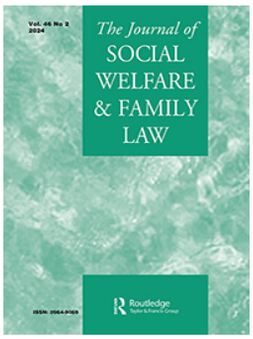

Routledge
Taylor & Francis Group

Journal of Social Welfare and Family Law

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/rjsf20

Two unsuccessful bites at the legal parenthood cherry – really in the child's best interests?

Kirsty Horsey

To cite this article: Kirsty Horsey (23 Jul 2024): Two unsuccessful bites at the legal parenthood cherry – really in the child's best interests?, Journal of Social Welfare and Family Law, DOI: 10.1080/09649069.2024.2382577

To link to this article: https://doi.org/10.1080/09649069.2024.2382577

Published online: 23 Jul 2024.

JOURNAL OF SOCIAL WELFARE AND FAMILY LAW
https://doi.org/10.1080/09649069.2024.2382577

Routledge
Taylor & Francis Group

Two unsuccessful bites at the legal parenthood cherry – really in the child's best interests?

Kirsty Horsey

Kent Law School, University of Kent, Canterbury, UK

ABSTRACT

This case review considers Theis J's judgment in Re Z (Surrogacy: Step-parent Adoption) [2024] EWFC 20, in which she refused a step-parent adoption order but made several other orders in relation to contact and the exercise of parental responsibility between the three adults involved. I posit that while the judgment probably represents the best possible outcome all round – especially the best interests of the child at its heart – it does not reflect the lived reality of most surrogacy agreements entered into in this country, or the experiences of those involved. It does, however, indicate that proposed reforms as recommended by the Law Commission of England and Wales and the Scottish Law Commission in 2023 would be welcome, especially as the intention behind them is precisely to protect against breakdowns in surrogacy arrangements such as sadly happened in this case.

KEYWORDS

Surrogacy; parental order; step-parent adoption; consent

In *Re Z (Surrogacy: Step-parent Adoption)* [2024] EWFC 20, a step-parent adoption order sought by one of the two male parents (X) of a child (Z) born through a traditional surrogacy arrangement was refused. Z lived with X and Y, the biological (and legal) father, since birth. As is normal after a surrogacy arrangement, X and Y applied for, and were granted, a parental order under s54 Human Fertilisation and Embryology Act (HFEA) 2008, establishing them as Z's legal parents. This was – unusually – granted alongside an order for Z to spend time with the surrogate (G).

The relationship between X and Y, and G deteriorated. Contact broke down and the parents applied to vary or discharge the contact order. G then appealed the parental order, contending that her consent had not been given unconditionally (as required by s54(6) HFEA 2008), being contingent on ongoing contact. She was successful (*Re C (Surrogacy: Consent)* [2023] EWCA 16) and the parental order was set aside, meaning G was once more the legal mother, with parental responsibility for Z.

Discharging the parental order also ended X's legal relationship with Z, making the application for the step-parent adoption order necessary to secure X's legal parenthood. The Children's Guardian and the Local Authority supported the application. G opposed it on the basis that although she did not want a 'parental' role in Z's life [104], she wanted meaningful contact, which she believed, based on past experience

CONTACT Kirsty Horsey k.horsey@kent.ac.uk

with X and Y, would not continue if the order was granted [108]. X applied to dispense with G's consent to the making of the adoption order under s52(1)(b) Adoption and Children Act 2002. Had this been done and the order made, the legal connection between Z and G would have been (re)extinguished. As it was not, G is the legal mother of, and has parental responsibility for, a child she is not caring for and does not intend to raise.

Describing the case as raising 'difficult and challenging issues' [203], Theis J found that an adoption order would make no difference to Z's day-to-day life. However, she concluded that granting one came with a real risk the two fathers may fail to comply with the contact arrangements between Z and G [241]. In denying the adoption order, Theis J instead made a 'lives with' order so that Z would continue living with X and Y, and X would have parental responsibility. She also made a 'spends time with' order in relation to G, to ensure ongoing contact between her and Z. Further, all three adults' exercise of parental responsibility was limited by a series of Specific Issues and Prohibited Steps Orders. An order was made barring the parties from making further applications in relation to Z for three years. G's parental responsibility was restricted to her being 'notified in the event that X and Y plan to live permanently out of the jurisdiction or for periods longer than six weeks if it interfered with any contact and [if] Z requires life-saving medical treatment' [243].

Previous surrogacy cases have stressed that parental orders are the most appropriate 'transformative' order following surrogacy and that they are important to children's identity (including e.g. *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam); *Re A (A Child)* [2015] EWHC 911 (Fam); *X v Z* [2022] EWFC 26; see also Brown and Wade (2022). The use of adoption orders following surrogacy (the only option for (married) intended parents prior to the HFEA 1990, and for same sex male parents until the HFEA 2008) in such circumstances are a 'square peg for a round hole' (*A & B (Children) (Surrogacy: Parental orders: time limits)* [2015] EWHC 911 (Fam)). While no order was granted here, that was largely because of the specific circumstances of the case, especially the history of the relationship and (lack of) communications between X and Y, and G. Arguably, denying the adoption is not in Z's best interests in this case, as he has no legal relationship with one of the parents raising him (and who intended him to be born), in a situation where the surrogate wants no parental relationship. An adoption order *could* have been granted and further contact orders made and – more importantly – *enforced*.

Securing the child's legal connection to the intended parents is frequently deemed the most important issue in surrogacy cases, including in those mentioned above. Most domestic surrogacy cases raise no issues with s54 HFEA and are heard largely by magistrates in happy circumstances. Those that do, and are heard in the High Court, usually illustrate judges' willingness to make arrangements work, even when this means 'reading down' the provisions of s54 (as Theis J has many times, including in *X v Z* [2022] EWFC 26). It is vanishingly rare for consent to a parental order to be refused by a surrogate. Where this has happened, there has either been genuine concern about the intended parents' ability to care for the child (*Z (surrogacy agreements: Child arrangement orders)* [2016] EWFC 34) or (as here, though consent was originally given) a relationship breakdown between the adults (*Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam)).

Re Z 'provides a graphic illustration of the difficulties that can be encountered if the arrangement breaks down' [205]. It demonstrates clearly that when adults enter surrogacy arrangements without careful research, and with no support in place before, during and even after the arrangement, they may not be properly prepared for what is entailed. Parties should fully prepare not only for the practical issues that arise (including medical treatments, successful or otherwise, legal issues such as wills, guardianship plans, parental orders) but also for the emotional ones: they need more than a 'superficial understanding of what lays ahead' [205]. Not doing so not only risks things going wrong, as here, but also the welfare of the child, which should be the parties' (as it is the court's) paramount consideration. In this case, targeted support was possibly needed at the point the parties 'agreed to proceed on an independent journey' [67] without the support of a surrogacy organisation, and certainly at the point they changed from a gestational to a traditional surrogacy agreement. As Theis J states: 'Any effective counselling at that stage would have helped each of them carefully consider the consequences of that, the implications and, probably, the need for continuing support' [208].

Arguably the consent requirement is the one aspect where existing law does *not* always make the child's lifelong welfare its paramount consideration. Judges' hands are tied if the surrogate refuses consent to a parental order, for any reason. While her consent can be dispensed with if she lacks capacity or cannot be found (s54(7) HFEA 2008), it cannot be – unlike in adoption – when unreasonably withheld. Alongside the surrogate's legal motherhood from birth, her ability to 'veto' surrogacy agreements in this way places intended parents, who may also be the genetic parents, over a barrel. This is often cited among the reasons why some pursue surrogacy overseas where they perceive arrangements are more certain.

For these reasons, and others, the Law Commissions' recommendations (Full Report, 2023) must be taken seriously. They aim to create a supportive regime for domestic surrogacy, based on existing good practice. It is intended that this will deter intended parents from seeking surrogacy abroad, often in less-than-optimal situations and/or in poorly regulated systems and/or at vast expense. It is recommended that under domestic surrogacy arrangements following a prescribed 'pathway', including pre-conception medical checks, independent legal advice, and implications counselling for all parties, overseen by a Regulated Surrogacy Organisation (RSO), intended parents will attain legal parenthood from birth (Full Report, 2023, Chapter 2). In such arrangements the surrogate – although not the legal mother – will retain the right to withdraw her consent to the arrangement (even if not because she wanted to keep the child) for up to six weeks post-birth which, if exercised, would invoke court involvement to determine the outcome in the child's best interests.

Though there was no consideration of the recommendations in the last Parliament, a new Government should do so, it is important that they – and the draft Surrogacy Bill that sits alongside them – are tabled and debated. Retaining the status quo is undesirable, as *Re Z* and other cases illustrate. Banning surrogacy – as some have suggested – is not either, as it would only push it underground and overseas. This is not in the interests of children, surrogates or families.

Disclosure statement

No potential conflict of interest was reported by the author(s).

References

Brown, A. and Wade, K., 2022. The Incoherent Role of the child's Identity in the Construction and Allocation of Legal Parenthood. *Legal Studies*, 43 (1), 29–46. doi:10.1017/lst.2022.21.

Law Commission of England and Wales and Scottish Law Commission, 2023. Building Families Through Surrogacy: A New Law Volume II: Full Report. Law Com No 411, Scot Law Com No 262. Available from: https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/03/2.-Surrogacy-full-report.pdf.