OUTER HOUSE, COURT OF SESSION

[2023] CSOH 46

HFE1/23
HFE2/23

OPINION OF LADY CARMICHAEL

in Petitions of

AB AND XY

Petitioners

for

orders under section 54 the Human Fertilisation and Embryology Act 2008

Petitioners: Aitken; A C White, solicitors

13 July 2023

[1] The petitioners, AB and XY, were formerly in a romantic relationship. They wished to start a family together, but AB was told that she would not be able to conceive. Z, who is AB's sister, agreed to be a surrogate. She became pregnant in 2020 as the result of artificial insemination using XY's gametes. G and H, who are non-identical twins, were born in 2021. AB and XY separated in early 2022. AB and XY brought two applications under section 54 of the Human Fertilisation and Embryology Act 2008, one in respect of G and the other in respect of H.

[2] Following a hearing I granted the applications. They raised issues which I was told have not previously been the subject of a published opinion in Scotland, although very similar issues have been the subject of published decisions in England and Wales. Counsel

and the curator ad litem both indicated that it would be helpful if I were to provide a short decision in writing explaining the approach I had taken in determining to grant these applications, and I now do so.

The statutory provisions

[3] Section 54 of the 2008 Act provides:

> "54 Parental orders: two applicants
> 1(1) On an application made by two people ('the applicants'), the court may make an order providing for a child to be treated in law as the child of the applicants if—
> (a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,
> (b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and
> (c) the conditions in subsections (2) to (8A) are satisfied.
> (2) The applicants must be—
> (a) husband and wife,
> (b) civil partners of each other, or
> (c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.
> (3) Except in a case falling within subsection (11), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born.
> (4) At the time of the application and the making of the order—
> (a) the child's home must be with the applicants, and
> (b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.
> (5) At the time of the making of the order both the applicants must have attained the age of 18.
> (6) The court must be satisfied that both—
> (a) the woman who carried the child, and
> (b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43), have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.
> (7) Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who

carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—

(a) the making of the order,

(b) any agreement required by subsection (6),

(c) the handing over of the child to the applicants, or

(d) the making of arrangements with a view to the making of the order, unless authorised by the court.

(8A) An order relating to the child must not previously have been made under this section … unless the order has been quashed or an appeal against the order has been allowed."

[4] Section 55 provides that the Secretary of State may make regulations providing for provisions of enactments relating to adoption, including the Adoption and Children (Scotland) Act 2007, to have meaning and effect in relations to orders under section 54. The relevant regulations are the Human Fertilisation and Embryology (Parental Orders) Regulations 2018. Article 3 and Schedule 2 of the regulations apply parts of the 2007 Act to applications for parental orders. Of particular importance is the application with modification of section 40 of the 2007 Act by paragraph 9 of Schedule 2. A person who is the subject of a parental order is to be treated in law as if born as the child of the person or persons who obtained the order, and as not being the child of any person other than the person or persons who obtained the order.

[5] Paragraph 2 of Schedule 2 applies section 14(1) to (4) and (8) of the 2007 Act with modification. Paragraph 6 applies section 28 with modification. In coming a decision the court must regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration. It must have regard in particular to

(a) the value of a stable family unit in the child's development,

(b) the child's ascertainable views regarding the decision (taking account of the child's age and maturity),

(c) the child's religious persuasion, racial origin and cultural and linguistic background, and

(d) the likely effect on the child, throughout the child's life, of the making of an adoption order.

The court must not make a parental order unless it considers that it would be better for the child that the order be made than not.

The issues

[6] The following issues arose:

(a) Section 54(3) provides that the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born. These applications were made 21 months after the children were born.

(b) Section 54(2) provides that the applicants must be (a) husband and wife, (b) civil partners of each other, or (c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other. The issue was whether, notwithstanding their separation, the petitioners met the criterion in subsection (c).

(c) Section 54(4)(a) provides that at the time of the application and at the time of the making of the order, the child's home must be with the applicants. Again, the issue was whether I should be satisfied that that requirement was satisfied given the petitioners' separation.

Procedure

[7] When the applications were lodged, the court administration drew these issues to my attention, and queried whether a hearing on competency might be required before determining whether to appoint a curator ad litem and reporting officer. On a preliminary reading of some of the decided cases from England and Wales I formed the view that it would probably not be appropriate to consider these issues other than in the context of the facts of the case, and I appointed a curator ad litem and reporting officer under Rule of Court 97.8.

[8] The applications in these petitions were not contested. The curator ad litem and reporting officer reported in positive terms on the matters that she required to address.

[9] At a hearing fixed under RCS 97.2(a) I was presented with affidavit evidence. Counsel relied on jurisprudence from England and Wales, and invited me to follow it. He pointed out that the issue arising from delay in seeking parental orders could not be resolved by an application to adopt. The petitioners were not a relevant couple for the purposes of the 2007 Act: section 29(3).

Jurisprudence from England and Wales

[10] In *Re X (A Child) (Parental Order: Time Limit)* Sir James Munby, P, wrote this at paragraph 54 and following, allowing an application 2 years and 2 months after the birth of the child:

> "54. Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about X's identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J's powerful

> expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in *In re J (A Minor) (Adoption: Non-Patrial)* [1998] INLR 424, 429, referred to as 'the psychological relationship of parent and child with all its far reaching manifestations and consequences'. Moreover, these consequences are lifelong and, for all practical purposes, irreversible: see *G* v *G (Parental Order: Revocation)* [2013] 1 FLR 286, to which I have already referred. And the court considering an application for a parental order is required to treat the child's welfare throughout his life as paramount: see *In re L (A Child) (Parental Order: Foreign Surrogacy)* [2011] Fam 106. X was born in December 2011, so his expectation of life must extend well beyond the next 75 years. Parliament has therefore required the judge considering an application for a parental order to look into a distant future.
>
> 55. Where in the light of all this does the six-month period specified in section 54(3) stand? Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so."

[11] In *Re X* the court also concluded that the effect of reading down section 54(3) so as to achieve consistency with the rights of the child to family and private life protected by Article 8 ECHR would lead to the same result, referring to the approach of Theis J in *A* v *P* [2011] EWHC 1738 (Fam); [2012] Fam 188 paragraphs 58-61. The case also concerned whether the child's home was with the applicants when they had separated at the time of the application and were living in different houses. In circumstances where the child did not have his home with anyone else and his living arrangements were split between the applicants, the court concluded that the child's home was with them at the material time. Again, that reading was consistent with there being family life as contemplated by Article 8, under reference to *Kroon* v *Netherlands* (1995) 19 EHRR 263.

[12] Courts in England and Wales have followed the approach in *Re X* on a number of occasion. In *Re A (A Child) (Surrogacy: s54 criteria)* [2020] EWHC 1426 (Fam) is another case in which the application was made outwith the 6 month time limit, and the applicants had

separated, and in which the court was satisfied it should make the orders sought. Keehan J surveyed a number of relevant authorities, including *A* v *P* and *In Re X*. His summary of the propositions to be drawn from them is as follows:

> "54. In light of the various authorities … I must apply the following principles when considering whether or not the statutory criteria are satisfied on the facts of this case and whether I should make a parental order in favour of the applicants:
>
> i) when interpreting legislative provisions, the court must have regard to the underlying purpose of the requirement and ensure the interpretation does not 'go against the grain' of the intentions of Parliament;
>
> ii) s.3 of the HRA requires the court, where possible, to give a Convention compliant interpretation of statutory provisions;
>
> iii) a failure to adhere to the six-month time limit to make an application for a parental order is not fatal to the making of the order;
>
> iv) the questions whether the applicants are in an enduring family relationship and whether the child has his home with the applicants are matters of fact for the court to determine;
>
> v) where the court finds that the Article 8 and/or Article 14 rights of the child are engaged, the biological and social reality of the child's life must prevail over legal presumption;
>
> vi) the existence of family life is not defined nor is its existence constrained by legal, societal or religious conventions;
>
> vii) there are no minimum requirements that must be shown if family life is to be held to exist;
>
> viii) what is required is an unambiguous intention to create and maintain family life, and secondly, a factual matrix consistent with that intention which is clearly a question of fact and degree;
>
> ix) the mere fact that the parents are now separated is not fatal to the application for a parental order;
>
> x) similarly, the mere fact that the parents live in separate homes is not fatal to the application;
>
> xi) if a parental order is not made, the child is likely to be denied the social and emotional benefits of recognition of his relationship with his parents and would not have the legal reality that matches his day to day reality;
>
> xii) the transformative effect of a parental order cannot be overstated; and
>
> xiii) the ultimate test for the making of a parental order is the welfare best interests of the child."

[13] *X* v *Z and others* [2022] EWFC 26, [2023] 1 WLR 1493 concerned a married couple domiciled in the United Kingdom who made a surrogacy arrangement with a couple domiciled in the United States of America, resulting in the birth of a child in 1998. A court in the United States made an order declaring the applicants to be the child's parents and all

concerned conducted their lives on the basis that the legal position in the United States was reflected in the United Kingdom. When they realised that it was not, the made an application under section 54 of the 2008 Act. Theis J granted the application. Theis J considered submissions focussing on two aspects of the rights protected by Article 8, namely family life and identity rights: paragraph 27. Although the "child" was by the time of the application an adult, Theis J concluded that the requirement of section 54(4)(a) was satisfied where the parties' lives had remained as one family unit through the close relationships they enjoyed, and their close contact remained even when they were apart. She described their family lives as entwined and inextricably linked. Their Article 8 rights were engaged, and pointed towards the court's seeking to be in a position to secure the legal parental relationship so that those rights could be properly and effectively exercised.

[14] *X and another* v *B and another* [2022] EWFC 129, [2022] 4 WLR 113 related to two men in a platonic relationship who became parents through an organised surrogacy agreement. Mr X met Mr Y when Mr X was temporarily separated from his wife. After a brief romantic relationship Mr X and Mr Y formed a close and loving platonic bond, which endured when Mr X reunited with his wife. Mr X and Mr Y decided, with Mrs X's approval, to have a child together. The child spent time with Mr X and Mr Y together and separately in their respective homes. Theis J was satisfied that the applicants' relationship was a long established loving and committed relationship, although unconventional. At paragraph 28 she reviewed a number of decided cases involving a range of circumstances in which courts had held that a child had his home applicants who did not cohabit, or who did not live with the children.

[15] Counsel also drew to my attention *AY and BY* v *ZX* [2023] EWFC 39. It relates to a concern as to whether the court was prevented from making an order under section 54

where surrogacy had taken place pursuant to a private arrangement, rather than in a licensed clinic. Macdonald J found that there was nothing in section 54 that prevented a court from doing so.

Decision

[16] So far as section 54(3) is concerned, the question, in construing the statute, is whether it was the intention of Parliament that no order could be granted in the event that the time limit of 6 months were not complied with: see, for example *R* v *Soneji* [2006] 1 AC 340. The line of authority referred to above from the courts of England and Wales is highly persuasive. The 2008 Act extends to England and Wales, Scotland and Northern Ireland. As Sir James Munby P pointed out in *Re X (A Child) (Parental Order: Time Limit)*, there is no particular policy consideration which appears to underpin section 54(3) or its predecessor provision, section 30(2) of the Human Fertilisation and Embryology Act 1990: paragraphs 16, 17. It is clearly desirable that applications relating to children should be made and dealt with promptly, but that requires to be balanced with the circumstances of the particular case and the consequences of an order not being made: *X* v *Z and others*, paragraph 50.

[17] I agree with the reasoning in the cases from England and Wales to which I have referred. It cannot have been the intention of Parliament that a failure to apply within 6 months should operate as barring an application, given the consequences for the child if no competent application were possible. The question of construction must be approached bearing in mind the character of the order as one which goes to the most fundamental aspects of status, identity and family and legal relationships. I have approached the matter primarily as one of statutory construction without reference to section 3 of the Human

Rights Act 1998. I do, however, agree with Sir James Munby P that reading down section 54(3) would lead to the same result.

[18] The liberal and purposive approach to construction which underlies that approach to section 54(3) also informs the interpretation and application of section 52(2) and (4)(a). I adopt the propositions formulated by Keehan J in *Re A (A Child) (Surrogacy: s54 criteria)*. The following are of importance in the context of the present case. Whether the applicants are in an enduring family relationship and whether the children have their home with the applicants are matters of fact. What is required is an unambiguous intention to create and maintain family life, and secondly, a factual matrix consistent with that intention which is clearly a question of fact and degree. If a parental order is not made, the children are likely to be denied the social and emotional benefits of recognition of their relationships with their parents and would not have the legal reality that matches their day to day reality. A broad and flexible construction of those provisions should be adopted where that is necessary to secure the effective protection of the rights protected by Article 8 ECHR.

[19] Turning to the facts of this case, the children's birth mother, Z, has never viewed the children as her own. She viewed the pregnancy and subsequent birth as doing a job, and feels the same way about the children as she does about her other nephews and nieces. The orders sought reflect the reality of the children's lives and family relationships, and those of Z, XY and AB. Against that background it is important both that AB should be recognised as the children's mother, and that she should have parental rights and responsibilities in respect of them.

[20] The petitioners did not have any legal advice when they and Z agreed to proceed with surrogacy. They were primarily concerned with the practical matters surrounding conception, and how to achieve conception. They were aware that parental orders existed,

but not of the time limit. The children were conceived and born during the pandemic. AB was concerned about going out and about at the time the children were born, in case she exposed them to a risk of infection. She did not consider it safe to risk meeting with a lawyer. When XY attended with Z to register the births of the children, he gained the impression that the petitioners would have to make an application after 6 months had elapsed, rather than within a 6 month period. When he learned that the application should have been made within 6 months he felt terrible, as he felt the mistake was his fault. By the time the petitioners sought legal advice the 6 month period had already ended. Against that background, I am satisfied that the expiry of the 6 month period should not act as a bar to my making the orders sought.

[21] The children are loved, well-cared for and thriving in the care of the petitioners. I am satisfied that the orders sought will safeguard and promote the welfare of the children throughout their lives, and that it is better for the children that I make the orders than that I do not make them.

[22] The petitioners separated amicably in February 2022. Immediately after their separation, XY visited AB's house and saw the children there on his days off from work. At that time he was working 5 days on and 2 days off. He remained fully involved in their care, including feeding and bathing them, and putting them to bed. He now resides with AB's mother, across the road from AB's house. He goes to her house on most days. He usually attends after breakfast and stays until dinner time. Both petitioners describe themselves as co-parenting. They intend to continue to do so. They plan for XY to obtain accommodation of his own and to spend time with the children there as well. He is planning to return to work in his previous career as a chef. I am satisfied that the petitioners are living as partners in an enduring family relationship. They remain in an

affectionate and committed relationship, and are committed to co-parenting the children. I am satisfied also that the children have their home with them. They do not have their home with anyone other than the petitioners.

[23] I was, in the circumstances of these applications, satisfied that all the conditions imposed by section 54 were met, as were the requirements of the 2007 Act as they apply in modified form to decisions under the 2008 Act. I therefore granted the applications.