Neutral Citation Number: [2022] EWHC 198 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2022

Before :

MRS JUSTICE KNOWLES

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Re X, Y and Z (Children: Parental Orders: Time Limit)

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Miss Fottrell QC (instructed by **Louisa Ghevaert Associates**) for the Applicants
The Respondents did not appear and were not represented.

Hearing date: 7 December 2021

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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.

Mrs Justice Knowles:

1. The court is concerned with three children: X, a girl, and Y, a boy, who are now four years old; and Z, a girl, who is now 2 years old. All three children were born in the USA in consequence of surrogacy arrangements entered into by the Applicants in that jurisdiction. Each of the children are the subjects of applications for parental orders pursuant to section 54 of the Human Fertilisation and Embryology Act 2008 ("the Act"). Those applications came before me for determination on 7 December 2021.

2. The first Applicant is TT. He is a British citizen in his late 40s. The second Applicant is RR who is a Danish citizen in his mid-50s. Both Applicants relocated to this jurisdiction at the end of October 2021, having lived in Denmark prior to that date. The Applicants have been in a committed relationship for about 12 years and they married in 2015. Both applicants were represented at the hearing by Miss Fottrell QC.

3. The first Respondents to the proceedings are Mr and Mrs HH, both of whom are American citizens living in the state of Oregon. Mrs HH was the surrogate for X and Y. The second Respondents to the proceedings are Mr and Mrs JJ, both of whom are American citizens living in the state of California. Mrs JJ was the surrogate for Z. None of the Respondents were represented or present at the hearing but I was satisfied that they had been given proper notice of the date of the hearing and told that the court might make parental orders on that occasion.

4. I read the bundle of documents prepared by the Applicants and heard submissions from Miss Fottrell QC. I also had the benefit of two extremely helpful reports from the parental order reporter, BB, which recommended the making of parental orders. At the conclusion of the hearing, I made parental orders with respect to all three children in favour of the Applicants but indicated that, given the slightly unusual features of this case, I would provide a judgment at a later date. This judgement has been written carefully to safeguard against the identification of the children with whom the court was concerned.

5. The key legal issue in this case was that the applications for parental orders were all made outside the six-month time limit pursuant to s.54(3) of the Act and thus I was asked to exercise my discretion so that parental orders could lawfully be made.

Summary of Factual Background

Surrogacy

6. RR is a successful businessman who, until October 2021, had lived his entire life in Denmark. TT worked in the UK, Ireland, before settling in Denmark in about 2010. He is also a businessman. RR and TT met in Spain in 2009 and TT relocated to Denmark to set up home with RR. RR and TT married in Denmark in 2015. Both enjoyed success in their respective businesses and were financially secure.

7. In 2016, RR and TT began to explore surrogacy in order to fulfil their dream of having a family. They had considered adoption but this was not a realistic option in Denmark because RR's age was outside the accepted parameters for adoption in that jurisdiction. After considerable research, the couple decided to pursue surrogacy in the USA, attracted by the regulatory framework in that jurisdiction which provides for

legal certainty as to parentage at the time of the child's birth. They decided to work with an established agency which undertook rigorous medical screening and, in April 2016, entered into an agreement to select an anonymous egg donor. TT provided a sperm sample which was subsequently used to create blastocyst embryos. In November 2016, the couple were matched with a married surrogate, HH, and entered into a gestation or carrier agreement with her, paying for HH and her husband to obtain independent legal advice. Two embryos created from TT's sperm and donor eggs were transferred into HH's uterus in March 2017 and the twin pregnancy was confirmed in April 2017. TT and RR maintained regular contact with HH during her pregnancy both by video call, text messages, and visits to the United States.

8. Both twins were born prematurely in September 2017 and remained in hospital for eight weeks after the birth. The Applicants travelled to Oregon immediately on hearing the news that HH was in premature labour and they remained in the US, caring for the twins after their birth. On the twins' discharge from hospital in November 2017, the Applicants returned with them to Denmark. The Applicants obtained a declaratory judgement of parentage whereby they were recognised as the legal parents of X and Y from birth pursuant to the law of Oregon. Both X and Y hold US citizenship. Following the family's arrival in Denmark, the Danish authorities provided X and Y with Danish passports and confirmed their Danish citizenship.

9. When X and Y were about 12 months old, the Applicants decided to have a third child by surrogacy. Once more, they used an agency in the United States and were matched with a married surrogate, JJ, who lived in California. In December 2018, they entered into a gestation or carrier agreement with JJ, once more paying for JJ and her husband to obtain independent legal advice. One embryo created from TT's sperm and a donor egg was transferred into JJ's uterus in February 2019. The Applicants again maintained regular contact with JJ throughout her pregnancy via texts, video calls and visits to the USA. Z was born at full term and TT was present at the birth. RR travelled to the USA with X and Y to introduce them to their baby sister and all returned, as a family of five, to Denmark about three weeks after Z's birth once her US passport had been issued. Prior to Z's birth, the Applicants obtained a pre-birth order so that they were recognised as a legal parents from birth under the law of California.

Legal Parentage in Denmark

10. In 2017, when the applicants returned to Denmark with X and Y, they had been advised that the children were entitled to Danish citizenship based on RR's parentage. They registered the children at their local town hall in front of the same registrar who had previously registered their marriage in 2015. The registration proceeded without incident. It was the Applicants clear understanding that this was permitted and lawful.

11. However, when the Applicants sought to register Z in 2019, they were told that X and Y had been registered in error and that it was not possible to confer Danish citizenship and parentage to these children born through surrogacy. According to Danish law, the biological father alone is the legal parent and the surrogate is also considered to be a legal parent even though she is not considered a parent in her home country. Danish law thus recognised only TT as the children's father and RR had no legal status as their parent. This was a hugely upsetting and catastrophic development as the Applicants had understood that Danish law did recognise the parentage bestowed on

them under US law. The Danish authorities began an investigation into the family which led, ultimately, to the rescinding of X and Y's registration as the children of the Applicants and their Danish passports. Additionally, Z could not be registered as the child of the Applicants.

12. On 16 December 2020, the Applicants were called to a meeting with the Danish authorities to discuss deporting the children from Denmark. They were advised that deportation would be put on hold for 90 days whilst a decision was made. TT had applied for British passports for all three children which were initially refused. However, with some assistance from an English solicitor, all three children were registered as British citizens immediately following the meeting with the Danish authorities on 16 December 2020. That event meant that the children acquired permanent rights of residence in Denmark prior to 31 December 2020, when the UK left the European Union. Thereafter, the children obtained British passports in February 2021. TT then applied to renew his permanent right of residence in Denmark and also applied for residency rights with respect to all three children. TT's right of residence in Denmark was confirmed in April 2021. Following a determination by the Danish Family Court in September 2021, the children's rights of residence in Denmark were confirmed and this resulted in the re-registration of X & Y's birth and the registration of Z's birth in Denmark recording TT as their father and the respective surrogates as their mother.

13. Until the issues arose with the children's residence and status in Denmark, the Applicants were unaware of the existence of parental orders in this jurisdiction. They had not previously been advised that this was a route they could or should take because they had understood that obtaining a legal status in the United States in respect of all three children would be recognised in Denmark where the family was settled and in other jurisdictions. The Applicants obtained legal advice and made these applications as soon as it became apparent that it was necessary to do so.

14. Although the Applicants were settled in Denmark, they experienced homophobia when TT was the victim of a homophobic assault which, unhappily, led to TT being charged with a criminal offence, namely an assault on a police officer whilst being arrested. A criminal trial is pending in Denmark. That experience, coupled with the difficulties surrounding the children's residency entitlement and the lack of legal recognition of their parentage under Danish law, led the couple to relocate permanently to this jurisdiction in October 2021.

The Parental Order Reports

15. The parental order reporter, BB, produced a comprehensive report in respect of each of the applications before the court. She met with the Applicants by video in October 2021 when they were still living in Denmark and had the opportunity to see them with each of the children. She received information from the nursery schools in Denmark and about their medical care and treatment in Denmark, all of which was entirely positive as to the parenting the children received.

16. She noted that the Applicants presented as *"loving, nurturing and well attuned parents to all three children"* and considered their relationship to be strong and supportive. She described being struck by their obvious delight in parenthood whilst

acknowledging that parenting three young children could, from time to time, be all consuming.

17. BB obtained police checks in this jurisdiction which confirmed that there was no information held on the national police database in respect of either Applicant. Having been informed by TT of his impending prosecution, BB requested information from the Danish authorities. That request was refused on the basis that it fell outside the remit of Danish legislation to provide such information in proceedings which were not criminal proceedings. Having considered TT's circumstances carefully, BB concluded that the criminal charge which he faces had no safeguarding implications for the children. Both Applicants had been transparent in declaring the impending prosecution in their statements and the information received from the Danish authorities with respect to the care of the children was entirely positive.

18. Despite her prematurity, X is a healthy little girl who is meeting her developmental milestones. Y has a diagnosis of cerebral palsy and his development is delayed. He requires daily therapy with which both Applicants are heavily involved. Z is an active and healthy child who is meeting all of her developmental milestones.

19. BB recommended that parental orders should be made with respect to each child because it was in their best interests that the Applicants, with whom the children shared a genetic link and who had met all their needs since birth, should be recognised as their legal parents thereby reflecting the reality of the children's care arrangements.

<u>Section 54 Criteria</u>

20. The information provided to the court demonstrated that the Applicants satisfied the section 54 criteria in the Act in these respects:

a) TT's sperm was used in the creation of the embryos for each of the children which were transferred by IVF to Mrs HH and Mrs JJ respectively (s.54(1));

b) the Applicants are lawfully married (s.54(2));

c) All three children have lived with the applicants in their home from birth. TT is a British citizen who has returned to live in this jurisdiction in October 2021. He and RR have purchased a property here; intend to live here permanently; and intend to bring up and educate their children in this jurisdiction. TT has plainly retained his domicile of origin (s.54(4));

d) Both Applicants are over the age of 18 years (s.54(5));

e) All the Respondents consented to the making of parental orders and their consent has been notarised in accordance with the requirements of the Family Procedure Rules 2010 (rule 13.11.4(c)). Additionally, both Applicants funded legal advice and representation for each of the surrogates and their husbands in the US legal proceedings which led to the Applicants acquiring legal parentage in that jurisdiction.

21. I have also considered carefully whether the payments made by the Applicants constituted reasonable expenses within the parameters permitted by s.54(8). That

exercise was rendered slightly more complex with respect to X and Y as the surrogacy agency in the USA was no longer functioning.

22. The payments made with respect to Z were clearly evidenced within the bundle provided by the Applicants. JJ received a sum of £41,585.79 in compensation for pain, suffering and inconvenience in relation to the pregnancy together with other expenses. Those sums were agreed in advance of JJ becoming pregnant and was set out in the gestational carrier agreement. Despite this being a considerable sum, I was advised by the parental order reporter that this sum was roughly in line with other surrogacy arrangements made in the USA. Having considered all the circumstances and being mindful of the paramountcy of Z's welfare, I was satisfied that I should retrospectively authorise these payments.

23. Insofar as the payments in respect of X and Y were concerned, the Applicants provided a detailed schedule of payments up to May 2017. The surrogacy agency collapsed after the children were born and it was not possible to obtain accurate records and so the Applicants have provided all of the evidence in their possession. They signed a gestational carrier agreement and returned it to the agency but were not provided with a signed copy. There are evidences that the detail and substance of the agreement were unaltered from the draft agreement attached to the statement of TT. Their surrogate, HH, provided a sworn statement, confirming that she received payments in line with the surrogacy agreement. Those payments were effected by the Applicants' attorney once the surrogacy agency ceased operating. She also provided a statement confirming these arrangements. I note that the Applicants were one of a number of families who were affected by the collapse of the agency (because of embezzlement by a member of staff).

24. The information provided to me set out the amount paid to HH together with payments for additional expenses which in total came to £42,095. I was satisfied that the Applicants had provided the best information that they could in these difficult circumstances. I also accept the analysis of the parental order reporter that the payments made to HH were in line with payments in other US surrogacy arrangements. Having considered the circumstances and mindful of X and Y's welfare, I retrospectively authorised the payments made.

25. Thus the Applicants complied with s.54(8) in respect of each child and paid to the respondents.

Time Limit: S.54(3)

26. The application with respect to X and Y was received by the court on 16 June 2021 and thus outside the period of six months from birth within which a parental order application should be made. Likewise, the application form with respect to Z was received by the court on 15 June 2021, again outside the relevant time limit. Miss Fottrell QC invited me to exercise my discretion to extend the time limit for each application, relying on the decision of Sir James Munby, President (as he then was) in Re X (A Child) (Surrogacy: Time Limit) [2015] 1 FLR 349.

27. In Re X, Sir James Munby held that s.54(3) did not have the effect of preventing the court making an order merely because the application was made after the expiration of the six month period for doing so following birth. Given the transformative effect

of section 54 on a child's status and identity, Parliament could not have intended that delay in making the application would be fatal and bar the child and the applicants from the lifelong benefits which a parental order would bestow. In paragraph 65, Sir James Munby made it clear that each case would, to a greater or lesser degree, be fact specific.

28. The evidence before the court demonstrated that the Applicants had been careful and organised in the arrangements they had made with respect to all aspects of the surrogacy arrangements entered into by them. They received legal advice in the USA as to the way in which they could acquire legal parentage in that jurisdiction and had understood that to be recognised in other jurisdictions. Crucially, they had understood that their legal status as parents under US law would be operative in Denmark where they were then living. It was clear throughout that they had acted in good faith. They were unaware of the necessity to apply for a parental order in this jurisdiction and I have accepted that that was a reasonable oversight given that they lived outside this jurisdiction at the time and had not had any advice from a UK based solicitor. As soon as they received advice to make the application they did so.

29. It was plainly in the interests of all three children that the Applicants should be recognised as their legal parents in this jurisdiction. In circumstances where no one else other than the Applicants sought to provide lifelong care for the children, it was evidently in the children's welfare best interests that the court should make parental orders. They needed the legal parentage of both TT and RR in this jurisdiction where they had recently relocated and in which they intended to remain permanently. I accept Miss Fottrell QC's submission that the history of registration and citizenship issues which arose in Denmark starkly illustrated how vulnerable the children were if orders were not made that had legal force in this jurisdiction.

30. I decided that the time limit in s.54(3) should not be applied as a straitjacket to prevent the court from making an order which was plainly in the children's interests and find that the delay in making the applications did not prevent the court from exercising its discretion to make parental orders.

Conclusion

31. In approving parental orders for all three children, I reminded myself that, in addition to the satisfaction of the statutory criteria in the Act, I should look at the children's welfare from a lifelong perspective, having regard to the welfare checklist set out in s.1 of the Adoption and Children Act 2002. Standing back and looking at the wide canvas of evidence in this case, I was satisfied that each child needed a parental order in favour of the Applicants to give permanence and security to their care arrangements.

32. I conclude this judgement by wishing the Applicants and the children my good wishes for the future. The Applicants acted with integrity throughout the surrogacy process but were undone by a different legal regime in Denmark insofar as it applied to children born via a surrogacy arrangement.

33. That is my decision.