Chapter 9 updates

These are linked to the main text as follows:

- **9.3 Determining parenthood in the context of natural reproduction**
- **9.5.2 The statutory framework for surrogacy**
- **9.5.3 Reform of surrogacy law**

9.3 DETERMINING PARENTHOOD IN THE CONTEXT OF NATURAL REPRODUCTION

From p 619 of the main text onwards, we discuss parenthood in the context of natural reproduction, as distinct from parenthood determined under the provisions of the Human Fertilisation and Embryology Act 2008. While we describe the former situation as 'natural reproduction', the law in this regard applies to any situation not governed by the HFEA.[1] Whether under the HFEA or not, the issue of determining who is a child's legal mother is generally straightforward: as we say on pp 619 ('natural reproduction') and 650 (HFEA s 33), the woman who gives birth to the child is the legal mother for all purposes at the time of the child's birth.

However, a significant challenge to the law in this respect was brought by the applicant in *R (TT) v The Registrar General for England and Wales*.[2] TT had been assigned female at birth, but in around 2009 had transitioned to live in the male gender at the age of 22. He undertook hormone therapy and a double mastectomy. In 2016, he suspended hormones and began fertility treatment. In January 2017, TT applied for a Gender Recognition Certificate under the GRA 2004, which was issued in April the same year. A few days later, TT underwent further fertility treatment, with donor sperm being placed inside his uterus, with the result that be became pregnant. His son, YY, was born in January 2018. The Registry Office informed TT that he would have to be registered as YY's mother, though he could do so with his (male) name. TT applied for judicial review of that decision, on the basis that he wished to be registered as YY's father or, failing that, as his parent.

[1] Note here the difference in language between HFEA 2008 ss 33 and 35, for example. In determining who is a mother, s 33 applies in relation to a woman who is carrying or has carried a child 'as a result of the placing in her of an embryo or of sperm and eggs'; by contrast, the provisions in relation to a father in s 35refer to 'the placing in [a woman] of the embryo or of the sperm and eggs *or of her artificial insemination*, …' (emphasis added). The reason is simply that the artificial insemination of a woman, not involving the placing in her of an embryo or of sperm and eggs, necessarily involves the fertilisation of the woman's own eggs; there is therefore no other candidate (questions of surrogacy aside) to be the child's mother. S 33 is designed to remove questions where there might be cause to consider some other person to the child's mother.

[2] [2019] EWHC 2384.

Though the case went to the Court of Appeal (see below), it is worth considering the rather longer analysis given to the case by the High Court in the judgment of Sir Andrew McFarlane P. The President started by noting the central importance of sections 9 and 12 of the GRA 2004: S 9(1) provides:

Gender Recognition Act 2004

9 General
(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards). …

12 Parenthood
The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.

TT's claim was that nothing in s 12 had any bearing on the absolute wording of s 9, because TT's transition and gender recognition certificate pre-dated his pregnancy and the subsequent birth of YY.[3] The President rejected this argument, holding that the meaning of s 12 had both a prospective and a retrospective application, and therefore acted as a qualifier to the general provisions of s 9. Consequently, the President considered that the issuance of a gender recognition certificate had no bearing on the status of a person as the mother or the father of a child, which issue was determined either by the common law (as in this case) or, where they applied, by the conditions of s 33 of the HFEA.[4]

Counsel for TT argued that the parental statuses of 'mother' and 'father' were inherently gendered terms, and therefore that the attribution of a person as being, in this case, the mother was incompatible with them being legally male.

R (TT) v The Registrar General for England and Wales [2019] EWHC 2384

McFARLANE P:

138. As much of this area of the law is virgin territory, it is not necessarily conclusive to observe that there is no authority for the proposition that a parent who is male is always a

[3] Ibid, [80]-[81].

[4] In practice, it makes no difference which: the person who gives birth to the child is the legal mother either way.

'father' and not a 'mother', but it is nevertheless the case that there is no such authority. Of more significance is the fact that, despite the passage into law of the GRA 2004, Parliament did not take the opportunity to make provision for the attribution of a particular parental status based on gender when passing the HFEA 2008, save to provide for there to be a second female parent in cases to which ss 42 and 43 apply.

139. It is pertinent to ask whether the role of 'mother' is as entirely gender specific as [counsel's] assumption requires. It is undoubtedly the case that throughout history the role of being a gestational mother has been undertaken by females, but is being female the essential or determining attribute of motherhood? There is a strong case to be made for the role of 'mother' being ascribed to the person, irrespective of gender, who undertakes the carrying of a pregnancy and who gives birth to a child. In that regard, being a 'mother' is to describe a person's role in the biological process of conception, pregnancy and birth; no matter what else a mother may do, this role is surely at the essence of what a 'mother' undertakes with respect to a child to whom they give birth. It is a matter of the role taken in the biological process, rather the person's particular sex or gender.

140. The law has, in recent times, readily recognised mothers, who are to be regarded as male, and fathers, who are to be regarded as female. Long before the GRA 2004, trans-gender parents were accepted in the family courts in their acquired gender.

…

146. I … reject [counsel's] central submission which is that, as a result of the GRA 2004, s 9, as TT was legally male at the time of YY's birth he must, as a matter of law, be 'father' rather than 'mother' to his child. The impact of the 2004 Act does not alter the common law position which is based on the biological/gestational process to the effect that a person who carries and gives birth to a child is that child's mother, irrespective of their legal gender at the time of birth.

The President went on to hold that, on the facts of the case, nothing in the HFEA 2008 had any direct bearing on the outcome, and proceeded to consider arguments based on human rights. The court noted that there was no clear authority on the issues raised by this case, either in the domestic courts or from the European Court of Human Rights.[5]

251. TT regards the term 'mother' as being gender specific. His argument before this court in favour of 'father' is also gender specific. Whilst, for the reasons that I have given so far in evaluating the domestic law, my preliminary conclusion as a matter of law is that the term 'mother' is free-standing and separate from consideration of legal gender, thus in law there can be male mothers and female fathers, I fully accept that this is not TT's perspective and is unlikely to be the perspective of others who, like TT, suffer from gender dysphoria. Whether or not there has been a breach of Art 8 must be assessed regarding the particular characteristics of the individual in focus, and in that regard to require him to be registered as 'mother' is rightly seen by him as a frontal assault on the integrity of his acquired male gender.

[5] Ibid, [246].

The requirement to register would, I accept, adversely impact upon TT's human dignity and his human freedom.

…

272. Although … I accept that from the perspective of TT, and to a lesser degree YY, the degree of interference in their Art 8 rights is substantial, I also accept the Government case … that the number of occasions when a full birth certificate may be produced and TT's status as YY's mother, and therefore the fact that he is trans-gender, would be disclosed, will be small. The adverse impact upon TT, significant though it will be were it to occur, is very substantially outweighed by the interests of third parties and society at large in the operation of a coherent registration scheme which reliably and consistently records the person who gives birth on every occasion as 'mother'.

273. It follows, that I conclude that, despite the admitted interference with the Art 8 rights of TT and YY, such interference is justified as being in accordance with the law, for a legitimate purpose and otherwise necessary, proportionate and fair.

From this analysis, the President went on to give his conclusions.

279. The principal conclusion at the centre of this extensive judgment can be shortly stated. It is that there is a material difference between a person's gender and their status as a parent. Being a 'mother', whilst hitherto always associated with being female, is the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth. It is now medically and legally possible for an individual, whose gender is recognised in law as male, to become pregnant and give birth to their child. Whilst that person's gender is 'male', their parental status, which derives from their biological role in giving birth, is that of 'mother'.

280. At paragraph 149, I set out my preliminary conclusions with respect to domestic law, these can now be firmly stated as:

a) At common law a person whose egg is inseminated in their womb and who then becomes pregnant and gives birth to a child is that child's 'mother';
b) The status of being a 'mother' arises from the role that a person has undertaken in the biological process of conception, pregnancy and birth;
c) Being a 'mother' or a 'father' with respect to the conception, pregnancy and birth of a child is not necessarily gender specific, although until recent decades it invariably was so. It is now possible, and recognised by the law, for a 'mother' to have an acquired gender of male, and for a 'father' to have an acquired gender of female;
d) GRA 2004, s 12 is both retrospective and prospective. The status of a person as the father or mother of a child is not affected by the acquisition of gender under the Act, even where the relevant birth has taken place after the issue of a GR certificate.

On appeal, the Court of Appeal upheld the President's decision, largely for the reasons that he

had given.[6] The single judgment of the court (Lord Burnett CJ, King and Singh LJJ) approved the President's interpretation of s 12 of the GRA 2004,[7] rejecting various arguments presented by TT for taking a different approach. The Court of Appeal considered arguments about ECHR case law,[8] and then assessed whether there was an argument that s 12 could be seen as incompatible with the ECHR due to a violation of the Article 8 rights of TT or of YY. The issue of whether there was an interference with Article 8 rights was conceded,[9] but the government argued that that interference was justified.

R (McConnell and Another) v The Registrar General for England and Wales [2020] EWCA Civ 559

LORD BURNETT CJ, KING AND SINGH LJJ:

57. The first question which arises under Article 8(2) is whether the interference is "in accordance with the law". In the present appeal it was not suggested that it is not. Clearly it is in accordance with the law. Legislation governs the matter and it is accessible, clear and foreseeable. It therefore has the requisite quality of law for the purposes of the Convention.

58. The second question is whether there is a legitimate aim for the interference. There clearly is. It consists of the protection of the rights of others, including any children who are born to a transgender person, and the maintenance of a clear and coherent scheme of registration of births. It is important in this context to bear in mind that this is a question to be addressed at a general level. It does not turn on the facts of this or any other particular case. The question is not whether it would be in the best interests of YY to have the person who gave birth to him described as his mother on the long-form birth certificate. The question is whether the rights of children generally include the right to know who gave birth to them and what that person's status was.

59. The next question is whether the interference complies with the principle of proportionality. The requirements of proportionality in the human rights context are now well established: see e.g. the decision of the Supreme Court in *Bank Mellatt v HM Treasury (No. 2)* [2012] UKSC 39; [2012] AC 700, at paras. 20 (Lord Sumption JSC) and 74 (Lord Reed JSC). There are four questions to be asked:

i) Is there a sufficiently important objective which the measure pursues?

ii) Is there a rational connection between the means chosen and that objective?

iii) Are there less intrusive means available?

iv) Is there a fair balance struck between the rights of the individual and the general

[6] [2020] EWCA Civ 559.

[7] Ibid, [29].

[8] Ibid, [44]-[51].

[9] Ibid, [52]; see generally main text at pp 6-8 and 559-561.

interests of the community?

The court noted that the first two elements were not in dispute, so the focus was on the final two questions. The Court of Appeal noted a number of elements of the social context, including the lack of consensus within the Council of Europe countries.

81. This brings us to an important aspect of this case. The margin of judgement which is to be afforded to Parliament in the present context rests upon two foundations. First, there is the relative institutional competence of the courts as compared to Parliament. The court necessarily operates on the basis of relatively limited evidence, which is adduced by the parties in the context of particular litigation. Its focus is narrow and the argument is necessarily sectional. In contrast, Parliament has the means and opportunities to obtain wider information, from much wider sources. It has access to expert bodies, such as the Law Commission, which can advise it on reform of the law. It is able to act upon draft legislation, which is usually produced by the Government and often follows a public consultation exercise, in which many differing views can be advanced by members of the public. Both Government and Members of Parliament can be lobbied by anyone with an interest in the subject in hand. The political process allows legislators to acquire information to inform policy decisions from the widest possible range of opinions. We have no idea, for example, whether all trans men object to the use of the word "mother" to refer to them when they have given birth to a child. It may be that some at least wish to have the automatic responsibility for the child to whom they have given birth which section 2 of the Children Act 1989 currently gives them. Moreover, we do not have evidence before this Court as to how other members of society would feel if they were no longer to be referred to on their child's birth certificate as a mother or a father but simply as "parent 1" and "parent 2". Those were among the possible ways forward which were suggested on behalf of the Appellants. In our view this illustrates how inapt the subject-matter is for determination by the courts as compared with Parliament. If there is to be reform of the complicated, inter-linked legislation in this context, it must be for Parliament and not for this Court.

82. The second foundation is that Parliament enjoys a democratic legitimacy in our society which the courts do not. In particular, that legitimises its interventions in areas of difficult or controversial social policy. That is not to say that the courts should abdicate the function required by Parliament itself to protect the rights which are conferred by the HRA. The courts have their proper role to play in the careful scheme of the HRA, as Lord Bingham emphasised in *A v Secretary of State for the Home Department*, at para. 42. In appropriate cases that can include making a declaration of incompatibility under section 4 in respect of primary legislation where an incompatibility between domestic legislation and Convention rights has been established and the interpretative tool provided by section 3 does not provide a solution. Democratic legitimacy provides another basis for concluding that the courts should be slow to occupy the margin of judgement more appropriately within the preserve of Parliament.

Four things are worth noting about the judgments of the Court of Appeal and of the President at first instance.[10]

[10] Thanks to Peter Dunne for his helpful thoughts which assisted in the formulation of these comments.

First, the comments about democratic legitimacy in the final quoted paragraph from the Court of Appeal are somewhat concerning. While the courts and Parliament clearly have different roles in a democracy, it is troubling to hear a court—in the person of the Lord Chief Justice, no less—suggest that the courts do not have democratic legitimacy, when the ability of the courts to protect human rights of individuals and the fundamental rights of the democracy itself is essential to protect the core values of western democracy.

Second, it is interesting to wonder whether this muted conception of the court's role explains the lack of serious interrogation of the government's claimed rationale for its policy, namely 'coherence'. Given that most people would see the terms 'mother' and 'father' as inherently gendered concepts, it is questionable whether the fact that the law does recognise male mothers and female fathers is enough to answer the challenge brought in this case. The courts at both levels offer a limited interrogation of the 'coherence' argument and, while a degree of deference is owed to government policy, the courts might have been expected to engage in more detail with the question of how registering a trans man as a father, rather than a mother, impacted the coherence of the legal framework.

Third, it is also notable that one of the policy arguments was that TT's position, if accepted, would have led to a position where the child never had a legal mother, 'which, at present, would mark YY out from all other children under UK law, [and so] must be seen as a detriment and contrary to a child's best interests'.[11] That is currently true of all children *born* in the UK when considered *at the time of their birth*, but it is far from being a universal position when seen through a broader lens. Children who are adopted need not have a mother if they are adopted by a single male applicant or by a gay male couple—and though those children do have a legal mother at the time of their birth, the law completely disregards that original parentage. As is made clear, 'An adopted child shall be treated in law … as if he had been born to the adopter in wedlock',[12] and 'An adopted person is to be treated in law as if born as the child of the adopters or adopter'.[13] The same legal framework is used in relation to parental orders for surrogacy arrangements.[14] In other words, the law treats the child as having *always* been the legitimate child of the adopter(s). So while it is true that all children are born with a legal mother under English law, it is also true that the law allows for two different routes by which a child may be deemed as a matter of law, after the event, never to have had a mother.

Finally, and perhaps connected to this third point, there seems to be an implicit assumption in the judgments that children in the position of YY gain some benefit from their fathers being registered as their mothers. The benefit seems to be about 'knowing who your birth parent is'

[11] [2019] EWHC 2384, [258].

[12] AA 1976, s 39.

[13] ACA 2002, s 67.

[14] Human Fertilisation and Embryology (Parental Orders) Regulations 2018, SI 2018/1412, Sched 1, para 12 applies s 67 of the ACA 2002 to parental orders, with appropriate modifications to the wording.

(as well as a further reliance on coherence), but these benefits are very much assumed rather than evidenced, and the potential confusion to children in this position of having their fathers registered on formal documents as being their mothers does not seem to be factored into the thinking. The evidence of all those involved in the case other than the government suggested that YY would benefit from having his father registered as his father or, in the alternative, as his parent, but again the court gives limited consideration to this issue.

9.5.2 THE STATUTORY FRAMEWORK FOR SURROGACY

The s 54/s 54A conditions

From p 670 of the main text onwards, we discuss the various requirements for a parental order to be made under the HFEA, and observe that the courts have found ways of getting around almost all of these requirements where they consider that the order should be made even if the statutory criteria are not met.[15] The decision in *Re N (Surrogacy: Enduring Family Relationship: Child's Home)* [2019] EWFC 21 offers yet another example of the courts flatly ignoring the statutory requirements for a parental order on the basis of the child's welfare. The commissioning parents applied in March 2018 for a parental order, but separated shortly thereafter and ceased cohabiting. In August 2018, the court made a child arrangements order and granted both commissioning parents parental responsibility. However, given that the relationship was no longer 'enduring', and given that the child was (at least arguably) not living with both applicants at the time the order was to be made, it was questioned whether a parental order was available. Theis J held that the requirements of s 54 needed to be read purposively:

Re N (Surrogacy: Enduring Family Relationship: Child's Home) [2019] EWFC 21

THEIS J:

Enduring family relationship

24. The question as to whether the parties are in an enduring family relationship is a question of fact (see *P and B v Z* [2017] 2 FLR 168).

25. There is no requirement in s 54(2) that the applicants must be in an enduring family relationship at the time of the making of the application and the making of the order. By contrast, s 54(4) expressly provides for the child's home to be with the applicants at the time of the application and the making of the order.

26. To date this specific issue has not been addressed in any previous decision.

27. In *A v P (Surrogacy: Parental Order: Death of Applicants)* [2012] 2 FLR 145 the

[15] For a short summary of the law, including these developments, see *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, [9]-[22].

intended father died after the application had been made but before the order. As a consequence, the applicants were married at the time of the application, but due to the intended father's death the marriage no longer subsisted at the time the court made the order. Although the focus in that case was on s 54 (4)(a) the broad and purposive construction of s 54 to achieve the transformative effect of the parental order required the court to read the provisions of s 54 to give effect to the right to family life in accordance with Art 8 (1)

…

The child's home

29. A number of cases have already set out a broad and purposive construction of what is meant by *'the child's home'* in s 54 (4) (a).

30. In *Re X (A Child) (Surrogacy: Time Limit)* *[2015] 1 FLR 349* the intended parents were separated at the time of the application, although reconciled by the time the court was making an order. Munby P set out why he considered in that case s 54 (4)(a) was satisfied at paragraph [67]:

> *'There are, in my judgment, two reasons why this question should be answered in the affirmative. In the circumstances as I have described them at paragraph 8 above, X had his 'home' with the commissioning parents, with both of them, albeit they lived in separate houses. He plainly did not have his home with anyone else. His living arrangements were split between the commissioning father and the commissioning mother. It can fairly be said that he lived with them.'*

31. This flexible treatment of what constitutes *'home'* in s 54(4)(a) has been applied in subsequent cases, such as *Re Z (foreign surrogacy: allocation of work: guidance on parental order reports)* [2016] 2 FLR 803 and *DM & LK v SJ & OJ* [2017] 1 FLR 514. In each of those cases the applicants did not share the same physical home but on the facts of each case the court, adopting a broad and purposive construction of s 54 (4)(a), concluded that the child did have their home with the applicants at the relevant time.

Discussion and decision

…

33. Whether the applicants were in an enduring family relationship is a question of fact. There is no issue that K and L were in a settled relationship at the time their application was made in March 2018. They had been together for over 4 years, had lived together for at least 3 years, purchased a property, jointly embarked on the surrogacy arrangement and following N's birth had jointly cared for her.

34. Unlike other provisions in s 54, s 54 (2) is silent as to the need for the requirement to be linked to any particular time. In those circumstances the court should be alert not to read in any requirement that is not there in the primary legislation.

…

36. Turning to the question of whether N has her home with the applicants at the time when the application is made and when the court is considering making an order, as required by s 54(4)(a) there is no issue N had her home with the applicants at the time of the application. It is submitted, adopting the flexible construction to the concept of home, that her home has continued to be with them, albeit they have been living in separate homes since August. There is no suggestion N has any other home apart from when she is with either K or L.

37. The aim of s 54 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants. The article 8 rights of the applicants and the child are engaged. N has lived with the applicants all her life and is biologically related to K. The effect of not making an order will be an interference with that family life in that their factual relationship will not be recognised by law, there will be no legal relationship between N and the applicants, she would be denied the social and emotional benefits of recognition of that relationship and would not have the legal reality that matches the day to day reality.

38. When considering the provisions in s 54 (2) in that purposive light it is clear the applicants were in an enduring family relationship at the time they made their application. S 54 (2) requires that the applicants must be two persons who are living as partners in an enduring family relationship, which they were when they made their application. In my judgment, in the absence of any other express time requirement, that requirement is satisfied in this case.

There is some irony in Theis J's comment at para 34 that the court must focus on the requirements of the Act—here, to avoid introducing *new* requirements that are not in the legislation—given the court's on-going willingness to ignore entirely those bits of the Act which might obstruct the court in making parental orders. Here, as in virtually all surrogacy cases, the court concluded that the parental order should be made.

Another case before Theis J offered a new permutation on the facts of *A v P (Surrogacy: Parental Order: Death of Applicant)*,[16] which we discuss on p 673 of the main text. Whereas in *A v P*, the commissioning father had died between the making of the application and the conclusion of the court proceedings for the parental order, in *Re X (Surrogacy: Death of Applicant)*,[17] the commissioning father, Mr Y, had died when the surrogate was five months pregnant. Mr Y was the only parent with a biological connection to the child, so being able to make an application under s 54 on behalf of both commissioning parents was essential for legal reasons (the commissioning mother would not meet the requirement of s 54A(1)(b), 'the gametes of the applicant were used to bring about the creation of the embryo'). Mrs Y also argued that it was essential to recognise Mr Y as the child's father as part of the child's understanding of her identity.

[16] [2011] EWHC 1738.

[17] [2020] EWFC 39.

Re X (Surrogacy: Death of Applicant) [2020] EWFC 39

THEIS J:

93. Can Parliament have intended that in circumstances such as this where the intended father dies after the embryo transfer but before the child's birth that, adopting the words of Munby P in *Re X* [*(Surrogacy: Time Limit)* [2014] EWHC 3135] paragraph 55, the 'gate should be barred forever'. I cannot think so for a number of reasons:

(1) As in *Re X*, Parliament has not explained its thinking why such a situation is excluded, when but for Mr Y's death prior to the birth all the requirements under s 54 would have been met following X's birth. There is no reason to believe Parliament either foresaw or intended the potential injustice which would result in this case if a parental order cannot be made in the circumstances in this case.

(2) Other provisions in the HFEA 2008 (ss 35 – 37) provide clarity about the status of the father of the child born as a result of assisted conception at the time when the embryo is transferred, or artificial insemination takes place, provided certain safeguards are in place, in particular consent. Consent is not an issue in this case, any consent required by s 54 is present and secure.

(3) The provisions set out in ss 39 and 49 HFEA provide clarity as to the status of the father in the circumstances of sub-paragraph (2) where they take place after his death, again with safeguards in place relating to consent.

(4) Parliament has recently, when considering the declaration of incompatibility made by the court in *Re Z (No 2)* [[2016] EWHC 1191], signalled that it seeks to ensure that the law does not discriminate against different categories of applicants for parental orders on the grounds of relationship status.

(5) A parental order is the only route by which X can have her status regarding Mr and Mrs Y recognised in a way that was intended by the surrogacy arrangement, which a parental order was specifically created for.

94. That conclusion is equally justified having regard to the Convention rights involved for the following reasons:

(1) Both Articles 8 and 14 are engaged.

(2) Munby P foreshadowed at paragraph 61 in *Re X* a situation such as this, when he highlighted the part of Article 8 that protects 'private life'; as he stated there may be cases where it may be more difficult to establish 'family life'. Here X did not have the opportunity to establish 'family life' due to the premature death of Mr Y, but X certainly has an established 'private life' right for her own identity to be protected by legal recognition of her relationship with Mr Y. The court's responsibility is to 'guarantee not rights that are theoretical and illusory but rights that are practical and effective' (*Marckx v Belgium* (1979 – 80) 2 EHRR 330 at paragraph 31). As

Russell J observed in *Re A and B* [2015] EWHC 911 at paragraphs 62–63:

> 62. It is undeniably a basic and fundamental part of these children's identity as human beings that the Applicant/father is their biological father, and that the Applicant/mother played a full part in the process of their conception having selected an egg donor, as she has herself explained to them and as they have grown up believing. The Applicants were their planned and intended parents from before conception and since the day on which they were born. All of these facts, fundamental to these children's very existence and identity are far from those present in adoption. Again I quote from the President's judgment in *Re X*; "Adoption is not an attractive solution given the commissioning father's existing biological relationship with X. As X's guardian puts it, a parental order presents the optimum legal and psychological solution for X and is preferable to an adoption order because it confirms the important legal, practical and psychological reality of X's identity; the commissioning father is his biological father and all parties intended from the outset that the commissioning parents should be his legal parents."
>
> 63. To make adoption orders would effectively deny adequate recognition of the Applicants' and children's identity and their right to family life under Article 8 ECHR, particularly their established identity, their biological and social ties. There is no doubt in this case that as far as these children are concerned their identity has already been formed as the biological children of their father and the commissioning of their conception and birth involving their mother.

(3) Although I have concluded that Parliament cannot have intended that a child in X's position would be excluded from such recognition, without the 'reading down' required by s 3 the provisions s 54 (1), (2) (a) (4) (a) and (5) could prevent a parental order being made.

(4) From the extensive review set out above it is clear such a reading down does not go against the 'grain of the legislation', on the contrary it seeks to provide the order that it is accepted best meets a child born as a result of this type of arrangement. The parental order was specifically created for a child born as a result of a surrogacy arrangement, such as in this case.

(5) No alternative order that can properly and accurately to reflect X's identity, including her relationship with Mr Y. A child arrangement or special guardianship order in favour of Mrs Y would mean Mrs Y secures parental responsibility limited to X's minority, but such an order would not negate X's legal relationship with Mr and Mrs Z, and would result in her biological father remaining a legal stranger to X. Mrs Y could apply for an adoption order, but only as a single applicant, which may give her the status of a legal parent but it will not accurately reflect X's identity in relation to either Mr or Mrs Y. This route would create something of a legal fiction, as s 67 [of the Adoption and Children 2002] states that the effect of an adoption order is the adopted person is to be treated in law as if born as a child of the adopter, which does not reflect the reality of the surrogacy arrangement entered into. In addition, such a course could have a distorting effect as

Mrs A would be an adoptive parent, the register would be marked that way and the tracing of the child's natural parents is still done in the same way as for any other adopted child.

(6) For X her connection with her biological father would be safeguarded in any other birth circumstances naturally or by way of assisted conception, consequently it is discriminatory for the circumstances of her birth to prevent this. A failure of the law to recognise her connection with her biological father as the result of her birth through a surrogacy arrangement amounts to a breach of her Article 14 right to enjoy her Article 8 rights without discrimination on the grounds of birth.

(7) Mrs Y's article 14 rights are also engaged. She is discriminated against based on her relationship status as a widow, rather than being married. In *Re Z (No 2)* Munby P stated at paragraph 17:

> Sections 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with the rights of the Applicant and the Second Respondent under Article 14 ECHR taken in conjunction with Article 8 insofar as they prevent the Applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple.

(8) The consequences of not making a parental order in this case is that there is no legal relationship between X and her biological father; X is denied the social and emotional benefits of recognition of that relationship; X may be financially disadvantaged if there is not legal recognition as the child of her biological father; X does not have a legal reality that matches the day-to-day reality; X is further disadvantaged by the death of her biological father.

(9) The only order that will confer joint and equal parenthood on Mr and Mrs Y is a parental order. Only that order will ensure X's security and identity in a lifelong way respecting both her Article 8 and 14 rights.

95. It is clear that reading down the provisions in s 54 (1), (2) (a), (4) (a) and (5) in this case to permit the parental order to be made would not be incompatible with the 'underlying thrust of the legislation being construed' and the words sought to be implied 'go with the grain of the legislation'. The HFEA sought to provide a comprehensive legal framework for those undertaking assisted conception, with the aim of securing the rights of any child born as a result. That policy and legislative aim remains intact if the order sought in this case is made.

From a policy perspective, there is little to object to in anything that Theis J says, but it marks yet a further departure from the requirements as set out in the legislation.

A more unusual situation faced Theis J in *Re Z and Y (Leave to Withdraw Application for a Parental Order)*.[18] Here, the applicants sought to withdraw their application under s 54,

[18] [2019] EWFC 43.

seemingly on the basis that they were dissatisfied with the length of time that the process was taking and the amount of evidence that they were being asked to provide in relation to the s 54 conditions. As the Judge noted, an applicant needs the court's permission to withdraw an application, and where the application concerns a child's welfare, s 1 of the CA 1989 applies to that decision. Theis J was clearly uncomfortable with the application being withdrawn because of the effects on the two children.

Re Z and Y (Leave to Withdraw Application for a Parental Order) [2019] EWFC 43

THEIS J:

25. As [the children's guardian's] letter so carefully explained to them, the applicants need to be aware of the limitations on their legal relationship with the children as a result of their decision not to proceed with the parental order application. This can have implications both in the short and long term. For example, the applicants will need to consider such matters as what provision is made following their deaths, as their status in relation to their eldest child and the younger children is different. They will need to ensure this difference is properly provided for, to make sure that whatever provision they intend should happen actually takes place.

Theis J granted permission to withdraw the application. An existing child arrangements order remained in force, providing for the children to live with both applicants and thus granting them parental responsibility.[19] As the children were the genetic children of the applicant father, he fell within the provisions of s 12(1) of the CA 1989, and thus the court made a free-standing parental responsibility order in favour of him under s 4.

23. ... He is, however, the father by virtue of his biological connection and the fact that the surrogate was not married. Consequently, he is the father (as there is no-one else who is deemed the father) but does not have parental responsibility by virtue of the CAO made previously by the court, therefore the court is required to make an order under s 4. As Ms Carew points out, it is only a parent who can be given an order under s 4. Ms Y cannot have such an order as her parental responsibility arises only from the child arrangements order, as the surrogate remains the legal mother. This means, as a matter of law, her parental responsibility could be said to be more precarious as it would be discharged automatically on the discharge of the child arrangements order. Whereas parental responsibility under s 4 can only be discharged by an application to the court or the making of an order that affects status, such as an adoption order. As Ms Carew submits there is no difference to the quality of the parental responsibility, but an order under section 4 is a status independent of any other order, such as the child arrangements order.

The surrogate was living in another country and showed no interest in having any role in the children's lives, but she remains the children's legal mother and retains her parental responsibility as a result of the applicants' decision to withdrawn from the court process.

[19] CA 1989, s 12(2).

9.5.3 REFORM OF SURROGACY LAW

On p 679 of the main text, we note the Law Commission's intention to undertake work in relation to reform of the law of surrogacy. A consultation paper was launched in June 2019, and remained open until October 2019.[20] The consultation paper is very comprehensive and contains a number of proposals for reform. Principal amongst these is the suggestion of a 'new pathway' to legal parenthood whereby parties could enter into an agreement, so long as it complied with the relevant formalities as set out, which would enable the commissioning parents to become the child's legal parents from the moment of birth. The Law Commission also proposes that the requirement for a genetic link between the child and at least one commissioning parent be removed, at least in cases where there was a medical justification for doing so. There is also suggestion that a surrogacy register be created, so that children born as a result of surrogacy would be able to obtain limited information about their genetic origins, similar to the register for children born from AID. The consultation paper is worth reading in detail for those interested in this area of law as it develops. Updates will be available via the Law Commission's website.

REFERENCES

Law Commission (2019). *Building Families Through Surrogacy: A New Law*. Consultation Paper 244. <s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/Surrogacy-consultation-paper.pdf>.

[20] Law Commission (2019).