

ENGLAND AND WALES / JUDGMENT

C v D [2025] EWFC 196 (02 July 2025)

[2025] EWFC 196

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Case No: FD24P0341

IN THE FAMILY COURT

SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice

Strand, London, WC2A 2LL

2 July 2025

B e f o r e :

MRS JUSTICE THEIS DBE

Between:

C

Applicant

-and-

D

Respondent

Tom Wilson (instructed by Mills & Reeve) for the Applicant

Marisa Allman (instructed by Hanne & Co) for the Respondent

Hearing dates: 10-13th June 2025

Judgment date: 2nd July 2025

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Mrs Justice Theis DBE:

Introduction

These proceedings relate to two children, X and Y, twins age 4 years. They were conceived by way of a surrogacy arrangement using D's gametes and donor eggs. D is their genetic father and sole legal parent pursuant to a parental order dated 18 April 2023. The applicant, C, seeks a child arrangements order and parental responsibility for the children. This is opposed by D.

C and D had been in a same sex relationship since 2013. According to D, the relationship finished in 2019 and he embarked on the surrogacy arrangement alone. According to C their relationship continued until early 2024, their previous joint decision to embark on a surrogacy arrangement in 2019 remained in place and he was very involved in the care of the children until 2024.

This application was made by C in June 2024. Directions for interim arrangements for C to see the children were made, C currently sees them fortnightly supervised by Mx Baker, an independent social worker. Case management directions included the instruction of an independent social worker, Mr Jeary.

At this hearing Mr Jeary and both C and D gave oral evidence, as well as, briefly, Ms Z, the surrogate. As the cross examination took longer than both counsel had estimated closing submissions were in writing, with the opportunity for each party to respond in writing. The court is very grateful to both counsel for their detailed written submissions.

I recognise that whatever my decision these proceedings have been difficult for both C and D. Their relationship and actions have been put under the forensic microscope and it was obvious how difficult this has been for both of them. I hope now the court has made its decision they will be able to work together for the benefit of both children.

Background

C and D commenced their relationship in 2013. In 2017 they moved in together in a rented property in London.

In early 2019 they decided to embark on a surrogacy arrangement together. It is accepted they jointly engaged a specialist Californian attorney and jointly signed an egg donor agreement. They created embryos together using D's gametes and donor eggs. During this process C and D underwent counselling with a psychologist who concluded that they were eager to have a child together. D is recorded saying that he wanted to become a father and wouldn't be doing it with anyone other than C. The report also refers to the decision that if they embarked on a sibling journey C's gametes would be used.

In August 2019 they were informed the embryos were not viable.

According to C, he understood that despite that news they were continuing on their surrogacy journey together, whereas D's evidence is that after that he decided to pursue the surrogacy journey alone due to the deterioration in their relationship. In his oral evidence D described talking to C about this and informing him of the position, although this conversation is not referred to in his written evidence. C's case is although he accepts he didn't ask much about the practical matters regarding the surrogacy arrangement that reflected their roles, namely D took the lead in organising it but when he did ask he was given some information about the delays being caused by Covid 19 and then one of the surrogates being impacted by the Californian wildfires. C states at no stage was there any discussion with D that the position had changed and going forward D was embarking on the surrogacy arrangement alone.

In any event it appears C and D continued spending periods of time together. C states their relationship was continuing and their lives remained entwined based on their aim to have a property in London and one in the country. D denies that, stating their relationship had finished by November 2019 but they remained good friends.

In November 2021 it is accepted D came to C's property in the country with a bottle of champagne and told C about the fact there were twins. It is agreed D stayed at C's property that weekend. After that there were messages between C and D sharing scans and discussing children's names in the context of this being, so C understood, their joint surrogacy. D states it was in the context of including C in matters based on their friendship.

D flew out to the US prior to the children's birth. C flew out to the US shortly after the children's birth and stayed with D and the children during their time in the US before their return here about 6 weeks after the birth. C paid for the flights back here and attended medical appointments in relation to the children. D doesn't take great issue with these events but remains clear that this was all in the context of this being a sole surrogacy journey and he involved C in the way that he did as his best friend.

Following their return C, D and the children lived together in C's property in the country from February 2022 to May 2023 as D's property in London was undergoing renovation work. C describes them acting as joint parents and that was how they were viewed by outside professionals. The community nurse and health visitor described the two adults as parents who are each

'considered capable and confident, in tune with the children's needs and with a 'lovely warmth'.

C also states they presented themselves to the outside world as co-parents, for example when their advice was sought regarding a surrogacy journey D responded in the context of it being a joint surrogacy journey that C and D had embarked on. D's evidence is that was more driven by C, not by D, although he acknowledged to the outside observer where they lived it was likely to be assumed they were co-parents.

It is agreed that in May 2022 D embarked on the parental order application as a sole applicant, C said he was not aware of that and only discovered the position during the meeting with the Parental Order Reporter (POR). The report that followed that meeting referred to C being the psychological parent to the children, the children enjoyed being cared for by him, C's relatives were connected to the children, C and D had separate bedrooms and each had a child in the cot next to them and they swapped the arrangement on a weekly basis. The POR observed that both children

'were clearly comfortable and secure in the care of both [D] and [C], and alternated seamlessly between their attentions. Both adults demonstrated good child care ability, expertly handling the babies and changing nappies'.

In January 2023 D sent an email to the POR about his relationship with C and sent a different version of the email to C.

A parental order was made in favour of D in relation to both children on 18 April 2023.

In May 2023 C and D had an argument and thereafter C states that he split his time between living with the children in London (in the property owned and occupied by D) and living in the country where D and the children would visit, sometimes for days at a time, sometimes without D and states he continued to play a full role in their day to day care. D accepts that they spent time together after the argument in May 2023 but this was as a friends and often C's visits to London were for other reasons unconnected with the children.

According to C the relationship between C and D broke down in March 2024 and his continuing role was recognised by D in a message sent by him to C when he refers to

'their co-parenting with the kids is over'.

Thereafter D prevented C from seeing the children and after unsuccessful attempts to reach agreement C issued this application. Contact initially started as monthly and more recently has been fortnightly supervised by an agreed independent social worker, Mx Baker. These visits have largely gone well with some isolated issues concerning matters such as how C refers to himself to the children and C permitting Y to have an ice cream when he is lactose intolerant.

Both parties have filed three statements. Mr Jeary was instructed in January 2025 to prepare a section 7 report and his report is dated 6 May 2025. He met with C and D separately on two occasions and saw then each with the children. In his report Mr Jeary considered both C and D as capable of meeting the children's needs, describing them as intelligent, thoughtful and successful people showing clear care and love for the children. He considered D was meeting the children's needs to a very high standard and the children were happy in C's company, that C had shown a high level of commitment to the children and appeared to be committed to parenting and caring for the children since their birth. From his enquiries Mr Jeary said he got a sense and understanding that C was present for both the children and D on multiple occasions. Many of the people he interviewed regarded C and D as a couple and co-parents. He considered C's motivation in making the application as genuine and, subject to the findings made by the court, did not consider the time C spends with the children required to be supervised.

Mr Jeary concluded if the court accepted C's explanation of the role he has played in the children's lives then he should be granted parental responsibility and there should be a child arrangements order that provides for increasing periods of time for the children to spend with C, building up to overnight and moving towards a shared care arrangement with D remaining the resident parent. In the event the court did not accept C's account C remains a significant adult in the children's lives. In those circumstances Mr Jeary did not recommend granting parental responsibility although recommended regular unsupervised contact, at least once a month. In his report Mr Jeary expresses confidence that once the proceedings are over C and D have the ability and emotional intelligence to work together for the benefit of the children. In his addendum report he provides more granular detail about the build up of time the children should spend with C if his account of events is accepted by the court, including some like story work.

In the position statement filed on behalf of D for this hearing he sets out the outcome he seeks that C's application should be dismissed with no future contact, direct or indirect, between the children and C. That position was not raised by D in his written evidence.

Legal framework

There is no real dispute between the parties as to the relevant legal framework in determining these applications namely that immutable principle is that the child's welfare shall be the court's paramount consideration in determining issues regarding child arrangements and parental responsibility in accordance with section 1 Children Act 1989 (CA 1989) (see Black LJ in

A v B and C (Lesbian Co-Parents: Role of Father)

[2012] 2 FLR 607

)

. The welfare checklist in section 1(3) CA 1989 provides a useful framework for identifying that sort of factors that will bear upon on each decision. In

Re H (Surrogacy Breakdown)

[2017] EWCA Civ 1798

McFarlane LJ (as he then was) re-affirmed the decisions are welfare focussed, that the law does not take a special approach to decisions about surrogacy breakdown stating

'the more unusual the facts, the greater the need to keep the child at the heart of the decision, and to ensure that the interests of others prevail only where they are in harmony with the interests of the child'.

Cases such as this are heavily fact specific. There is no issue between the parties as to the relevant legal principles in fact finding hearings, recently summarised by Cobb J in

BY v BX

[2022] EWHC 108 (Fam)

at [26]. As Ms Allman submits

'Context is important. Each case turns on its own facts, and the granting of contact or parental responsibility in one factual scenario is not authority for the proposition that it should similarly be granted in another factual scenario'.

In his written submissions Mr Wilson, whilst recognising that each case will turn on its own facts, drew out the following guiding principles from the cases:

- (1) Participation in the child's very early life and plans for their future, ability to care for the child physically, desire to care for the child, and support for the mother (see Lieven J

MacDougall V SW (Sperm Donor: Parental Responsibility or Contact)

[2022] EWFC 50

at [39].

- (2) The court should have regard not only to the child's genetic and legal parenthood, but also to any social or psychological parent-child relationship (see

Re G (Children)(Residence: Same Sex Partner)

[2006] 1 WLR 2305

[35] and

Re G (Shared Residence Order: Biological Mother of Donor Egg)

[2014] 2 FLR 897

at [54]).

(3) The parties' pre-birth intentions are not determinative (see Lieven J in
FC v MC

[2021] EWHC 154 (Fam)

at [23]).

(4) Issues of contact and parental responsibility must be considered separately and are distinct
from each other (see Waite J

Re CB (A Minor)(Parental Responsibility Order)

[1993] 1 FLR 920).

(5) The decision as to whether to grant parental responsibility upon an individual is fact specific
and one which must have regard to all the circumstances of the case. The non-exhaustive list
of factors in

Re H (Illegitimate Children: Father: Parental Rights) (No 2)

[1991] 1 FLR 214 includes the degree of commitment, degree of attachment and reasons for
applying for the order.

This helpful list emphasises the lodestar remains the child's welfare, which is the paramount
consideration in reaching any decision.

Evidence

In his oral evidence C described the different characters of the children and his positive view of D
as a father stating that D is

'living his dream and I am blessed to be a part of it'.

He described how D was someone who would undertake significant research before making a
decision whether to do something. As regards their decision in 2019 to embark on surrogacy
journey he recognised it was D who initiated the discussion, which he was happy to agree with
and said it became their dream. He said they felt devastated when it couldn't proceed in August
2019 due to the embryos not being viable and they took time off, going away together to Mexico
and then skiing in December. From his perspective he considered their joint decision remained
in place although recognised they didn't speak about it regularly and at that time C was doing a lot
of travelling abroad. He denied any discussion with D in the autumn of 2019 that D was going to
continue the surrogacy journey on his own.

C described when he tried to talk about the surrogacy plans he was met by silence from D, but that didn't change what he understood the arrangement was between them. When asked about his reaction when told the news in November 2021 about twins he said he was shocked, happy and sad. His sadness was about D not having shared with him information earlier but he was happy they were going to become a family although he was concerned about the children's health. When he first met the children he said he had never felt so happy and felt

'accomplished, happy and grateful'

and felt

'committed to work for all of us'.

He described how well D got on with his mother and she regarded herself as the children's grandmother.

When the parties had their disagreement in May 2023 C confirmed D left but left the children in C's care for a couple of days before he took them to London. After that D did not return to C's house in the country but C would visit D and the children in London each week for 2 – 3 days and would, on occasion, take the children to his home in the country. After his hernia operation later that year the children came to stay with him in the country in November and December 2023. He accepted to Ms Allman that after that argument in May 2023 their communication was worse, but did not accept their relationship was over as he said there had been periods like this before and he didn't accept that what D said in subsequent emails signalled their relationship was over. As he said, it was hard to believe their relationship would end over an argument about a stroller.

C denied the emails between them in July 2019 meant there were already cracks in their relationship although he acknowledged there were problems, he said that was caused by D's secretive approach. Ms Allman pressed him on the email from D to C on 21 November 2019 which she said made it clear D was going to do his own thing. C said the reference to C signing documents was to remind D who had initiated the surrogacy idea. C didn't accept any change about the surrogacy arrangement as they continued to do things together after that, for example looking at properties together in 2020. C denied he had copied in his friend to the email exchanges he had with D as he wanted to set out to people how he saw their life. C said he would put things in emails to trigger a response from D. Whilst C accepted they had difficulties in 2019 he said they went on romantic holidays saying the bigger picture was they had a relationship that had its challenges but they remained together doing joint things, such as looking at properties and he understood their relationship remained in place.

C agreed the move into the property in the country was in June 2020 and maintained it was both of them who moved in there. C agreed the property in London was purchased by D in December 2020 and said they chose the property together. C maintained the plan was to have two properties and have a family together. C denied D walked away in October 2020, he referred to it as a mid-life crisis and that he accepted D back and they purchased a dog that was collected in December 2020. Ms Allman pressed C stating that whatever D did C didn't accept it, C responded saying that

he didn't force D to be with him but he kept coming back. C said he had to oversee work at the property in the country and D was looking for a property in London, as a result they often spent periods apart but they continued to share a bedroom. C denied he had changed any messages between them to seek to show heart emojis. C accepted he knew in January 2019 that D was providing his gametes to the clinic in the US but denied he knew D was HIV positive.

C accepted he knew the egg donor had changed and accepted he did sign the first egg donor agreement in June 2019. When pressed about why he didn't question why he didn't sign the new egg donor agreement he said he was travelling a lot for work at that time and the nature of their relationship was that D dealt with all the paperwork. C acknowledged over the next 18 months they had limited conversations about the surrogacy after that, including whether a surrogate had been engaged, but that reflected their relationship and C's work commitments. C said he would ask some questions but got limited or no response from D, but maintained nothing had been said to alter the original joint arrangement. C acknowledged he did not know the date or details of the embryo transfer or the pre-birth order that was obtained by D in the US in October 2021. C interpreted D's actions as not wanting to build up C's hopes again and wanting to wait until things were confirmed. Ms Allman took C to the plans for the renovations to his property that did not include any specific arrangements for the children, C said that was not necessary as there were sufficient bedrooms and denied the internal arrangements of the rooms meant it was not a family home.

When asked whether he was surprised that D turned up out of the blue with the champagne in November 2021 C said the happiness was stronger than the negatives as to why he had not been told beforehand. He denied the reported conversation with the surrogate that he didn't want children or that that was consistent with what he had said in the November 2019 email and that he was reluctant to have children but came to love them. He said during the visit in November 2021 they talked about being fathers and the messages after that were D setting out the practical arrangements he was making to travel to the US for the birth. C said they discussed the arrangements between them and agreed he did not book his flight to the US until 20 December 2021, after he had been to Country B to see his family and had work commitments in Spain. As regards the birth certificates, he said he was expecting to be on the birth certificates and they had discussed having both their surnames on the birth certificates at

'some point'.

As regards his work C said he expected to be off work for several months so they could support each other but agreed he did not request paternity leave. C did not accept he was not as involved with the medical appointments concerning the children as he suggested in his statement although he agreed he did not take the children to health appointments alone and is not named in the red book as a parent or at the GPs.

C agreed it was a source of tension with D as to what the children called him. C felt that was used by D as a tool against him. They would present outwardly as a happy family but D acted differently at home. C said he didn't understand how he had D and the children staying at his home and the way D acted. C said D '

acted as if we were both daddies, he left me with the children, it made no sense to me'.

C said he learned that D had made the application for a parental order as a single applicant in December 2022 but again repeated that he did nothing about it as all the paperwork side of things was dealt with by D. He said he was shocked when he learnt of that. C said in his discussions with D after meeting the parental order reporter D told him it was not possible to change the application but that adoption could be done once the parental order application process finished, although he accepted that he may have mentioned this and D did not respond. C agreed he did not seek legal advice.

After the birth of the children C did not accept there were disagreements about matters related to the children although accepted there were tensions, such as how C was referred to in relation to the children. Turning to the incident in March 2024 C accepted D was not happy about C intervening in relation to the way D was disciplining Y but maintained his description of what D did. He agreed he had threatened to report D to the authorities, saying he did not know where else to go and was trying to get D to his senses. C accepted he had not in fact reported matters to the police. He denied D's allegation that he threatened he would use a knife if D tried to stop him seeing the children. C accepted there were tensions at this time. He denied the ice cream incident during his contact could be viewed the same way. He acknowledged he had been told about Y's lactose intolerance and accepts it was his mistake but agreed he did not volunteer the information. He denied he had used the word 'Pappi' in contact relating to himself, he was referring to D.

In his oral evidence D accepted the joint decision in 2019, as described to the psychologist in the US, was one they had thought out, they were ready for children, were open with each other and if there was a sibling C's gametes would be used. He agreed he signed the agreement with the surrogacy agency alone in March 2019 for convenience due to C's work schedule but denied C was not aware of it. D said he thought the egg donor agreement was the most important, which they both signed. He agreed he had the time to devote to the practical arrangements and a lot of documents were sent on to C. D denied he had not given C the name of the clinic in Boston he attended in January 2019. He agreed in July 2019 the joint surrogacy arrangements was still in 'full swing'

. D said he made the decision to proceed with the surrogacy arrangement alone in November 2019, he agreed only he signed the egg donor agreement on 20 November 2019 and had had discussions with the agency in the weeks leading up to that. D said he had a conversation with C about this in about September 2019 although agreed he had not mentioned this previously in his statements. He agreed there were emails in November 2019 about properties C was looking at where he referred to

'us'

, he said that was in the context he was still helping C. When Mr Wilson took him to the way the email on 21 November 2019 was expressed he said it was

'difficult to end our relationship as well as moving to friends – sometimes used more affectionate words. There was not a pivotal moment when the door slams'.

Mr Wilson suggested if D was seeking to impose boundaries as D suggested he was the emails were giving mixed messages i.e. sending C property particulars. D agreed in C's email on 21 November 2019 he was thinking of them as a couple and they went on holiday together at Christmas 2019. He agreed C was referring to separate mortgages on the properties for financial reasons.

Mr Wilson suggested to D that in C's email in November when he referred to D making him sign the documents C still thought they were pursuing the surrogacy together, D denied this stating C was

'trying to push us to do things together, I was trying to be clear do things by myself. This break up not one single moment – it was a bumpy ride. I wanted to keep [C] as a friend. We had problems being on the same page'.

When it was suggested C thought they were still together D responded

'He wanted me to think still together'.

D agreed they went skiing, stayed in the same bed, undertook house viewings together and sent each other property details, D said

'I was hoping we would share a joint life as friends, he was my best friend. Looking at properties helping him, it was fun to do'.

D agreed the communications with the architect referred to them jointly but said he didn't interpret the email as referring to them as a couple.

D denied that choosing the dog and the messages in 2021 meant they were more than just friends but accepted they were heavily involved in each other's lives and he agrees he did give C some updates about the surrogacy, for example informing him the surrogates' house had burnt down.

Following November 2021 when D had told C about the twins he denied the messages that followed that gave C the message that he had a parental role. In the messages about the children's names D said he did reflect that it was not C's call but accepted he didn't say anything. D denied that the steps taken by C were consistent with him thinking he had a parental role.

After the birth of the children D accepted they shared the care of the children although said it was

'not 50/50'.

When it was suggested that the photographs of them together with the children soon after their birth were more consistent with them being parents D said

'There are many different friendships, he was a very close friend'.

He agreed that in early 2022 the email to C's friend was the most overt evidence of how C viewed his parental role and D was copied into it. D said that was when he started getting

'worrying signs'.

When it was suggested to him that if he was worried about boundaries this was the time for him to draw a line in the sand, D replied

'It started getting me worried'.

When D was asked about the email he wrote in April 2022 referring to their joint surrogacy and it being inconsistent with his wish to have boundaries, D responded there were '

many conversations'

and then said that this email was a favour to C's friend and

'[C] pushed me to reply'

as he didn't want them to lose face. He agreed they had a congratulatory video in April 2022 that was to them both and that C went with D and the children to Country A. D agreed he issued the application for a parental order a few weeks after the trip to Country A and the email that referred to the surrogacy as joint.

In 2022 D agreed C helped with the practical arrangements regarding payment of the renovations at D's London property and that C helped a lot with the parenting tasks as described in the POR's report. When it was suggested that what D was saying in the parental order proceedings regarding C's role with the children and what he saying now being different D's response was

'I agree I should have been clearer'.

Mr Wilson put to D the references to third parties who thought they were co-parents in 2022, which D accepted, he said he didn't volunteer anything different as he was not asked. D agreed he was present when the POR spoke to C about his wider family. When Mr Wilson suggested they were operating as a family unit D responded '

No, [C] did do a lot. I felt a bit vulnerable. I tried boundaries. I hoped once I got into my own home to get boundaries.'

D doesn't accept he did not tell C he was making a sole application for a parental order. D apologised if he misled C regarding the email that was sent to the POR and agreed he made no reference to the POR that the surrogacy arrangement had started as a joint one.

D agreed that prior to May 2023 C continued on occasions to care for the children overnight. He agreed following the argument in May 2023 he left the children with C and they continued to spend time with C, including at C's property and C would visit them in London. D denied C was co-parenting as he was not playing a full role.

Referring to the incident in March 2024 D agreed both of them could have handled themselves better but maintained what C said about the knife. D accepted that C could have forgot Y was lactose intolerant.

D acknowledged C has played an important part in the children's lives since their birth. D said if the children don't see C with time their memory or emotion fades.

D said the amount of time they stayed at C's house with the children made it difficult to have boundaries with the children as when he tried to impose them it caused friction with C. D said he would find it very difficult in the light of the incident in March 2024 to visit C's home as he would not want to be alone with him. D described his positive relationship with C's mother but denied referring to her as the children's grandmother.

46. Describing the parties' relationship after 2019 he said '

I truly wanted to keep [C] as my best friend...I felt older now important to have good friends. For periods I tried to create a distance, a new way for us when it became a bit too intense, setting boundaries...we had long periods when we spoke less after 2019'.

D was clear that after 2019 they did not have an intimate relationship and if they shared beds it was due to practicalities rather than any continuance of their relationship. He denied any conversation with C about how there were going to be daddies.

In her short oral evidence the surrogate confirmed what was set out in her statement.

In his oral evidence, Mr Jeary did not depart from his recommendations and recognised they turned on the factual conclusions made by the court. If C had the early role that he outlined regarding the care for the children Mr Jeary considered the children would have been developing an attachment to him, although he recognised the gap of eight months would have had an impact on that. Mr Jeary considered that whatever C or D thought the position was C had shown a high

level of commitment to the children and was permitted to do so by D including skin to skin contact, bathing the children and other daily tasks. He confirmed his assessment that C was motivated in making this application as he considered he was the other parent, wanted that to be recognised and to be there for the children, he did not get any sense this application was to undermine D. He considers that once the court has made its decision they have the capacity to then move on. Mr Jeary set out the welfare benefits for the children if C's account of his role is accepted enabling the secure attachment to continue to develop and recognising that C is an important part of their story. He also recognised that even if the court did not accept C's account of the history C played a key role in the children's lives which was, in his view, beyond any godfather type role.

Mr Jeary agreed with Ms Allman that he found it difficult to make recommendations where the factual differences were so stark. As Mr Jeary said

'it's complicated'.

He considered there was a potential for blurring boundaries because of the context of their relationship history, the situation is '

multi-faceted'.

He considered if the court accepted D's account of the background he still considered children would benefit from contact with C but recognised the welfare analysis could push it the other way.

Submissions

In his comprehensive written submissions Mr Wilson invites the court to conclude that the children were born as the result of a shared surrogacy process which began in early 2019 and continued through until November 2021. He submits

'whatever the court makes of the status or nature of the parties' relationship during the period [C] and [D] were building a life together based on mutual affection and a mutual desire to have children'.

He relies, in particular, on the evidence of the steps taken since November 2021 and C's role as a parent to both children, underpinned by the many caring tasks he undertook. C says this role was encouraged by D and acknowledged by D on at least two occasions (the April 2022 email and to the POR). Regardless of how it came about it was a role C fulfilled and one that he adopted with love and unwavering commitment. As a consequence, he submits, whatever the conclusion the court reaches about the adult relationship before and after the children's birth C will always be an essential part of the children's life story. Mr Wilson submits it will promote the children's emotional, psychological and identity needs for their relationship with C to be maintained and for his role in their life to be secured by court orders.

Mr Wilson submits there were concerning aspects of D's evidence which impact on his credibility. For example, the suggestion for the first time in his oral evidence of a conversation between him and C between September and November 2019 during which he says he made clear to C he was continuing the surrogacy alone. Mr Wilson submits this is very surprising as this is a central issue in the case and is not mentioned in his three witness statements or his evidence in chief. It is also submitted that D sought to give a misleading account of C's involvement in the children's lives. Mr Wilson submits D's actions on 1 and 2 January 2023 regarding the email sent to the POR and a different one sent to C further negatively affect his credibility.

Mr Wilson submits that although this was a joint surrogacy arrangement there were many aspects that D undertook alone which, he says, supports C's account of D's approach. For example, the fact that the surrogacy agreement was signed by D alone, the lack of evidence regarding the identity of the clinic in January 2019. Despite this approach by D the psychologists' report in June 2019 gives a fulsome account of C's level of commitment to the arrangement.

Following the news about the failed embryos Mr Wilson submits the evidence points towards supporting C's case that there remained a joint arrangement. D's language in his statements is striking in the way it refers to D rather than them both yet for the first time in oral evidence D refers to conversation that he said took place between C and D where D made it clear going forward D was doing that alone. Mr Wilson submits either there was no discussion and both adults proceeded on the basis this remained a joint surrogacy or there was no discussion D continued to take the lead but had decided to proceed alone and C reasonably understood the basis remained joint as previously. Mr Wilson submits the contemporaneous evidence supports C's account, as in the latter part of 2019 they continued to build their lives together. C's email on 21 November 2019 demonstrated he continued to believe this was a joint surrogacy and referred to other joint matters such as viewing properties. D did not respond to this email. C was cross examined on the basis that D was entitled to conclude from this email C didn't want to proceed any more but it is of note that the new egg donor agreement that was signed by D alone was signed the day before, on 20 November 2019. Mr Wilson submits there is evidence from then that C and D continued to build their life together including, for example, going away, viewing properties together, getting a dog and consulting each other on renovations to the properties they purchased. Mr Wilson roundly rejects any suggestion the messages C relies upon have been edited, especially when they were ones sent to D who would readily be able to correct any changes. The actions from November 2021 also support C's account that this remained a joint surrogacy. Mr Wilson characterises what took place as C

'immediately adopted the role of co-parent and [D] did not question this. Indeed, he supported and encouraged it (or, at the very least, acquiesced to it)'.

Alternatively, Mr Wilson submits the court can conclude that C genuinely believed that it remained a joint arrangement and it was reasonable for him to do so. This is on the basis that there was no conversation as D suggested, they continued to build a life together and D fluctuated in his behaviour about what role C would have and gave mixed messages about this.

Mr Wilson recognises the circumstances of C being informed about the twins raises some question but he invites the court to accept C's evidence that he was overcome with happiness and the evidence of the extent of C's involvement after that (i.e. messages about suitable family cars, names for the children and the extent of C's care for the children when he went to the US) undermines D's case that this was done in C's role as D's best friend. All of these steps are consistent with both adults understanding that C was to play a shared parental role with the children. For example, D did not correct an email C sent to a friend about 'our twins'

which D was copied into. All of this, submits Mr Wilson, undermines the evidence from the surrogate that just prior to this email C was expressing negativity about being a parent. The failure by D to correct the messages and email leads to the conclusion that he did not do so as it was, in reality, a joint arrangement. The actions after their return here served to confirm that position evidenced by the email from D to the third party about their joint surrogacy, their living arrangements at C's property and C's role in caring for the children during which time D took no steps to limit C's involvement with the children, including C going on trips to Country A, which undermines D's evidence where he seeks to minimise C's role.

Mr Wilson invites the court to conclude that C was fully involved in the care of the children from soon after their birth until May 2023 and continued to remain involved until March 2024. Mr Wilson relies, in particular, in the account given to the POR (at a time when D was present) of C's role with the children, supported by what the professionals involved with the children said. This report, Mr Wilson submits, also supports what C has said about the role of his wider family with the children together with the dates of frequency when she visited. After the children moved to London C's role with the children continued. In May 2023 D considered the relationship between the adults was over, this, submits Mr Wilson, was not related to C's role to the children which is confirmed by D's reference in a message to C in March 2024 referring to

'our co-parenting with the kids is over'.

This undermines D's evidence that he tried to impose boundaries. Mr Wilson submits when looked at overall the evidence supports Mr Jeary's conclusions about C's role. Mr Wilson submits the evidence demonstrates C was the children's psychological de facto parent and rejects any over interpretation of the way the children reacted when they saw C after an eight month gap.

Mr Wilson recognises C asked limited questions about the parental order proceedings but submits that merely reflects the roles C and D had and whilst C may have been naïve or unwise his position was understandable in the wider evidential context. He refers to his views about that in emails in May 2023 and took some re-assurance from what he understood was the email D had sent to the POR about C. Mr Wilson invites the court to reject D's account for the different versions of the email as being unsustainable and relies on the very limited reference in D's statement in the parental order proceedings about C's role.

As regards any welfare concerns raised by D Mr Wilson submits they don't stand up to any scrutiny. The reference by D to a knife being mentioned by C in March 2024 is not referred to in the communications after the incident. Other concerns about medication, the reference to Pappi and Y being given an ice cream are either not sustainable or have been magnified out of all proportion.

Mr Wilson invites the court to accept the assessment of Mr Jeary that the parties are able to work together. This is supported by Mx Baker.

60. Mr Wilson submits that whatever the court's factual conclusion regarding the history C is a figure of central importance in the children's lives. He submits

'There are obvious emotional, psychological and identity benefits to the children continuing their relationship with [C] in a meaningful way...'

Even if the court does not accept C's account about his parental role in the children's lives he invites the court to accept Mr Jeary's evidence about the welfare need for the children for C to have an ongoing role as he remains a significant adult. In that scenario Mr Wilson invites the court to order at least one unsupervised contact per month. He rejects D's position of cessation of all contact as it would sever an important relationship for the children, leave a gap in their life story and could impact on their identity needs.

As regards parental responsibility Mr Wilson sets out the benefits to the children if that order was made. It would recognise C's role and reflect his status as a parental figure, particularly in circumstances where D struggles to accept that. It would reflect C's commitment to the children and the nature of the relationship that has been established with them. The children would benefit from an additional adult who is responsible for their welfare and would resolve the issue of what C's role is in the children's lives. It is recognised that this would be in the context of their primary home being with D.

Ms Allman's submissions focus on the evidential determination the court is required to make before detailing what welfare decisions should be made.

In her submissions C's evidence demonstrated a

'stubborn unwillingness to accept what was obvious'.

She relies on C's own description of the adult's relationship, with D's long periods of silence, D stating the relationship was over in May 2023 yet C maintains the relationship continued until March 2024. C based this on the fact that they never discussed their relationship. This approach she submits is reflected in C's evidence about the surrogacy arrangement continuing as a joint arrangement after September 2019. It is telling, Mr Allman submits, that once C decided he wanted to be a parent for the children, notwithstanding his lack of involvement in the process of their creation he began presenting that fact to the outside world, despite knowing D was not supportive of that. She submits the way C did this is relevant to the court's assessment of the history but also when considering future risk and potential harm to the children arising from

conflict. C's evidence that he will accept the court's decision will not cover every issue that may arise in the future and the court should factor in D's obvious distress when giving evidence about the events in March 2024.

Ms Allman submits C's case makes no sense. She draws on what Mr Jeary states was his surprise that C did not know more about the surrogacy journey, especially when D told him about the twins and then when C discovered the details about the sole parental order application. As Ms Allman submits no motive was suggested as to why D would conceal the reality of the surrogacy process, only to immediately welcome C into a parent role and then to exclude him from the parental order process. As Ms Allman sets out

'The way in which the case appeared to be put in cross examination of [D] is that [D] knew [C] wanted to become a father to the children after they were born, he was presenting himself as such, and [D] did nothing or not enough to stop it. It is submitted that [C] cannot simply will his fatherhood into being and override the careful framework that had been put in place around the children's conception and birth and parenthood'.

In her analysis of the evidence of what the arrangement was between the parties Ms Allman submits C seeks to portray D as being duplicitous from the start regarding the nature of the arrangement between them regarding the surrogacy process. For example, she relies upon the evidence that C knew D attended a clinic in January 2019 whereas he sought to suggest D had commenced the surrogacy process before speaking to him. If C's case is that D deceived him from the start she submits it is difficult to see how that forms a secure basis for co-parenting going forward, even though C sought to row back from what he described in his first statement.

Ms Allman submits there was a marked change from September 2019 from which the court can conclude that C knew he was no longer part of the surrogacy process but that it was nonetheless continuing. She submits C's evidence that he had no information to the contrary and that is what made him believe there was no change cannot stand. She relies upon the lack of sharing of information with C, D did not seek C's signature on any documents, C knew a new egg donor had been found yet he was not required to sign a fresh agreement and the continuation of the joint arrangement was not referred to in any written communications between the parties. Ms Allman relies on what C put in the messages he sent in July and November 2019, and the lack of any evidence thereafter that C took any steps towards the creation of a family or children.

Ms Allman submits the evidence supports the relationship between the parties ending in November 2019. She acknowledges there was no pivotal moment but the picture that emerges, especially from the summer of 2020 is of them living separate lives. For example, they lived separately, they saw less of each other, D rented accommodation in London during renovations on his property. Ms Allman submits the email from D that he considered the relationship between them being over could not be clearer. She submits when the court looks at the evidence as a whole a picture emerges of C being unwilling to accept D's decision to end the relationship.

Ms Allman relies on the evidence from D that supports his case that he was pursuing the creation of a family as a sole parent in particular signing the documents, seeking a pre-birth order making it inherently unlikely that D would do all that and then present the news of the pregnancy in November 2021 as them both being parents. It supports D's case of informing C as his best friend. She rejects the evidence relied upon between November – December 2021 as being a secure foundation for C being regarded as a parent in the context of C's lack of involvement over the preceding two years. Ms Allman submits there remained a tension between C and D as to how C would be referred to, D accepted he sent the email to the third party in the way he did so as not to undermine or hurt C. Ms Allman invites the court to reject the evidence C relies upon as D's actions that made him believe they were both parents was down to C persisting in his own narrative despite D attempting to set boundaries.

As regards the parental order application Ms Allman submits the only time there were discussions about a joint application was in 2019 when they were embarking on the surrogacy process together. She submits it would have been clear from the letter C received from the parental order reporter that he was being contacted as a connected person and not a joint applicant. C's explanation as to why he didn't raise this with D that he considered D was trying not to put pressure on him she submits lacks credibility and is not consistent with his case that he had been consistently committed to the surrogacy process since 2019 and D knew that.

Ms Allman submits the role undertaken by C in the weeks after the children's birth is not inconsistent with what close friends and family may do to support a new parent. C's role was extended due to the works that were being undertaken at D's London property. D accepts the role C played during their time they stayed in his property but Ms Allman submits C has sought to exaggerate it, for example overplaying his wider family's role.

71. Ms Allman submits if the court accepts D's account of the history the application for a child arrangements order should be dismissed. She recognises there would need to be an explanation to the children about C, who he was and what role he played but that can be done by D. It is not, she submits, a reason for the court to make a child arrangements order. An order for no contact would have limited impact on the children, as regards any longer term welfare need for an explanation this can be undertaken by D. As Ms Allman submits

'This is part of normal life...!'

In balancing the risks Ms Allman submits any benefit to the children of having a continuing relationship with C is outweighed by the risk of likely harm caused by continuing conflict between the parties, including an inability of C to accept any parenting decisions and the consequent impact of that on D their main caregiver. D relies on C's approach to the ice cream incident which he says illustrates the risks of C undermining D's role. She submits C has made up the incident of D grabbing and shaking Y and not been truthful about denying any reference to a knife. She relies on D's obvious distress when giving evidence about this. She submits against this background of mistrust there is an increased risk of harm to the children without the current structure of support that enables contact to take place currently.

Ms Allman opposes the court making a parental responsibility order irrespective of the court's findings. She submits such an order is likely to lead to increased conflict which is likely to harm the children with no tangible welfare benefit to them of the order being made. That is demonstrated by the difficult history between the parties and their inability to communicate in a child focussed way.

Discussion and decision

This is a difficult and complex case where the court is being asked to assess the nature of the multi-faceted relationship between C and D and the decisions made by them about each other and in relation to having children.

There is no dispute that in late 2018/early 2019 there was an agreement between the parties to embark on a joint surrogacy agreement in order to have a family. That was initiated by D who C accepts had undertaken the investigation in relation to how that could take place. It does not appear to be in dispute that this was D's dream and C was happy to join D in that.

The evidence demonstrates that plan was put into effect relatively quickly, with D attending a clinic in January 2019, the egg donor agreement being signed in June 2019 and the parties undergoing counselling in May/June 2019 with a positive report of the discussions with C and D about the proposed arrangement. D alone signed the agreement with the surrogacy agency in April 2019, surprisingly describing that in his evidence as not a very important document.

The message from C to D in early July 2019 hinted at difficulties in their relationship referring to 'fights, misunderstandings and having 'no conversation' days',
continuing

'With all that said, I still agreed to fully support your dream about kids and go for that, knowing it would hugely impact my own life, done irreversible changes in priorities and plans, I still agreed because I knew and felt it was your dream, your desire, it would make your life complete, so I adjusted again my life to make it happen, but also because I thought I was with the right person. And look at you, you don't care what I feel, you just want to have fun.'

C said this message was in the context of D wanting to go away on his own.

The news that the embryos were not viable in August 2019 was clearly distressing to both C and D. It is accepted they went on holiday together in September 2019 to Mexico and went skiing over Christmas 2019.

79. According to D he spoke to C around November 2019 informing him that he was going to continue the surrogacy arrangement alone. That conversation is not mentioned in any of his statements. C sent an email on 21 November 2019 referring to having no news about the children stating

'you made me sign docs which I proudly did because supporting your dream is a huge privilege for you. But you are like a black hole, I told you many times in case something would happen to you. I simply know nothing about you, and facing questions from your family in that case, I would look and feel like an imbecile. You are a secretive person, stupid marriage never convinced you, and now I lost interest in it simply because the special thing is gone, because of the never ending waiting and secrets and deep unknown that you express. Not sharing enough with me, not having signed a piece of paper with me, you want kids with me, you want to buy a house with me...!'

D did not respond to this email. The evidence demonstrates D alone signed a new egg donor agreement the day before this email.

From then on it appears that for the next two years, apart from occasional bits of information from D about the process when asked by C, there was no regular discussions or sharing of information about the surrogacy arrangement. D says this was because he was continuing on a sole basis, C said it was because of D's secretive nature but says he had no basis to understand their joint arrangement had come to an end and they continued to do things jointly as a couple.

In assessing the evidence I am very conscious that both C and D are seeking to justify steps they took in the light of the cases they are now presenting. Their relationship was complex, on one level they were very close and attuned to each other yet on another they remained emotional strangers. On any view the decision to embark on a joint surrogacy arrangement was driven by D, both in terms of having undertaken the necessary practical enquires and his wish to have a family. C was content to join D in that through his wish to continue his relationship with D rather than any independent wish to have a family. D took the lead on the practical arrangements and shared information with C, including jointly signing the egg donor agreement in June 2019, jointly instructing lawyers in the US and attending the joint counselling in May/June 2019. Whilst the report from the counselling was positive it didn't, in my judgment, properly reflect the complex nature of the relationship between C and D and the dynamics behind their decisions. The message in early July 2019 is revealing about the difficulties in their relationship and how fragile it really was.

I don't accept D's account first given in his oral evidence that he had a conversation with C about his decision in about September/October 2019 to proceed alone. D could give no satisfactory explanation why such a critical piece of information had not been mentioned in his three statements, why he had not responded to the 21 November 2019 email from C stating that or referred to it in any of his other messages around that time. In my judgment due to the complex dynamics of their relationship he did not effectively communicate to C that important change. It was revealing that D said in his oral evidence with sadness that his previous relationships had ended without any friendship continuing and that was something he wanted with C. As a result he was not clear about the position as, in my judgment, he feared he may lose the friendship of C he wanted and valued. As a result he allowed the situation to continue with a lack of clarity, with him giving mixed messages and not setting the boundaries he repeatedly said he wished to do.

C's position that he considered the joint arrangement continued after November 2019, in my judgment, lacks solid evidential foundation. Even making all due allowances for him being busy, the way he characterised their relationship with D being in charge of all the practical arrangements and D's lack of communication it is unsustainable that over a period of two years he had so little information about what was, on his evidence, a continuation of a joint surrogacy arrangement. He did not question why he hadn't signed any documents, even knowing the egg donor had changed, how a surrogate was being selected, how many embryos were being transferred and when. In my judgment, as with D, it is caught up in the complexities of their relationship and I strongly suspect he did not ask too much as he may have not wanted to hear the answer because of the wider implications for their relationship which he did not want to end. I fully recognise what C says about the fact that they continued to do many things jointly which led him to believe their plan to have a family remained in place but to have or be satisfied with so little information about such an important part of their lives simply doesn't stand up to scrutiny.

In my judgment, for their own respective reasons and their lack of effective communication the situation from November 2019 was allowed to drift on with D making all the important decisions regarding the surrogacy arrangement alone with no effective input from C. On the evidence it could not be characterised as a joint surrogacy arrangement from November 2019.

D's announcement of the forthcoming arrival of the twins to C supports this conclusion. C described his feelings of sadness about not having been involved prior to then. On the evidence he had no knowledge that there had been a surrogate selected, who she was, when the embryos were transferred or how many; all important and critical decisions in any surrogacy arrangement. Rather than deal with those questions C said he was overcome with happiness and embraced D's willingness to involve him in what lay ahead. That blinkered approach by C continued. D's account that he made this announcement in the way that he did as C was his best friend also does not stand up to scrutiny. This was someone who he had previously had a joint surrogacy arrangement with, who he had been less than clear with that from his perspective the joint arrangement had come to an end and after a long period of no involvement in the process was now seeking to fully involve C. It is clear from then on D did little to prevent C forming the impression that he was going to be significantly involved in the children's lives. The messages exchanged prior to their birth included details about matters such as names without D placing any boundaries on those discussions. This situation continued after their birth the detail and extent of C's involvement went far beyond that of a friend it included travelling to the US very soon after their birth, skin to skin contact with the children, the sharing of many of the day to day caring tasks, the sleeping arrangements of the children taking it in turns to sleep next to each of them and all this is encapsulated in the many photographs in the bundle of C and D with the children. Whilst I acknowledge photographs only capture a moment in time the fact they were taken in the way they were demonstrates a much deeper attachment and role by C than a friend. It is more akin to a co-parent role which D recognised had come to an end in his message to C in March 2024. D realistically recognised in his oral evidence that to the outside world, whether that be health professionals or neighbours in the community, they were regarded as co-parents. This was supported by D's email to a third party and I reject D's explanation for that as not wanting to

hurt C. If the position was as D now says it was he could easily and readily have put in boundaries, which he didn't. He did not have to continue staying in C's home in 2022/2023 which he did. In my judgment D has sought to redefine the parties' relationship after November 2021 which is not credible when the wider canvas of evidence is considered.

I do not accept D's evidence that the parties' relationship ceased in November 2019, the wider evidence demonstrates their lives continued to be entwined and whilst the intimacy in their relationship may have stopped, in all other respects their relationship continued and it was more than good friends as D maintained. They were partners, they did things together, went on holiday together, made decisions together and enjoyed each other's company. Their relationship continued in this way until May 2023 and then less so until March 2024 when they finally separated. This was connected with them ceasing to be co-parents too.

D was correct when he said there was no pivotal moment when their relationship ended, the boundaries remained blurred in relation to the nature of their relationship with mixed messages being given by both of them in relation to their relationship, to the surrogacy arrangement and C's role with the children. The POR report in January 2023 refers to C as D's long term partner and the children's psychological parent. There were changes between 2019 and 2024 but essentially C and D remained in a changing relationship from November 2021. C's role in relation to the children was akin to a co-parent although not borne out of a joint surrogacy arrangement that C fully took part in after November 2019.

This conclusion is supported by the steps D took in the US to obtain a pre-birth order and in seeking a sole parental order here. It would have been clear to C from the letter from the POR prior to his visit he was being seen as a connected person rather than a joint applicant. In different ways both C and D failed to give the POR and the court in those proceedings a full and accurate account of the history of their relationship. Whilst the POR report sets out C's role in relation to the care and support he provided for the children it did not mention the history of the joint surrogacy arrangement. It is notable that in his statement in support of the parental order application in September 2022 D makes no mention of C, the nature of his involvement in the care of the children or their previous joint surrogacy arrangement. On any view D was being economic with his account of the relevant history in that statement and both C and D failed to give the POR a full account of the history of their relationship and the earlier joint surrogacy arrangement in their meeting with him or subsequent communications.

Having made these findings about the relevant history I now turn to consider the welfare needs of these young children. Prior to March 2024 C was very much involved in their lives, in particular until May 2023. I agree with Mr Jeary the care C was providing for the children would have enabled them to start forming a secure attachment with C as they were with D. Due to the breakdown in the adult relationship there was a gap before regular contact was restarted. I accept the evidence from Mr Jeary and Mx Baker that the contact has largely gone well and been enjoyed by the children. I do not regard any other interpretation of how the children initially reacted to C at the start of the contact to be helpful. There have been some issues, for example the ice cream incident, but I accept C's account that he forgot. If there is to be any contact going

forward I agree with Mr Jeary's assessment that away from these court proceedings C and D will be able to make independent arrangements and will be able to draw on any support, if required.

I consider C has been an important figure in the children's lives to date. Certainly up until May 2023 he had the equivalent of a co-parenting role. Due to the unusual background to this case that role was not as a result of a joint surrogacy arrangement but due to the ongoing relationship between C and D that was more than friends but less than a joint surrogacy arrangement that both parties were jointly fully engaged in. The evidence clearly shows that from November 2021 C was engaged in what lay ahead for the children, D permitted that to happen, placed no boundaries so from the children's perspective the reality was both C and D jointly cared for them to the extent that those viewing from the outside considered they were co-parents. Whatever doubts D may express now that was a situation he allowed to develop and for whatever reason was unable to put any boundaries on that relationship being allowed to develop between C and the children. The POR report provides a real time window into that relationship between C and the children in late 2022/early 2023 which I accept. C was an integral part of their early life and is a part of their early identity.

The children have shown themselves to be adaptable, they managed the 8 month break when they did not see C and have now settled into the routine of fortnightly contact which they clearly enjoy.

It is clear that in 2023 and 2024 the children witnessed disagreements between C and D. In 2023 it is notable that following the argument D left the home leaving the children in C's care without raising any concerns into C's ability to care for the children. Both parties accept neither behaved well in the argument in March 2024, C recognised he should not have threatened reporting to the authorities and leaving uncertainty as to whether that had been done. On balance I do not accept D's evidence that C referred to a knife. D did not refer again to that being said at the time. Whilst this incident would have been distressing for the children to witness it was not part of any pattern of behaviour and arrangements can be made to reduce the risk of any similar event taking place in the future.

As set out above I consider for their own respective reasons in connection with their enmeshed relationship neither C or D have in the past been able to put in boundaries. Looking forward I consider the position will be different and agree with Mr Jeary's assessment about that.

In the light of my findings that these children were not born following a joint surrogacy arrangement but that C has been a significant person in the children's lives I consider their welfare needs will be met by being able to see C on a monthly basis. I do not have the confidence in the light of the background that D will be able to properly recognise and reflect the role C had and not having that knowledge and information in an ongoing real and tangible way is likely to inimical to the children's welfare. As a result I reject D's position that C's application should be dismissed.

By continuing to see C both children will be able to continue to learn about and understand the role he had and will continue to have through regular contact. I have carefully considered the impact of this on D as the children's main carer but I am confident D will be able to manage this arrangement and it will not impact on his ability to care for the children. The contact should build up to a full day once a month unsupervised. C and D should be encouraged to continue to engage in mediation or other similar expert support so they can continue to agree practical arrangements and to what extent, if any, such contact can or should develop. It is difficult at this stage to be more prescriptive due to the unusual background to this case.

Turning to the issue of parental responsibility I do not consider C should share parental responsibility with D as I consider that does not properly reflect the history, including the lack of active engagement by C in the surrogacy arrangement that resulted in the birth of the children. Sharing parental responsibility is likely to be inimical to the welfare of the children as it is likely to increase the risk of harm through disagreements and conflict between C and D with no obvious welfare benefit for them. There was no suggestion in the case that D would exercise parental responsibility other than in accordance with the welfare needs of the children. Whilst it is right C has shown enormous commitment to the children in the unusual circumstances of this case the children's welfare needs are best met by the arrangements for them to continue to have direct contact with C as provided for above.

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