Neutral Citation Number: [2022] EWFC 26

Case No: FD22P00020

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5/04/2022

Before:

MRS JUSTICE THEIS

- -

Between:

	Mrs X	**1st Applicant**
	- and – **Mr X**	**2nd Applicant**
	-and- **Mrs Z**	**1st Respondent**
	- and – **Mr Z**	**2nd Respondent**
	-and – **Y**	**3rd Respondent**

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Ms Deirdre Fottrell QC (instructed by **Russell Cooke**) for the **Applicants**
Ms Sharon Segal (instructed by **Goodman Ray)** for the **3rd Respondent**
The 1st and 2nd Respondents did not attend

Hearing date: 22nd March 2022
Judgment: 5th April 2022

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Approved Judgment

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MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE :

Introduction

1. The court is concerned with an application for a parental order made by Mr and Mrs X in relation to their son, Y who was born in 1998 following a surrogacy arrangement in the United States. Y is a respondent to the application, as is the surrogate, Mrs Z, who carried Y, and her husband, Mr Z.

2. This is the first time the court has been asked to consider making a parental order for a person who is now an adult. As a consequence it will be necessary to consider the provisions of the Human Fertilisation and Embryology Act 2008 ('HFEA 2008'), in particular whether the criteria in s54 are met.

3. Before turning to the background and legal framework it is right to record one of the defining features of this case. It was not until September 2021 that any of the parties had any idea the legal relationships were anything other than Mr and Mrs X being Y's legal parents. That reflected the legal position in the United States, where the surrogacy arrangement had taken place and orders made there confirmed that position. Everyone had worked on the basis and conducted their lives on the understanding the legal position there was reflected here.

4. It therefore came as a complete surprise to both Mr and Mrs X and Y when they were contacted by the surrogate, Mrs Z in September 2021, she first alerted them to the need for a parental order here. She had recently become aware of this due to another child she had carried following a surrogacy arrangement being in the same position.

5. Having had the opportunity to get specialist advice this application was issued, directions made and the matter listed for hearing. There is no issue between the parties that the order should be made. The court is extremely grateful for both the solicitors and counsel who have advised the parties and those representing Y on a pro bono basis. They are each experts in this area and their excellent written and oral submissions outline a route in this case for the order everyone seeks to be made.

6. Whilst the hearing focussed on the law, it is important not to lose sight of the enormous significance of this application for the individuals involved. The effect of a parental order will recognise what they had all thought was the position for so many years. It is clearly the right order to make, the consequences of not making it would be significant and lifelong and not reflect the reality for everyone on the ground. Mr and Mrs X and Y have each eloquently and powerfully described in their statements the need for this order to be made in their circumstances. They also recognise the wider issues this case raises, and the need for the message to go out to others who may be in a similar situation to urgently consider their position and any consequences that may flow from that.

Relevant Background

7. Before turning to consider the background in this case the position has been greatly assisted by the fact that Mr and Mrs X have remained in contact with the surrogate and her husband. That continuing contact has meant the evidence necessary to fulfil the requirements in s54 HFEA 2008 has been readily available, despite the passage of time.

8. Mr and Mrs X are married. Due to a congenital anomaly, Mrs X always knew that they would need to consider surrogacy to have a family of their own. Mrs X outlines in her statement the concerns they had about the uncertain framework for surrogacy in this jurisdiction, as compared to what they considered to be the transparent and well supported process they encountered in the United States, which was underpinned by a legal framework.

9. They engaged a surrogacy agency, based in the United States. Through that agency they were introduced to Mr and Mrs Z.

10. Following those introductions they decided to proceed. Each were supported with independent legal advice and psychological support was available to them all throughout the surrogacy process. The embryo containing the gametes of both Mr and Mrs X was transferred to Mrs Z and the pregnancy confirmed.

11. In her statement Mrs X describes that throughout the pregnancy she and her husband's relationship with Mr and Mrs Z was close. When they visited the United States during the pregnancy they all spent time together *'enjoying each other's company…we really got on with each other'.* She said they talked at least once a week. Mrs X described the psychological support provided to Mrs Z by the agency as *'amazing'.*

12. The pre-birth legal process was conducted in Los Angeles by Mr and Mrs X's attorney there. In 1998 the Superior Court of California made an order declaring Mr and Mrs X as Y's joint legal parents. As Mrs X sets out in her statement *'During that process, we were never informed about the parental order process nor was it suggested that we needed to take separate legal advice in the UK'.*

13. Following Y's birth, securing his US passport took a few days. They travelled to the United Kingdom in September 1998, when Y was only a few days old.

14. Both Mr and Mrs X have been entirely open about Y's circumstances. They have a picture of Mrs Z pregnant with him at their home and as soon as Y was old enough he was told that he was carried by her. As they describe in their statements *'It has always been a very natural part of his life and always talked about openly with friends and family'.*

15. The Applicants family have remained in touch with Mr and Mrs Z and their family, with trips either to the United States or here and more regular contact through telephone or social media. As Mrs X states Mrs and Mrs Z *'have seen Y grow and develop through yearly photos, texts and cards. We have a caring friendship…'.*

16. In September 2021 Mrs X was contacted by Mrs Z and informed that Mrs Z was involved in parental order proceedings here with another British couple she had been a surrogate for and was informing her, as she knew Mr and Mrs X had not been involved in similar proceedings here.

17. Mrs X made her own enquiries and sought legal advice about their situation, as she says *'we were completely shocked. We had absolutely no idea about the parental order or, that we were not treated as Y's legal parents under this jurisdiction. From our perspective we had been through a US legal process, are named on Y's US birth certificate and are his biological parents. We have never encountered any legal*

difficulties in terms of parenting Y since he was born.' She continues *'Now that we know the legal position, we are extremely keen to do all we can to ensure that our legal relationship with Y is resolved and secured for the rest of his life. We want to make sure that he does not encounter any legal obstacles later in his life because of the current situation and we want Mr and Mrs Z to have closure so we can all get on with our lives in a legal and respectable manner…we wish to do all we can to promptly resolve the legalities.'*

18. This application was issued in December 2021, directions were made by this court on 11 January 2022. Those directions included giving notice of this application to the Secretary of State for Health and Social Care ('SSHSC') and Cafcass. The SSHSC have responded stating they do not wish to intervene, or make any representations. Cafcass have confirmed in writing that their remit is limited to representing children.

19. Mr and Mrs Z have completed the C52 acknowledgment of service, confirming their consent to the court making a parental order. They have been informed of the hearing.

Legal Framework

20. The legal framework relating to parental order applications is set out in the HFEA 2008. It provides that the person who gives birth to the child remains the legal mother (s 33 HFEA 2008**)** and by virtue of s35 HFEA Mr Z, as her consenting husband, is the legal father.

21. The eight relevant criteria under section 54 HFEA 2008 which need to be satisfied before the court can make a parental order can be summarised as follows:

(1) The biological connection with at least one of the applicants and the child, and the child was not carried by one of the applicants (s54(1)(a) and (b)).

(2) Whether the applicants at the time of the application and at the time when the court is considering making an order are married, civil partners or in an enduring family relationship (s54 (2)).

(3) The application should be made within six months of the child's birth (s54(3)).

(4) At the time of the application and at the time when the court is considering making an order is the child's home with the applicants (s54(4)(a)).

(5) At the time of the application and at the time when the court is considering making an order at least one of the applicants is domiciled in this jurisdiction (s54 (4)(b)).

(6) Whether the applicants are over 18 years (s54 (5)).

(7) Whether the surrogate mother has given her consent, freely and with full understanding, to the making of a parental order at least 6 weeks after the birth of the child (s54 (6) and (7)). If such written agreement is executed outside the

United Kingdom rule 13.11(4) Family Procedure Rules 2010 (FPR 2010) provides details of who can witness such agreements, including a notary public.

(8) Whether any payments have been made, other than for expenses reasonably incurred and, if so, do they require to be authorised by the court (s54 (8)).

22. If those criteria are satisfied the court then needs to consider whether making the order would meet the lifelong welfare needs of the child, having regard to s 1 Adoption and Children Act 2002 (ACA 2002).

23. The leading decision on time limits in these cases is *Re X* [2015] 1 FLR 349. That case paved the legal route for courts to consider applications made outside the six month time period provided for in s54(3). The then President, Sir James Munby, concluded that the court could consider such applications as a matter of statutory interpretation as he stated [55] *'Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe s54(3) as barring forever an application made just one day late is not, in my judgment, sensible.'* In that decision it was acknowledged that even if that analysis was wrong the same result was entirely justified on a reading down of the statute to protect the Article 8 rights to family life and identity that were clearly engaged ([58]).

24. Since *Re* X in 2014 a number of reported decisions have involved parental orders for older children, the most recent concerning a child who is 13 years (see *A v C* [2017] 2 FLR 101).

25. *Re X* made clear that in considering whether the application made outside the 6 month time limit should proceed would depend on the facts of each case, in particular any reasons for the delay in making the application.

Submissions

26. Both Ms Fottrell Q.C. and Ms Segal submit the s54 criteria are all met in this case save for the issue that Y is now an adult, the delay in making the application outside the six month limit and whether it could be said Y had his home with Mr and Mrs X at the time of the application and when the court is considering making a parental order.

27. Ms Fottrell's submissions have honed in on the Article 8 rights to family life, whereas Ms Segal's concentrate on the identity rights that come within Article 8.

28. In addition, Ms Segal has addressed the criteria requiring Y to have his home with the applicants at the time of the application and when the court is considering making an order.

29. Turning first to the fact that Y is now an adult, Ms Fottrell and Ms Segal jointly submit that although this case is in yet unchartered waters, there is nothing in the HFEA 2008 that prevents a parental order being made in favour of someone who is no longer a child. The scheme of the HFEA 2008 and the framework in Part 13 of the Family Procedure Rules 2010 envisages the application relating to a child, coupled with the fact that the court is directed, if the s54 criteria are established, to consider s1 ACA 2002.

30. However, they submit there is no express provision in the HFEA 2008 preventing an application being made that relates to a person who is now an adult. This compares with adoption where the ACA 2002 expressly prevents an adoption application being made by someone over the age of 18 years or an adoption order being made after their 19th birthday (s47 and 49 ACA 2002). Section 9 (7) Children Act 1989 ('CA 1989') provides a limit in relation to orders under s8 CA 1989 where it states that s 8 orders in relation to children who have reached the age of 16 years should not be made, save in exceptional circumstances. Also, they note s55A Family Law Act 1986, which provides for declarations of parentage, does not include any age limit, so declarations can be made in favour of adults of any age.

31. They submit there is nothing to believe Parliament either foresaw or intended the potential injustice that would result in this case if a parental order could not be made. They rely on what Sir James Munby set out in *Re X*, albeit in the context of the 6 month time limit, at [16] and [17] when he observed that there was no obvious policy underpinning the time limit in the HFEA 1990, which was replicated in HFEA 2008.

32. Reliance is placed on the Article 8 rights that are clearly engaged and should be protected. They submit when looked at through that lens the court cannot distinguish between the rights of adults and children. As Ms Fottrell submits, there is nothing in the analysis in *Re X* that suggests that an adult child is any less worthy of legal protection and recognition than a child. To suggest otherwise, she submits, would be arbitrary.

33. As regards the time limit, they both rely on what Sir James Munby set out in *Re X*, in particular at paragraphs [54], [58] and [64], where he emphasised the importance of identity rights and the consequences if a parental order cannot be made. They submit that decision, when read with the earlier decision of this court in *A v P* [2012] 2 FLR 145, enables the court, if a narrow and literal reading of the provisions of s54 prevent the Court from making an order which offends Convention rights, the court should then engage in a constructive and purposive analysis of the legislation being considered, protecting the Convention rights engaged.

34. Section 3 of the Human Rights Act 1998 ('HRA 1998') requires the court to read the legislation to give effect to it in a way which is compatible with any Convention rights that are engaged. Ms Fottrell draws attention to what Sir James Munby said in *Re X* at [58] *'The two key authorities here are the decision of Theis J in A and Another v P and Others, and the later decision of the Supreme Court in Pomiechowski v District Court of Legnica, Poland and Another. Although, as I have pointed out, Theis J founded her analysis on Art 8, whilst the Supreme Court's analysis was based on Art 6, the reasoning in both cases is fundamentally the same: the statute must be 'read down' in such a way as to ensure that the 'essence' of the protected right is not impaired and that what is being protected are rights that are 'practical and effective' and not 'theoretical and illusory'…..Theis J focused on that aspect of Art 8 of the European Convention which protects 'family life', but Art 8 also protects 'private life', and 'identity', on which she appropriately laid stress, is an important aspect of 'private life'. So, any application for a parental order implicates both the child's right to 'family life' and also the child's right to 'private life'.'*

35. Ms Segal relies, in particular, on *Mennesson v France No 65192*/11 which involved children born abroad following a surrogacy arrangement and on return to France was not able to secure a French birth certificate. In that decision the Court observed [97] *'…although aware that the children have been identified in another country as the*

children of the first and second applicants, France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children's identity within French society'. At [98] *'The Court also observes that the fact that the third and fourth applicants are not identified under French law as the children of the first and second applicants has consequences for their inheritance rights…this is also a component of their identity in relation to their parentage on which children born as a result of a surrogacy agreement performed abroad are deprived.'* The Court found France in breach of its obligations under Article 8.

36. Articles 8 and 14 provide:

Article 8:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or in the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

Article 14 provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

37. They submit Article 8 rights are engaged as both the applicants and Y have clearly established a family life, they are genetically related, orders were made in the United States to establish their legal relationship and they have operated as a close and supportive family unit since Y's birth. There are serious legal consequences for them if the order is not made, not least that Mr and Mrs Z would remain Y's legal parents in this jurisdiction 'for all purposes' (per s 48(1) HFEA 2008) and his inheritance rights would be impacted.

38. The Article 14 rights are engaged, as if the order is not made Y is not able to have Mr and Mrs X recognised as his legal parents by virtue of the circumstances of his birth through surrogacy.

39. If those rights are engaged they come with an entitlement to have legal protection for their family unit and there is a positive obligation to ensure the protection of such rights are *'real and effective rather than theoretical and illusory'* (*Marckx v Belgium* ECHR 13 June 1979*)*

40. That legal protection needs to be in the form of an effective mechanism, which they submit a parental order provides, and there is no other order that would secure the legal parent/child relationship between Mr and Mrs X and Y in a lifelong way, as a parental order does.

41. They both make the point that no one else suffers any consequences if this order is made, yet if it isn't the consequences are serious and lifelong for Mr and Mrs X and Y.

42. Turning to the issue of whether Y had his home with Mr and Mrs X at the time of the application and at the time when the court is considering making a parental order, Ms Segal submits the court has made clear in a number of cases that it should give a purposive interpretation to this provision, engaging with the Convention rights that are involved. Here, she submits, the Article 8 rights that exist both as to family life and identity provide the necessary foundation for the court to conclude that at the relevant time this requirement was satisfied.

Discussion and decision

43. The statements from Mr and Mrs X and Y provide a compelling account of the impact on them of the information received in September 2021 that the legal relationship they all thought had been resolved and established was not in fact the case.

44. During Y's childhood all parties had understood that the legal parental relationship between Y and Mr and Mrs X had been resolved by the pre-birth order made in the United States and Mr and Mrs Z had been completely divested of any parental relationship, although remained an important part of Y's background. The discovery that Mr and Mrs Z's legal status is entirely at odds with the intention and expectations of all parties came, understandably, as a very great shock. That misapprehension continues to impact in real terms. Given Y's age, the protection of his inheritance rights under the Inheritance (Provision for Family and Dependants) Act 1975, and consequences that flow from his legal status as a child of Mr and Mrs X, and not of Mr and Mrs Z, is of particular significance. Mr and Mrs Z's legal status is entirely at odds with the intention and expectations of all parties.

45. As Y describes in his statement '*The fact that my relationship with my parents is questioned legally in my home country, where I have lived all my life, have been educated, have my social life and now my profession, brings into question my identity as British…my identity is here, as the child of British parents'.* He continues '*The granting of a parental order would mean that it would never again be possible to challenge legally our family tree and would restore my understanding of surrogacy as being a 'normal' part of life, rather than something which leads to one's relationship with parents or grandparents being questioned…If this application is not granted, I will never be able to be considered in law to be their son. That is simply unimaginable for us all….my parents have been my parents in every way since birth. They have made all of the decisions about my care and welfare; they have always been there for me as a child and now as an adult. My identity as their legal child is wholly dependent on this application being granted. It is of fundamental importance to me and to any children I might go on to have.'*

46. This court has made clear in a number of cases that a parental order is a bespoke order, created specifically for surrogacy arrangements, requiring, for example, the need for evidence of the biological connection. It is an order that has a transformative effect, affecting the status of all parties if an order is made. It impacts the legal relationships in a lifelong way, with long term practical and psychological implications for everyone's identity, in particular the child the subject of the parental order. As Sir James Munby set out in *re A and others (Legal Parenthood: Written Consents)* [2016] 1 WLR 1325 the question of who, in law, is or are the parents of a child is *'a question of the most fundamental gravity and importance. What, after all, to any child, to any parent, never mind to future generations and indeed to society at large can be more important,*

emotionally, psychologically, socially and legal, than the answer to the question: Who is my parent? Is this my child?'

47. The evidence the court has clearly establishes the biological connection between both Mr and Mrs X and Y (s54 (1) (a)) and that he was carried by Mrs Z (s 54 (1) (b)). Mr and Mrs X are married (s54 (2)), domiciled in this jurisdiction (s54 (4) (b)) and they are both over 18 years (s54(5)). Mr and Mrs Z consent to the court making a parental order (s54 (6) and (7)) and the court should authorise any element of the payments made, amounting to about $12,000, that are other than for expenses reasonably incurred (s54(8)).

48. In relation to the requirement that Y should have his home with the applicants at the time when the application is made and when the court makes a parental order (s54 (4)(a)), the evidence sets out that although Mr X has worked abroad he regularly spends time here. The witness statements from Mr and Mrs X and Y speak to the very close relationship that has existed between them all. Y has lived with them throughout his childhood and remains in very close contact with them, often spending time with them at their family home. A number of cases have demonstrated the need for the concept of 'home' to be construed flexibly. As was stated in *AB* [2019] EWFC 22 (Fam) the court should take a *'broad and purposeful interpretation'* to the concept of what is home.

49. Taking a broad and purposeful interpretation of the term "home with", this requirement is satisfied in this case. The parties lives have remained as one family unit through the close relationships the evidence demonstrates they have and the amount of time they have spent together, and their close contact remains even when they are apart. Their family lives remain entwined and inextricably linked. The family life they have established has existed throughout Y's life to date. Section 3 HRA 1998 makes clear that primary legislation should be read in a way that is compatible with Convention rights. The Article 8 rights are clearly engaged in this case, those Article 8 rights point towards the court seeking to be in a position to secure Y's legal parental relationship with Mr and Mrs X, so those rights that are engaged can be properly and effectively recognised.

50. Turning to the issue of the time limit (s54 (3)). The rationale that underpinned the analysis in *Re X* centred on the decision to extend the time limit as being one permitted by statutory interpretation (see [55]). Even if the court was wrong about that analysis, it was entirely justified to protect the Convention rights engaged (see [58]). As was made clear in *Re X*, each case will be fact specific and the court will anxiously consider whether the circumstances justify the application being made outside the six month period, bearing in mind the need to encourage applications for such orders being made promptly, whilst balancing the circumstances of the particular case and the consequences of an order not being made.

51. In this case there is no issue that prior to September 2021 none of the parties were aware of the need to apply for a parental order. They had proceeded on the basis that it was not required in the light of the pre-birth order made in the United States, which secured the legal parental relationship between Mr and Mrs X and Y in that jurisdiction. Once Mr and Mrs X were alerted to the need for a parental order they promptly sought legal advice and made this application. No other person would be prejudiced by this order being made. The benefits for all parties of an order being made are clear.

52. For Mr and Mrs X it would provide the lifelong security of their parental relationship with Y being recognised as a matter of law, in circumstances where despite having cared for Y since his birth and provided for all his emotional and psychological needs as parents at present they have no legal parental relationship with him. That would remain the position if an order is not made.

53. For Y it will cement and secure his rights to family life, that include his identity rights legally as Mr and Mrs X's child. As he describes in his statement, it is *'unimaginable'* if the application is not granted and he would never be able to be considered in law as Mr and Mrs X's son.

54. For Mr and Mrs Z it will divest them of the legal parental relationship they retain in relation to Y in this jurisdiction, which will reflect the position in the United States and the reality of the day to day circumstances of the parties. It will not undermine the importance of their continuing relationship with Mr and Mrs X and Y and their role in his background.

55. The fact that Y is now an adult does not, in my judgment, preclude the court from making the order. Although s 54 HFEA 2008 sets out *'the court may make an order providing for a child to be treated in law as the child of the applicants…'* the HFEA 2008 does not limit such applications being made only in relation to children in the same way as, for example, the ACA 2002 does in relation to children who are the subject of adoption applications. There is nothing in the analysis in *Re X* that seeks to suggest making parental orders are limited to children, or in any information that has been provided about the policy considerations that underpin the legislation, in particular the time limit provided for in s54(3). In addition, it is of note this issue was not raised in the recent comprehensive Law Commission Consultation on surrogacy in 2019. Consideration of the time limit in Chapters 5 and 11 centred on whether or not the six month time limit should be retained and the provisional view in the Consultation paper that the time limit should be abolished.[1] Any limit on orders being limited to children is not raised or discussed. This perhaps reflects that as a matter of fact everyone remains the child of someone, even when they become adults.

56. Like Sir James Munby in *Re X,* even if I am wrong in the analysis set out above, I am entirely satisfied the HFEA 2008 should be 'read down' in such a way to ensure the Article 8 rights of Mr and Mrs X and Y to the family life they have established including, in particular, Y's identity rights are properly recognised. The protection of those rights needs to be '*practical and effective'* and not *'theoretical and illusory'* which making this order will satisfy.

57. For the reasons set out above, a parental order was made in relation to Y on 22 March 2022 in favour of Mr and Mrs X.

[1] Building families through surrogacy: a new law; paragraph 11.19. Published 6 June 2019.