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IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION  
**[2021] EWHC 589 (Fam)**



Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Tuesday, 12 January 2021

Before:

MRS JUSTICE GWYNNETH KNOWLES  
**(In Private)**

**Re Z (Care Proceedings: Surrogacy)**

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MS L. MCLYNN appeared on behalf of the Applicant local authority.

The First Respondent was neither present nor represented.

MR M. KINGERLEY QC appeared on behalf of the Second Respondent.

MR TAMBER appeared on behalf of the Third Respondent, by her Children's Guardian.

MR A. POWELL appeared on behalf of the Fourth Respondent.

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**J U D G M E N T**

**(via Microsoft Teams Conference)**

(Transcript prepared without the aid of documentation)

MRS JUSTICE GWYNNETH KNOWLES:

- 1 I am concerned today with care proceedings issued on 15 May 2020 in relation to Z, a little girl born on 14 December 2019, who is thus nearly thirteen months old. The first respondent to the proceedings is EF, Z's surrogate mother. The second respondent is AB, Z's biological father. Z herself is the third respondent, through her children's guardian, and the fourth respondent is CD, AB's partner and cohabitee.
- 2 The local authority applied today for permission to withdraw its application for a public law order in respect of Z. There is a concurrent parental order application before the court, which was issued on 9 June 2020. The local authority is not party to that application, though it has seen the papers.
- 3 Z is presently a ward of court, and that has been the case since 23 October 2020. A wardship order was granted by me on that date to place Z in the care and control of AB and CD. Z transitioned from foster care to CD's care on or about 27 October, and a month later, on 27 November 2020, I gave CD permission to remove Z from the jurisdiction to return to Thailand, where both he and AB live. On 4 December 2020, Z travelled with CD to Thailand, and she is now living there with both CD and AB.
- 4 I am grateful to all the advocates for their assistance this morning. This judgment is a companion to a judgment I will give with respect to the parental order application.
- 5 I summarise the matters which are pertinent to this application. CD is fifty-six years old. AB is forty-one. They have been in a relationship for more than twenty years and have cohabited for the last seventeen years. Both have wished to become parents for a long time. In 2018, both moved to Thailand, for AB to take up employment as a teacher.
- 6 CD's personal history has, in large part, been the driver behind the public law proceedings. He experienced neglectful and harmful parenting as a child and appears to have been sexually abused by his brother. He became a looked after child when he was about eleven years old and remained in the care system until reaching his majority. During his time in care, I very much regret to say that he experienced further sexual abuse perpetrated by his carers, including being trafficked and recruiting other boys to be sexually abused.
- 7 As an adult, in 1990, CD was convicted of eight offences of indecent assault on a male aged under fourteen years. He received a probation sentence for three years with a condition of treatment. He is not on the sex offenders' register. It was only during the treatment prescribed by the court that CD came to understand that what he had done was abusive, and indeed that what had been done to him was also abusive.
- 8 In 2019, AB and CD travelled to Colombia to undertake a surrogacy arrangement. Embryos were created using donor eggs and AB's gametes. Following successful embryo transfer, EF became pregnant with twins. Sadly, both twins were born prematurely on 14 December 2019, and one twin, Y, died at birth. Z spent the first weeks of her life on the neonatal intensive care unit in Bogota, Columbia.

- 9 AB and CD arrived in Colombia on 20 January 2020, when Z was well enough to be discharged from hospital. Sadly, she was not well enough to travel to Thailand, so the couple decided that AB would resume his employment in Thailand, and he returned there on 18 February 2020.
- 10 After AB left for Thailand, CD cared for Z, together with her surrogate mother. As Z became well enough to travel, the COVID pandemic took hold, and CD and Z found themselves at risk of being stranded in Columbia. The borders in Thailand were closed and CD and Z eventually managed to obtain places on a repatriation flight to the United Kingdom. They found themselves to be in an unprecedented and unanticipated situation which was entirely out of their control. Z was able to travel, but unable to enter Thailand. CD was alone in Colombia, where he could not remain indefinitely and did not speak the language, and AB, himself, was unable to re-enter Colombia from Thailand.
- 11 In the circumstances, the most feasible option was for CD and Z to travel to the United Kingdom on an interim basis, with a view to travelling onwards to Thailand as soon as restrictions allowed. Accordingly, on 1 May 2020, CD and Z flew to the United Kingdom on one of the final humanitarian flights from Colombia. Given the context of Z's birth, the Foreign and Commonwealth Office, UK Border Authorities and Colombian immigration all required satisfaction in the form of notarised documents as to a number of factors, including but not limited to, firstly, Z's eligibility for a British passport, secondly, that there was DNA evidence of AB's paternity, thirdly, documentary evidence relating to her birth in the form of a birth certificate, fourthly, documentary evidence in respect of the surrogacy arrangement and, fifthly, consent for Z to travel to the UK with someone other than her father, namely CD. I note also that Z's surrogate mother, EF, provided her consent for Z to travel to the UK and to be accompanied and cared for by CD.
- 12 It is clear that both the UK and Colombian authorities were content for Z to leave Colombia and travel to the UK in the company of CD, who was neither a biological nor legal parent, and that full consent for travel for that purpose had been provided by both AB and EF. Z, who held a Colombian passport, was permitted to enter the UK in consequence of a visa waiver, a request for the same having been made by the UK Visas and Immigration in Bogota to the Border Force National Command Centre in the UK, who subsequently granted the requisite visa waiver. Thus, on the date of travel, Z and CD were able to lawfully enter the United Kingdom, having satisfied both the Colombian and the British authorities of Z's status.
- 13 However, on arrival in the United Kingdom, it appeared to Border Forces at the airport that CD had tried to conceal Z under his jacket, and that he did not appear to have the appropriate documents for her. It also transpired that he had convictions for sexual offences against children, and he was said to have provided misleading information to Border Force officials about his and Z's onward travel.
- 14 I have attempted to ascertain the flow of events on 2 and 3 May from the documentary material before me. It appears that, on arrival, CD was able to satisfy UK Border Force officials that the Colombian authorities had kept the paperwork which both he and AB had provided, and AB was able, at the request of the UK Border Agency, to provide copies of all the paperwork. CD was also open on being asked whether he had any convictions in relation to children. He provided that information and he was eventually allowed to leave the airport with Z.
- 15 It appears that, prior to CD leaving the airport with Z, the Border Force had contacted the local authority where the airport was situated to ask for its advice. That advice was given in

terms that, firstly, Z appeared to be well cared for, secondly, that there was parental permission for her to travel in CD' care, thirdly, that the convictions were some thirty years old and, fourthly, that CD had provided a UK address; therefore, the threshold for removal was not thought to be met by the local authority.

- 16 The local authority suggested that, as CD and Z had indicated they were going to travel to the X area, that X social services should be asked to conduct a welfare and police check. CD left the airport shortly after that, but it appears that he was unaware that checks would be made. He initially said that he would be staying with AB's sister at an address in X, and also appears to have given an address of a hotel near the airport.
- 17 Judging from the police material which I have inspected over the course of the luncheon adjournment, I would agree with the assessment contained in the documents that the Border Force seem to have second thoughts about CD' travel with Z and contacted X Police, who then contacted X social services. In the light of the contact made, the local authority (by then, X) contacted CD, who said he was staying in a hotel. When police officers attended to conduct a welfare check, he was not found there. Unfortunately, this escalated the concerns and, following further contact with the first local authority during the early hours of the morning of 3 May 2020, CD eventually provided an address at which he was staying in X. This was not the address that he had originally given. When the police attended to check on Z's welfare, having been asked to do so by X social services, Z was taken into police protection.
- 18 AB agreed to Z being accommodated pursuant to s.20 of the Children Act on 6 May 2020, and provided documents verifying the legality of the surrogacy arrangements in Colombia. The local authority (X Council), where CD and Z found themselves, was concerned by CD' convictions and the circumstances which had led to Z's removal from his care, and accordingly issued care proceedings on 15 May. Those proceedings were transferred to Keehan J by order of HHJ Thomas on 18 May, and, in July 2020, Keehan J approved the instruction of a clinical psychologist to assess AB and CD, and also joined CD as a party to the care proceedings. CD's medical records were obtained, as well as documents from the X Police relevant to the offences for which he was convicted.
- 19 Dr Allam, a clinical psychologist, assessed both men. She found them both to be open and commented that CD had particular insight into his own functioning. She assessed him to be at low risk of abusing Z or any other child. There was no evidence he had committed an offence in the last thirty years, his mental health was stable, and he was more confident and had more self-esteem than when he was younger. He had a good support network and a good relationship with AB. He was said to adore Z and was mindful of her needs and keen to protect her from harm and give her a happy childhood. Likewise, AB enjoyed a respectful, supportive, and loving relationship with CD. He was not a risk to Z, and he was able to discuss safeguarding issues and talk about how he might recognise any positive risk to Z.
- 20 Alongside this assessment, the local authority completed its own parenting assessment, which was positive and recommended Z should return to the care of AB and CD. At a hearing on 23 October 2020, the local authority informed me that it was its intention to withdraw the application for a public law order at the final hearing then listed in January 2021. The plan was for Z to be in the care of CD and, subject to the necessary visas, for CD to fly with her to Thailand to re-join AB. I approved that plan and made wardship orders which had the effect of providing CD and AB with the care and control of Z, and which would, in due course, provide a structure which would allow her to lawfully travel to Thailand with CD, who of course had no legal relationship with her. I listed the matter for a

further hearing on 27 November. Between 27 and 30 October, Z transitioned from local authority foster care to that of CD, and he looked after her until he left this jurisdiction with her on 4 December. On 27 November 2020, I approved the plan for Z to return with CD to Thailand. They returned there and, after a period of self-isolation, the family was reunited.

- 21 Before I turn to the local authority's application, I make the following matters plain. First, I am satisfied, as is the local authority, that CD did not attempt to conceal Z on his arrival in the United Kingdom. He was travelling on a humanitarian flight, authorised by the Foreign and Commonwealth Office and the UK Border Agency, and was clearly carrying a baby and a baby seat. He also volunteered Z's passport. It is difficult, in those circumstances, to envisage how it could possibly have been thought he might have attempted to conceal Z.
- 22 CD has admitted to providing misleading information to the UK Border Force about his onward travel arrangements. I accept that he was fearful that Z might be removed from his care, given his convictions, about which he had been asked at the airport.
- 23 In Colombia, Z's surrogate had accompanied CD and Z to the airport. All the properly notarised documentation in relation to Z was accepted by Colombian immigration, the Foreign and Commonwealth Office and the Colombian Border Control, and the UK Border Agency. This has all been corroborated in the documents before me. Unfortunately, the Foreign and Commonwealth Office retained Z's paperwork, which caused problems when CD arrived in the United Kingdom. CD was open with the UK Border Force about his convictions, and this has been corroborated by X Police.
- 24 The process of decision-making which led to Z's removal by the police pursuant to their powers under s.46 of the Children Act was confused and based on a series of misunderstandings arising from poor communication. Z has, since her removal from the care of CD, and since 6 May 2020, always been a child accommodated pursuant to s.20. There has never been any determination by this court as to whether the threshold criteria, even on an interim basis, were made out with respect to her.
- 25 The Colombian authorities have made enquiries, at this court's request, and have confirmed that the surrogacy arrangement was lawful under Colombian law. The Family Court in Colombia made an order confirming that the surrogate mother, EF, no longer had parental responsibility for Z, with effect from 4 August 2020, and that parental responsibility resided with AB and CD.
- 26 Finally, this local authority must be credited for signalling, at the earliest opportunity, having considered its own parenting assessment and the report of Dr Allam, that it wished to withdraw the application for a public law order in relation to Z.
- 27 I turn to the legal framework in relation to applications by local authorities for permission to withdraw public law proceedings. The local authority is required to seek the court's permission to withdraw the application for a care order pursuant to r.29.4(2) of the Family Proceedings (sic) Rules 2010. The case law in relation to such applications has recently been considered by the Court of Appeal in the case of *GC v A Local Authority (A Child)(Withdrawal of Care Proceedings)* [2020] EWCA Civ 848. The Court of Appeal reviewed the relevant first instance authorities in its judgment and endorsed the approach summarised as follows at paras.19 and 20 of its judgment:

“As identified by Hedley J in the *Redbridge* case, applications to withdraw care proceedings will fall into two categories. In the first, the local authority will be unable to satisfy the threshold criteria for making a care or

supervision order under s.31(2) of the Act. In such cases, the application must succeed. But for cases to fall into this first category, the inability to satisfy the criteria must, in the words of Cobb J in *Re J, A, M and X (Children)* be ‘obvious’.”

28 Paragraph 20:

“In the second category, there will be cases where on the evidence it is possible for the local authority to satisfy the threshold criteria. In those circumstances, an application to withdraw the proceedings must be determined by considering [firstly] whether withdrawal of the care proceedings will promote or conflict with the welfare for the child concerned, and [secondly] the overriding objective under the Family Procedure Rules.”

29 Thus, the court’s first task is to consider whether the threshold criteria can be satisfied. If not, the application for permission to withdraw must succeed, and the court need go no further. The relevant date for considering threshold in this case is the date on which protective arrangements were put in place, this being 6 May 2020. The court is also entitled to consider evidence acquired during the proceedings which relates to the state of affairs at the relevant date (*Re G (Children: Care Order)* [2001] EWCA Civ 968).

30 All the parties support the local authority’s application. There is, on the material before me, no evidence that Z has suffered significant harm. This case has been about the likelihood of such harm arising from CD’ convictions. The proceedings and Z’s time in foster care have been extremely difficult for AB and for CD. They have been entirely open and cooperative with the local authority, the court and have assisted professionals at each and every stage.

31 The local authority had, as the children’s guardian acknowledged in her case analysis, an obligation to investigate legitimate concerns because of CD’ convictions. I agree that safeguarding proceedings were necessary whilst matters were further investigated. These proceedings were not brought on a whim or without proper justification. However, the social work evidence and the report of Dr Allam indicated that Z was not likely to suffer significant harm. Further, CD’s lack of frankness does not of itself lead to the likelihood of significant harm and should be seen in the context of his subsequent engagement with the local authority. I have taken account of the words of Peter Jackson LJ in the case of *Re K (Children: Placement Orders)* [2020] EWCA Civ 1503:

“Lies, however disgraceful and dispiriting, must be strictly assessed for their likely effect on the child, and the same can be said for disobedience to authority. In some cases, the conclusion will simply be that the child unfortunately has dishonest or disobedient parents. In others, parental dishonesty and inability to cooperate with authority may decisively affect the welfare assessment. But in all cases the link between lies and welfare must be spelled out.”

CD’s behaviour has to be seen in the context of CD’ subsequent engagement with the local authority and with this court.

32 I am satisfied that this case falls into the first of the two categories identified in *GC* of withdrawal applications, that is where the local authority is unable to satisfy the threshold criteria for the making of a public law order. This was an entirely different case to *GC*. That case concerned a child who had sustained injuries and where the trial judge had

acceded to an application withdraw the proceedings an interlocutory stage. That case was plainly in the second category, where it was possible for the local authority to satisfy the threshold criteria. In this case, the conduct of both CD and AB, once the proceedings commenced, allied with the psychological and parenting assessment, made it plain and obvious that threshold criteria could not be satisfied in this case.

- 33 Accordingly, I grant the local authority permission to withdraw its application for public law orders. I also discharge the wardship order with respect to Z. That was always a mechanism by which to affect her removal from this jurisdiction. She is now with both CD and AB in Thailand, and there is no need for the wardship order to continue.
- 34 I have already indicated that, following a period of self-isolation on her return to Thailand, Z is now living with AB and CD. She is clearly thriving in their care. I recognise that AB and CD will never get back the time lost to them while she was in foster care. The costs of maintaining another home in the United Kingdom for CD have been financially crippling for the couple. What should have been a happy time will forever be one of the most painful time for both of them. I very much hope that Z will enjoy a happy and secure upbringing, in the care of AB and CD and I have no doubt that they will do their utmost to provide her with the love and care she needs . I wish them the very best.
- 35 That is my decision.

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**CERTIFICATE**

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**This transcript has been approved by the Judge**