letters.

32. Ms Roddy, the Children's Guardian, filed her report on 28 September 2018. She had provided previous documents for the court dated 13 March 2018, 9 April 2018 and 1 May 2018. Her most recent report recommended an adoption order.

33. On 5 October 2018 I directed Y should be given notice of the adoption application and Z joined as a party and directions made to give her notice of the application. The local authority was directed to file an adoption support plan and an addendum report to provide further information regarding the referees who X had put forward. The final hearing was listed on 21 November 2018.

34. The addendum report was filed by the local authority on 18 October 2018 setting out details regarding the contact with the referees.

35. Z emailed Ms Roddy more recently on 8 November 2018 confirming her agreement to the adoption application stating she had *'nothing against adoption'*.

Legal Framework

36. The legal framework surrounding the applicant's status in relation to B is not straightforward.

37. The Ukrainian legal expert report confirms the legal status of X, Y and Z in the Ukraine. X and Y are the mother and father of B and have parental responsibility. Z has not rights or responsibilities in relation to the child.

38. This position is similar to that faced by the commissioning parents in *Re X and Y (Foreign Surrogacy) [2008] EWHC 3131 (Fam), [2009] 1 FLR 733*. In that case, an English couple entered into a gestational surrogacy arrangement with a Ukrainian woman. The surrogate mother gave birth to twins. The situation in *X and Y* is distinguishable from the present case as the commissioning couple in *Re X and Y* remained in a relationship. However, it is relevant to the extent of the legal position the applicants in *Re X and Y* were in and the position X and B found themselves in 10 years later. Hedley J observed:

    [8] Under Ukrainian law, once the surrogate mother had given birth and delivered the children to the commissioning couple, the surrogate mother and her husband were free of all obligations to the children. They had neither the status nor the rights and duties of parents; indeed it seems that they could probably have been compelled under Ukrainian law to complete the surrogacy agreement once the children had been born. Moreover ***, the children had no rights of residence in or citizenship of the Ukraine*** *and there was no obligation owed them by the state other than to accommodate them as an act of basic humanity in a state orphanage.* ***The Applicants became the parents for all purposes under Ukrainian law and were registered as such on the birth certificate. The children accordingly took their parents' nationality and were not therefore Ukrainian citizens****.*
    [9] The Applicants had of course entered the Ukraine on a temporary visa and had no rights to remain (let alone work or reside) in the Ukraine beyond the period specified in the visa. The effect of all this was of course that ***these children were effectively legal orphans and, more seriously, stateless. […] Under Ukrainian law, however, the surrogate mother and her husband were not only relieved of but deprived of all rights, duties and status of parents, the Applicants alone had them****. Their legal position was the graver because under the law of the United Kingdom (and I had uncontroversial expert evidence in relation to this) not only did these children have no right of entry of their own to the United Kingdom, for the Applicants could not confer nationality on them, but the Applicants had no right to bring them in; or at best the male Applicant may have obtained leave to do so as a putative father or relative.*

    (emphasis added)

1996 Hague Convention

39. An issue was raised early in these proceedings as to whether the 1996 Hague Convention applied, which governs the recognition, registration and enforcement of measures relating to the protection of the child as between Contracting States. Both the UK and the Ukraine are signatories. Article 1 includes as the objects of the Convention are to *'determine the law applicable to parental responsibility'* (Article 1 (1) (d)). According to Article 3 the measures referred to in Article 1 may deal in

particular with *'the attribution, exercise, termination or restriction of parental responsibility, as well as it's delegation' (Article 3 (a)).*

40. Article 16 provides

Article 16

(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.
(2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.
(3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.
(4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.
(emphasis added)

41. To consider whether the 1996 Hague Convention applies it is necessary therefore for the court to consider whether B was habitually resident in the Ukraine prior to her arrival here in January 2018. If she was, Article 16 (3) means that X and Y's parental responsibility for B in the Ukraine would subsist here without the need for any further application to the court here.

42. The issue of habitual residence has been the subject of five Supreme Court decisions in as many years. It is now well established it is a question of fact that needs to be considered in the context of each individual case. Lady Hale summarised the position at paragraph 54 in *A v A and another (Children: habitual Residence) (Reunite International Child Abduction Centre and other intervening) [2013] UKSC 60* as follows:

> *"i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.*
>
> *ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in The Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.*
>
> *iii)The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.*
>
> *iv)It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and The Hague Child Abduction Convention.*

v)In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from R v Barnet London Borough Council, ex p Shah should be abandoned when deciding the habitual residence of a child.

vi)The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.

vii)The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.

viii)As the Advocate General pointed out in para AG45 and the court confirmed in para 43 of Proceedings brought by A, it is possible that a child may have no country of habitual residence at a particular point in time."

43. On behalf of X Mr Powell submits, supported by Ms Jaffar on behalf of the child, that B was not habitually resident in the Ukraine during the period of time she was there is the care of X. He relies on the following matters to support the submission. B was discharged from hospital into X's care who was the only legal parent in the Ukraine as by that stage Y had abandoned his responsibilities in relation to the child. The evidence demonstrates X always intended to return to this jurisdiction with B, sought to take all necessary steps to achieve that result, only intended to be in the Ukraine for 6 – 8 weeks, clearly struggled with the consequences of having to stay longer and was in unsuitable temporary accommodation. There is no evidence to suggest any degree of integration other than taking such essential steps regarding health and accommodation pending the return to this jurisdiction.

44. I agree with those submissions. The social and family environment in the Ukraine was essentially temporary in nature, pending the necessary immigration application for B to come here. Whilst there was a social and family environment in that the child was cared for by X, it was in the context of the pending application for B to come here and there is no other evidence to support any integration in a social and family environment. X and B were isolated there, did not speak the language, had unsatisfactory accommodation and were staying there longer than expected, which clearly created difficulties for X. Whilst the intention of X is only one factor, the evidence demonstrates that at no stage did X relinquish her habitual residence in this jurisdiction or plan to stay in the Ukraine any longer than she had to.

45. As a result of that conclusion, it is accepted Article 16 (3) 1996 Hague Convention did not apply and consequently X's parental responsibility for B in the Ukraine did not subsist on arrival here.

Parental Status

46. I turn now to consider the status of X, Y and Z in relation to the B in this jurisdiction.

47. Z carried the child and is treated as the mother (s33 Human Fertilisation and Embryology Act 2008 HFEA 2008) unless the child has been made the subject of an adoption or parental order which would extinguish her parental status. Z is treated as the mother even though she was in another jurisdiction. s33 provides

    '(1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

    (2) Subsection (1) does not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child.

    (3) Subsection (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs'

48. Mr Powell, supported by Ms Jaffar, submits that if assisted conception took place using the gametes of the commissioning mother's spouse or partner (in this case Y) and the surrogate mother (Z) is not married the genetic father is also the legal father unless there has been an adoption or parental order made in favour of a third party.

49. In Lady Hale's judgment in *Re G [2006] UKHL 43* at paragraph [32]

    'So what is the significance of the fact of parenthood? It is worthwhile picking apart what we mean by 'natural parent' in this context. There is a difference between natural and legal parents. Thus, the father of a child born to unmarried parents was not legally a 'parent' until the Family Law Reform Act 1987 but he was always a natural parent. The anonymous donor who donates his sperm or her egg under the terms of the Human Fertilisation and Embryology Act 1990 is the natural progenitor of the child but not his legal parent: see ss 27 and 28 of the 1990 Act. The husband or unmarried partner of a mother who gives birth as a result of donor insemination in a licensed clinic in this country is for virtually all purposes a legal parent, but may not be any kind of natural parent: see s 28 of the 1990 Act. To be the legal parent of a child gives a person legal standing to bring and defend proceedings about the child and makes the child a member of that person's family, but it does not necessarily tell us much about the importance of that person to the child's welfare.

50. Mr Powell submits, and Ms Jaffar agrees, there are three competing principles for establishing legal fatherhood.

51. First, the common law presumption of legitimacy in opposite sex marriage. This can't apply here as the surrogate in not married to anyone.

52. Second, the law recognises (per *Re G (ibid)*) where a child has been conceived naturally the genetic father as the father of the child (subject to the presumption of legitimacy).

53. Third, the provisions of section 41 HFEA 2008 sets out the circumstances in which a person is not to be treated as a father. The genetic father will not be recognised as the legal father in the case of assisted reproduction where either

    (1) He is said to be an anonymous sperm donor (as defined by s 41 (1) HFEA 2008 (and Sch 3, para 5 HFEA 1990).
    (2) He died prior to treatment of the birth mother (s 41(2) HFEA 2008 (unless s 39 applies)).
    (3) Another person is recognised as the child's father or second female parent under the provisions of HFEA 2008.

54. Mr Powell submits that as Y does not fall within any of the exceptions in the previous paragraph it can be inferred that he is a legal father. He submits there appears to be a lacuna in the statutory framework as the HFEA 2008 does not envisage a situation whereby a gestational surrogate is unmarried and the progenitor (Y) indicates, albeit after the embryo transfer (if he knew about or consented to the transfer in December 2016) but before the birth, that he no longer wishes to be a legal parent.

55. Ms Jaffar submits this analysis is supported by two additional matters. First, the recognition by Baker J (as he then was) in *Re G (a Minor); Re Z (A minor) [2013] EWHC 134 (Fam)* at paragraph 68 that the genetic father was also the legal father in the case of a child born prior to the reforms in the HFEA 2008 regarding recognition of a second parent, and therefore entitled to make an application under section 10(4) CA 1989 without the need for prior leave. Second, when considering an application for a declaration of parentage under section 55A Family Law Act 1986 it can and usually is made on presentation of scientific testing alone to determine paternity.

56. The significance of being a legal parent of a child, as set in *Re G*, is it *'gives a person legal standing to bring and defend proceedings about the child and makes the child a member of that person's family'*.

57. In this case, due to the position taken by Y that he wishes to have no further involvement in the child's life it is not necessary for the court to determine this issue other than to note what appears to be the practice in some surrogacy arrangements, both here and abroad, for there to be a preference for unmarried surrogates to ensure that the genetic commissioning parent has some status in this jurisdiction in relation to the child.

Parental Responsibility

58. The next issue to consider is who has parental responsibility for the child in this jurisdiction. Pursuant to the child arrangements order made on 6 February 2018 X has parental responsibility, although she is not a legal parent (s 12 (2) Children Act 1989 'CA 1989').

59. Parental responsibility does not define parenthood, a legal parent may or may not have parental responsibility, equally a person can have parental responsibility

without being recognised as a parent (for example, under a child arrangement order or special guardianship order in their favour).

60. A birth mother will always acquire parental responsibility (s 2 CA 1989), so Z has parental responsibility for the child until any order is made that would extinguish her parental status, such as an adoption or a parental order.

61. In respect of Y's status, where the child's mother and father were not married to each other at the time of the child's birth (as here, Y was not married to Z) the father shall only acquire parental responsibility through the provisions of s 4 CA 1989 if

    (i) he becomes registered as the child's father under any of the enactments specified in subsection (1A) (i.e. his name is on the birth certificate).
    (ii) he and the child's mother make a parental responsibility agreement.
    (iii) the court on his application orders that he should have parental responsibility for the child.

62. As none of these provisions apply in this case, Y does not have parental responsibility.

Adoption Application

63. Turning now to consider the adoption application issued by X on 30 April 2018. There is no issue that X is entitled to make the application.

64. Although they have lived separately since at least early 2017, if not earlier, and a decree nisi was granted on 10 August 2017 X, has applied as a single adopter. Section 51 (3) (b) ACA 2002 provides that such an application can be made where the court is satisfied that ''

65. Y has had notice of the adoption application. He is not an automatic respondent to these proceedings (see rule 14.3 Family Procedure Rules 2010 'FPR 2010'), as he does not have parental responsibility. In the light of his position in October 2017, repeated in March 2018, and as conveyed in his meeting with the Guardian when she spoke to him that he doesn't wish to take any role in these proceedings, does not oppose the application or intend to have any relationship with the child in the future, I determined on 5 October 2018 he should not be made a party.

66. The position of Z is different. She is a legal parent, does have parental responsibility and is an automatic respondent to these proceedings (see rule 14.3 FPR 2010). At the hearing on 5 October 2018 I joined her as a party, directed she should be given notice of this hearing and notified that the court will be invited at this hearing to make a final adoption order. That has taken place via Ms Roddy who has spoken to her and had email contact.

67. Although there is considerable evidence before the court that Z does not oppose the adoption order, it is recognised by Mr Powell and Ms Jaffar that because of the unusual course of these proceedings have taken, the importance of order being sought and to avoid any uncertainty about whether Z has or has not consented the

court is invited to dispense with her consent under section 52(1)(b) Adoption and Children Act 2002 ('ACA 2002'), as she is a parent with parental responsibility (s 52 (6) ACA 2002).

68. Turning to the relevant principles the court needs to consider when determining the adoption application, the court's primary focus is the child's life long welfare needs as set out in s 1 ACA 2002, having regard to the matters set out in the welfare checklist s 1 (4) ACA 2002. The effect of making an adoption order is that the child will be treated as a child of the applicant. Section 67 ACA 2002 provides:

    'Status conferred by adoption
    (1) An adopted person is to be treated in law as if born as the child of the adopters or adopter.'

Such an order is transformative for the child and, if made, will extinguish any other parental relationship the child has.

Discussion and Decision

69. The court has the benefit of a number of assessments of X's capacity to care for B. There are two assessments undertaken by the local authority. First, the Family and Friends assessment completed in March 2018, which recommended B remained living with X. Second, the detailed adoption assessment dated 31 August 2018 and the undated addendum and support plan directed to be filed by the order on 5 October 2018. The purpose of the addendum report was to give more information regarding the discussions with the referees and to set out the support plan that underpinned the placement.

70. The local authority assessments are detailed and full. The adoption assessments have been undertaken by Ms A, a Senior Practitioner within the Adoption Assessment Team. She has twelve years' experience as a social worker and has been in her current post for 18 months. She visited the applicant and the child on five occasions during the preparation of her main report as detailed in Part 3, liaised with the health visitor and considered the four references that were put forward. The addendum reports confirmed she spoke at length to two of them (Dr H, CF) and considered the information provided by the others (including a work colleague, a neighbour and EJ's childminder). All spoke in warm and positive terms of the relationship between X and B and how they viewed X's parenting capacity.

71. The assessment summarises the updated medical position. B was last seen by a Consultant Neonatal Paediatrician on 23 April 2018. The report confirm that he considers the child's growth and development are normal and the neurological examination is normal, and she does not need physiotherapy. He concludes there is no reason why she should have breathing problems in the future. He has discharged the child from his clinic and no further appointments have been needed since then.

72. Having looked at the applicant's qualifications and work history as described in the adoption assessment she has considerable expertise in working with children. She has worked in the field of child care for nearly 29 years, for the last 18 years she has run a Montessori nursery and took charge of a second nursery 10 years ago.

73. In her discussions with Ms A, X was sensitive to B's background and heritage and how she will ensure the child is aware of her history and identity. Having been adopted herself the X is alive to and aware of the issues that can arise.

74. The recommendation by the local authority is to support an adoption order being made, in their view only that order will give the security and stability that B's lifelong welfare demands. The assessment concludes

> *"An adoption order in favour of [X] will be in [B's] best interest as it will ensure she has stability and a sense of permanent belonging within her family. [B] will benefit with the legal security of having a parent to ensure her physical, emotional and developmental needs are met throughout her childhood, adolescence and in to adulthood"*

75. The addendum report confirms the discussions with the referees, in particular Dr H. She has agreed to be a testamentary guardian for B. Ms A concludes *'All the references gained were positive and gave good examples of [the applicant's] characteristics and ability to meet [B's] needs. The referees commented on her strengths and resilience to manage difficult situations. I gained a very clear sense [B] had been completely embraced by [the applicant's] family and her friends and that there is a commitment to supporting her and [B] now and in the future'.*

76. Ms Roddy, the Children's Guardian, in her thoughtful and perceptive report supports the court making an adoption order, but not without some reservations. For the preparation of her report she has met X at her home and at the office, observed X with B, met with Y and had telephone communication with Z (with the assistance of an interpreter) as well as X, Y, the social worker and the health visitor.

77. In her discussions with Z she notes *'she has been consistently clear to me that she is in support of the child remaining permanently in the care of [the applicant] and she has no intention to play any role in her life.. [she] confirmed her understanding that, following the child's birth, she would have no ongoing involvement, or retain any rights.. [she] provided her A101A consent when [B] was six weeks old….she emailed again on 26.9.18 again confirming her understanding of the adoption plan, and her agreement to it.'*

78. In relation to Y she notes he *'has been served with notice of the application. Further to our meeting, detailed in my previous report, I spoke to [Y] on the phone on 18.9.18 when he repeated his view that he does not intend to play any role in this matter, is aware of the application and does not oppose it.'* She notes the paternal family are aware of B and are saddened that a child of their family will be raised with no contact with them. According to [Y] *'their priority has been to protect him from [X's] false allegations, and support his decision to remain distant from her and from the child'.*

79. The concerns raised by Ms Roddy in her report focus on several themes:

    (1) The circumstances in which B was born. There is some evidence to suggest that was duplicitous in that X did not inform the clinic or Z of her separation from

Y. Even if X's account is correct that she did not separate until January 2017 and the clinic had delegated authority to sign for Y I December 2016, her proceeding on another surrogacy attempt and embarking on her own IVF attempt to have another child exposes what Ms Roddy describes as *'her failure to confront the reality for the child or children she planned to bring them into the world, born to an abusive relationship'.*

(2) Ms Roddy considers X's inability to carry a child, and her sense of urgency to become a mother propelled her eagerness to embark on an unsuitable relationship with Y and plan to have a child with a man she simply did not know, exposes *[X's] poor relationship planning'.* Ms Roddy remarks on the timeline and the inconsistent accounts X has given about Y's knowledge of the second surrogacy arrangement with Z.

(3) In Ms Roddy's view X has on occasion presented in an erratic fashion that has attracted concern (for example at the hospital in January 2018), and whilst appreciating her anxieties and the context of them Ms Roddy noted a marked resistance by X of any suggestion of having a mental health issue. In Ms Roddy's view, given the totality of those aspects of her experience known to her (including unsuitable abusive adult intimate relationships, identity issues arising from her own experience as an adopted child, the death of her father, the anxiety around B's health issues , uncertainty as to her legal connection with the child given the absence of a genetic link and mounting financial expenses) she strongly encourages X to embark on counselling support to help her process those aspects of her life. In Ms Roddy's view if they remain unaddressed, they may have a negative bearing on her ability to provide the standard of safe, ordered and child-focussed parenting that B requires.

(4) Ms Roddy concludes that despite the undoubted love X has for B, B is likely to struggle with the loss of her genetic father. X needs to understand that whilst B will undoubtedly benefit from the love she can provide, that will not negate what might be the child's sense of a fractured identity.

80. Despite those reservations Ms Roddy notes the positive reports of X's day to day care of B, X's sensitive approach to B's mixed heritage and how positively to promote her [AB] and [CD] heritage. She notes that the local authority assessment, whilst having some concerns about its lack of depth, does weigh the benefit of the child being provided with legal certainty through adoption taking into account the issues of concern. Ms Roddy concludes '*On balance I concur with the plan that remaining in the care of [X] represents the most appropriate care arrangement for this child'.* Ms Roddy considers the options, including that B could remain in the care of X under a child arrangement or special guardianship order, supported by a 12-month supervision order, X could adopt B or B could be placed with a stranger adoption. She notes that X is the only parent B has known, X has been the subject of two positive assessments and it would be unlikely that the local authority would support any move. Ms Roddy considers B's welfare needs would be best met remaining in the care of X, and anything other than an adoption order would mean that the surrogate mother retained parental responsibility and her legal status as the mother. That is not what Z wants and would result in uncertainty and confusion for B. Ms Roddy concludes *'the opportunity for [B] to be legally adopted by [X] has immeasurable benefits. Despite the dispute around the circumstances of her creation, she was conceived to be [X's] child. Despite the questions of whether the child was beset by the medical issues [X] insists she was, medical help and*

intervention was sought. Although [Y] insists [X] has lied about his abusing her as alleged [the applicant] has sought the support of the police to protect herself and [B]. The involved professionals concur with the view that [B] has been provided with a good standard of care that demonstrates [X's] commitment to her. No one else in [B's] world is claiming her.'

81. At the hearing on 21 November 2018 I raised with Mr Powell the issue of X seeking counselling, for the reasons so powerfully put in Ms Roddy's report. There was a brief adjournment to enable Ms Roddy and X to discuss this issue. X was able to give the re-assurance that she would take up the counselling as suggested and accepted the need for it. I wholly endorse that; X has had to manage a lot of difficult issues recently. Now this litigation has concluded this is the time for her to begin to address these matters. I am quite sure that such support will greatly enhance her ability to assist B in the long term with what she will no doubt ask about and want to explore about her own identity and background.

82. In reaching my decision I must remain focussed on B's lifelong welfare needs, which is the courts paramount consideration. Currently, B is in limbo in so many respects. She is cared for by someone who she regards as her mother who has no genetic relationship with her, and until the orders made by this court no legal status in relation to her in this jurisdiction. Whilst there remain concerns about the reliability and consistency of X's account of the background and the action she took to fulfil her desire to have a child, the balance of the evidence following B's birth is that X has provided good and consistent care for B and undoubtedly loves her. Those adults that have parental status for B in this jurisdiction (Z and Y) have remained consistent that they wish to relinquish that status. Z following the terms of the surrogacy arrangement and her lack of legal status regarding B in the Ukraine, and Y following the breakdown of his relationship with X. Whilst both Z and Y are an important part of B's identity and background and an adoption order will extinguish their legal status with B, this has to be balanced with the advantages for B of an adoption order being made. Such an order will provide lifelong security and stability to her relationship with X. X has demonstrated sensitivity and understanding to B's background. She was adopted herself, so is aware of the issues that can arise. Whilst I share many of the concerns outlined by Ms Roddy concerning B's conception and X's actions both prior to and immediately following B's birth the more recent evidence demonstrates that X has been able to provide the consistent care B requires and has not continued to form unsuitable relationships. Additionally, X has recognised the need for counselling for herself as identified by Ms Roddy.

83. B's welfare requires Z's consent to be dispensed with. Z has been consistent in expressing her wish to have no further involvement in B's life. B needs the security and stability an adoption order will give her, securing her relationship with X long term.

84. I am satisfied only an adoption order will meet the lifelong welfare needs of B.