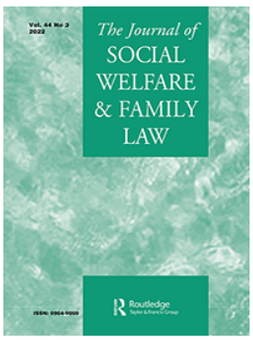

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'Everyone remains the child of someone': a parental order for an adult

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In *X v Z* [2022] EWFC 26 a parental order was granted under section 54 Human Fertilisation and Embryology Act 2008 regarding a surrogacy arrangement undertaken in 1998, meaning that the 'child' involved was an adult at the time of both the application and the making of the order. This represented a novel issue for judicial consideration, and the judgment provides striking evidence of the extent to which the statutory conditions for parental orders 'are being stretched to their limits, or simply cannot be applied' (Joint Consultation Paper, 2019, para. 11.2).

Mr and Mrs X undertook a surrogacy arrangement with Mrs Z through a Californian agency in 1998 and Y was born as result (para. 1). They are Y's biological parents, since both of their gametes were used to create the embryo that was carried by Mrs Z (para. 10). The relevant pre-birth legal process was followed declaring Mr and Mrs X as Y's legal parents under Californian law (para. 12) and a US passport was secured for Y, allowing the family to return to the UK when Y was a few days old (para. 13). The couple were entirely unaware of the requirement for a parental order to transfer legal parenthood in the UK and no application was made (para. 17). Quite remarkably, this position remained until September 2021, when Mrs X was contacted by Mrs Z who had recently been informed of the parental order process (para. 16). Mrs X sought legal advice and the application was made in December 2021, when Y was 23 years old.

The apparent difficulty for the applicants is that section 54(3) provides: 'the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born'. However, as is now well known, since Sir James Munby P's judgment in *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349 parental orders can be granted for applications made after six months, with a 13-year-old and 12-year-old twins in *A v C* [2016] EWFC 42, [2017] 2 FLR 101 being the oldest children where orders had been previously granted. The question for the court in *X v Z* was whether this reasoning was limited to parental order applications raised prior to the child's eighteenth birthday, as is the case for adoption orders under section 49(4) Adoption and Children Act 2002.

Ultimately, Theis J granted the parental order (para. 57), stating: '[t]he fact that Y is now an adult does not, in my judgment, preclude the court from making the order' (para. 55). The judgment emphasises the factual background, observing that 'Mr and Mrs Z's

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legal status is entirely at odds with the intention and expectations of all parties' (para. 44). The judgment quotes extensively from the accounts of Mrs X – 'we had been through a US legal process, are named on Y's birth certificate and are his biological parents' (para. 17) and Y himself – 'my identity is here, as the child of British parents' and '[m]y identity as their legal child is wholly dependent on this application being granted' (para. 45). Crucially, the judgment states:

> 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' (para. 46).

With that understanding of parental orders established, the judgment considers the section 54 conditions; the majority are considered briefly and held to be satisfied (para. 47). Theis J adopts a 'broad and purposeful interpretation' of section 54(4)(a), based upon her judgment in *A v C* [2019] EWFC 22 (para. 48) to hold that Y's home was 'with the applicants' at the time that the application and order were made (para. 49). While Y is not currently living with Mr and Mrs X, this was held to be satisfied because Y had lived with them during his childhood, continues to spend time with them, and maintains close contact with them (paras. 48 and 49).

Thereafter, the judgment focuses on section 54(3) (paras. 50–55), emphasising that '[n]o other person would be prejudiced by this order being made' (para. 51). The judgment notes the benefits of the parental order. For Mr and Mrs X, 'it would provide the lifelong security of their parental relationship with Y' (para. 52), 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' (para. 53), and for Mrs Z and her husband, 'it will divest them of the legal parental relationship they retain' (para. 54). The reasoning is heavily influenced by existing case law, particularly *Re X*, with Theis J commenting: '[t]here is nothing in the analysis in *Re X* that seeks to suggest making parental orders are limited to children' (para. 55), and '[t]his perhaps reflects that as a matter of fact everyone remains the child of someone, even when they become adults' (para. 55). As with *Re X*, the decision is based upon statutory interpretation, but Theis J observes that if her interpretative approach is incorrect, then 'HFEA 2008 should be 'read down' in a manner that would allow the parental order to be granted, as this would ensure that, 'Y's identity rights are properly recognised' (para. 56).

There are three points worth emphasising about *X v Z*. First, this decision represents a significant further 'stretching' of section 54(3), confirming (if such confirmation was required) that 'there is now no real-time limit in the law' (Horsey 2016, p. 610). However, Theis J reiterates the point made in *Re X* that each case depends on its own facts, in particular the reasons for the delay in making the application (para. 25). In this judgment and *Re X*, the reason for the delay is lack of knowledge of the law. This raises the question as to whether there would be any circumstances where a parental order would not be granted based upon the reasons for the delay. Given the judicial approach to the authorisation of payments beyond 'reasonable expenses' under section 54(8), it is difficult to conceive of such circumstances (See Horsey 2016, pp. 610–612).

Second, as we have argued, 'the judgments in the parental order cases suggest that reflecting the "identity" of the child is crucial to the determination of legal parenthood' (Brown and Wade 2022, p. 11). This decision illustrates the centrality of 'identity' to

parental order applications, given Theis J's repeated comments about Y's 'identity' (para. 46) and his 'identity rights' (paras. 53 and 56). 'Identity' is particularly significant to this decision because Y's age means that the 'welfare of the child', which is the 'paramount consideration' in previous judgments, cannot serve the same function in this judgment. The focus on the impact of not granting parental orders on the 'identity' of children leads to the lack of judicial appetite for strict application of the section 54 conditions, and the reticence to engage with justifications for the requirements if not explicitly stated by Parliament. In *Re X*, Munby P observed that King J's statement in *JP v LP and others* [2014] EWHC 595 (Fam), [2015] 1 FLR 307, that the purpose of section 54(3) is 'to provide for the speedy consensual regularisation of the legal parental status of a child's carers' following surrogacy, was 'little more than speculation' and, even if this were the policy rationale, 'it surely does not require section 54(3) to be read as meaning that any delay, however trivial, is to be fatal' (para. 55). The reason for this is that 'a parental order goes not just [to] status but to identity as a human being' (para. 64). Leaving aside the validity of his criticism of King J's suggested policy justification for section 54(3), it is notable that Munby P referred to delays 'however trivial', but over time this has been interpreted to include extremely protracted delays, including the delay of 23 years in *X v Z*, which is difficult to describe as 'trivial'.

Third, it has become trite to note the pressing need for law reform shown by these decisions. As the judgment notes (para. 55), the Law Commissions' 2019 Consultation Paper proposed the abolition of a time limit for its 'reformed parental orders', which are being retained for certain surrogacy arrangements (Joint Consultation Paper, 2019, chapter 11). Moreover, its proposed 'new pathway' would assign legal parenthood to intended parents from birth, eliminating the need for a time limit for other surrogacy arrangements (Joint Consultation Paper, 2019, chapter 13). We hope that such reforms are adopted, thereby providing greater clarity and coherency, limiting the need for the judicial creativity seen in *X v Y* and in other cases interpreting the section 54 conditions, and establishing a legislative framework which reflects the operation of the law in practice.

Disclosure statement

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