

English and Scottish Adoption Orders and British Parental Orders After Surrogacy: Welfare, Competence and Judicial Legislation

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This article seeks to explore two questions. First, given that the legal effects of an adoption order and a parental order made under s. 54 of the Human Fertilisation and Embryology Act 2008 are virtually identical while the statutory conditions for each are different, would the granting of one in circumstances designed for the other create any genuine problem and do the differences in aims justify the different conditions for each order? Secondly, when is it right for the court to override statutory conditions on the ground that the welfare of the child requires the order to be made? Does welfare “trump” all or only some conditions, and if only some then how do we distinguish between competency determining conditions and those subject to welfare considerations? Both questions arise from a decision of the President of the Family Division, in which the judge held (i) that the child’s welfare overrode a statutory requirement, and (ii) that the use of the adoption legislation, which contained no such

requirement, would be entirely unsuitable for the circumstances in which a parental order was sought. It will be suggested that this approach is an unnecessary subversion of the expressed will of Parliament; it will be concluded that parental orders, by avoiding the policy balances of adoption, are themselves dangerous and ought to be abolished. These issues will be explored in the context of both Scots and English law because parental orders, though designed to reflect the different adoption rules in each of these jurisdictions, contain elements traced to English law that fit imperfectly into the Scottish system.

Introduction

Most legal systems allocate parenthood of children according to rules designed to reflect the natural connection between progenitor and child while at the same time taking account of the messy realities of life; many legal systems also have a process to transfer parenthood from those identified as parents by the normal rules to those who seek to be responsible for the child's upbringing. In the United Kingdom legal systems, there are two such processes. First, there is adoption, wholly a creature of statute, and governed in Great Britain separately by the Adoption and Children Act 2002 (for England and Wales) and the Adoption and Children (Scotland) Act 2007.¹ Secondly, there are parental orders after surrogacy, likewise creatures of statute, and governed throughout the United Kingdom² by s.54 of the unitary Human Fertilisation and Embryology Act 2008³ and its associated regulations.⁴

Both orders place the child's welfare at the heart of the court's consideration,⁵ but with each it is important to remember that welfare is not relevant to every question before the court. Welfare has no role to play in resolving disputes of either fact or law: questions of who the child's parents are and whose consent, therefore, is

¹ Hereinafter respectively "the 2002 Act" and "the 2007 Act". Simply for ease, this article will not be examining the separate adoption regime in Northern Ireland.

² The legislation is a matter reserved to Westminster and so the Scottish Parliament currently has no power to amend it: Scotland Act 1998, Sch 5, part 2, para J3.

³ Hereinafter "the 2008 Act".

⁴ Primarily the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010/985) (hereinafter "the 2010 Regulations").

⁵ 2002 Act, s.1(2); 2007 Act, s.14(3), and applied to parental orders by the 2010 Regulations, Schs 1 and 3.

required to the making of either order, and whether that consent has been given, or is unconditional, cannot be resolved by application of the welfare test. Nor can the child's welfare determine the very competency of the application: issues such as title to seek the order, or the jurisdiction of the court, are determined on their own terms, irrespective of the effect of their resolution on the child's welfare.⁶ The so-called "threshold test" serves, in public law cases, to emphasise the crucial difference between the questions "Can the order be made?" (in answering which the child's welfare is irrelevant) and "Should the order be made?" (in answering which welfare is central).⁷ That distinction is equally crucial in private law actions such as parental order applications, and the failure to keep it in mind lies behind the difficult decision of Sir James Munby, President of the Family Division, in *Re X (A Child)(Surrogacy: Time Limit)*.⁸

Here, a parental order was made over of a child who was almost 3 years old, notwithstanding the explicit and unambiguous rule in s.54(3) of the 2008 Act that "the applicant must apply for the order during the period of 6 months beginning with the day on which the child is born". Munby P held that Parliament could not have intended to create an absolute bar on parental orders after the child reached the age of 6 months, even in circumstances in which making the order was clearly in the child's best interests. It followed, he held, that the word "must" required to be interpreted purposively in such a way as furthers the child's welfare.⁹ This conclusion, though not without precedent,¹⁰ was in the circumstances unnecessary

⁶ True it is that Brussels II Revised, art. 15, allows the child's welfare to be a factor in determining whether to transfer jurisdiction once established, but there "the question is not what eventual outcome to the case will be in the best interests of the child but whether the transfer will be in her best interests": per Lady Hale in *Re N (Children)* [2016] UKSC 15 at [57]. In any case, Brussels II Revised does not apply to adoption or "the establishment ... of a parent-child relationship" (art.3(a) and (b)), which surely includes parental orders.

⁷ That welfare only comes into play once the statutory threshold has been crossed was emphasised by Munby P in *Re N (Children) (Adoption: Jurisdiction)* [2016] 2 WLR 713 at [30]-[31] and by the Court of Session in *R v Stirling Council* [2016] CSIH 36 at [13]. This is also true of the question of proportionality: *Re B (Care Proceedings; Appeal)* [2013] UKSC 33 [2013] 2 FLR 1075 and *Re W* [2016] EWCA Civ 793, esp. at [68] – [69].

⁸ [2014] EWHC 3135 (Fam) [2015] 1 FLR 349.

⁹ See especially Munby P at [31]-[33].

¹⁰ Munby P cites various cases in which statutory time limits have been extended by English judges. Without an in-depth analysis of wide-ranging case law it is not possible to say definitively whether the Scottish judges are less inclined than their English counterparts to depart from statutory time limits, but it is relevant to note that the Inner House of the Court of Session in *Simpson v Downie* 2012 CSIH 74 at [13] described the statutory time limit in that case (which they refused to extend) as one of "jurisdictional competency".

given that if the surrogacy legislation were not able to achieve the transference of parenthood required by the child's welfare, exactly that transference could nevertheless be achieved through the adoption legislation, as happened for example in *C v S*,¹¹ the only surrogacy case to appear in the Scottish law reports.¹² But this solution did not commend itself to Munby P, who dismissed adoption as "not an attractive solution given the commissioning father's existing biological relationship with X".¹³ He was followed in this by Theis J in *AB (Parental Order: Consent of Surrogate Mother) v CT*,¹⁴ who held, adopting the President's language, that "the applicants and the children ... will suffer ... *immense and irremediable prejudice* ... if this application is stopped in its tracks."¹⁵

The decision in *Re X (A Child)*, which has been followed in numerous cases since,¹⁶ raises the two questions which this article seeks to address. First, if the condition in s.54(3) requires to be interpreted in light of the child's welfare, does this also follow for the other conditions in s.54? Are Mason and McCall Smith right in concluding that "the trumping principle of the welfare of the child is sweeping away all the detailed attempts in the law to regulate [surrogacy]"?¹⁷ Secondly, are the circumstances that properly found an adoption application so different from the circumstances behind a parental order application that granting one in circumstances for which the other was designed does indeed constitute "immense and irremediable prejudice" for the child? Are the legislative differences in the two orders justified by their different aims? This second question is complicated somewhat by the fact that the adoption law in England and Wales is different from the adoption law in Scotland,

¹¹ 1996 SLT 1387.

¹² There have been more cases. The National Records of Scotland show a handful of parental orders being made each year since the first in 2003. Between 2003 and 2008 there were 15 orders in total; between 2009 (when eligibility was extended to same-sex and unmarried couples) and 2014 there were 52 in total.

¹³ [2014] EWHC 3135 [2015] 1 FLR 349 at [7].

¹⁴ [2015] EWFC 12 [2015] EWFC 12 [2016] 1 FLR 41. See also *Re A (A Child)* [2015] EWHC 911 at [56] – [69] and *Re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73 [2015] 1 WLR 4993 at [16] and [36].

¹⁵ [2015] EWFC 12 at [40] (emphasis added to the phrase first used by Munby P in *Re X (A Child)* at [65]).

¹⁶ *AB & CD v CT* [2015] EWFC 12 [2016] 1 FLR 41 (twins almost 4 years old); *A v X* [2015] EWHC 2080 (twins 3 years old); *Re A and B (Children)* [2015] EWHC 911 (children 5 and 8 years old).

¹⁷ J Mason and A McCall Smith, *Law and Medical Ethics* (10th edn, 2016), para.8.107.

while the rules for parental orders purport to be the same, and so a certain amount of comparison between the adoption laws in these two legal systems is unavoidable.

Legislative History of Parental Orders

Parental orders were created by the UK-wide statute, the Human Fertilisation and Embryology Act 1990. Governmental intention in introducing these orders is impossible to determine, because the policy objective changed, without explanation. The Bill that became the 1990 Act had no provision for parental orders throughout most of its Parliamentary passage. Indeed, at its Third Reading in the Upper House, the Lord Chancellor, Lord Mackay of Clashfern, reiterated Government policy against the development of surrogacy as an acceptable practice and stated that where it did occur the commissioning couple “will have to adopt the baby if they want to become its legal parents”.¹⁸ This remained the approach as the Bill made its way through the House of Commons until the final stage. Earlier, at Second Reading in the Lower House, an MP had raised the case of two of his constituents whose gametes had been used to create an embryo for implantation into a surrogate. On being told that they would need to adopt the child they were affronted: “it is like buying one’s own possessions back”.¹⁹ With neither explanation nor debate, but apparently in response to this intervention, a Government amendment at Report Stage²⁰ was accepted and became s.30 of the Act, which was passed the next day.

The regulatory sections of the 1990 Act were substantially amended, and the parenthood provisions replaced, by the 2008 Act. Section 30 was re-enacted as s.54, and it was only the changes (the expansion of eligibility to seek a parental order to same-sex couples and unmarried couples) that were discussed at Committee stage.²¹ An amendment to further extend eligibility to single people was resisted by the Government. The minister distinguished surrogacy from adoption: with the former but not the latter the child is brought into existence expressly for the purpose sought to be achieved by the court order. The magnitude of the surrogacy arrangement and the responsibilities it generates led the Government to conclude

¹⁸ HL Deb. 20th March 1990, vol. 517 cols. 206-207.

¹⁹ HC Deb, 2nd April 1990, vol. 170 col. 945.

²⁰ HC Deb. 20th June 1990, vol. 174 col. 1041.

²¹ HC Public Bill Committee, 12 June 2008, cols. 246 – 252.

that these responsibilities are best taken on by a couple.²² The amendment was withdrawn and the 2008 Act passed with s.54 as drafted by the Government, identical to s.30 of the 1990 Act other than with an extended definition of “couple” eligible to apply for a parental order.

The policy behind the introduction and re-enactment of parental orders remains, therefore, obscure but it would seem that Parliament intended a mechanism to avoid the need for adoption when at least one of the commissioning couple is the genetic parent. In addition, a desire to protect the surrogate mother is both inherent in the legislation itself, with the 1990 Act amending the Surrogacy Arrangements Act 1985 to make any such arrangements unenforceable,²³ and apparent from what few Governmental statements there are.²⁴ Beyond these considerations, the speculations of either judges or academic commentators on what might be the purpose of any part of the parental order legislation remain merely that. But it is noticeable that the welfare of the child was never once mentioned in any Governmental or Parliamentary statement about parental orders. They were designed to address adults’ wishes rather than children’s welfare.

Similarities Between Adoption Orders and Parental Orders

At first glance, the similarities between the two orders are striking, and were clearly designed to be so. Many of the statutory rules governing adoption are applied with no more than terminological modifications to parental orders. The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 apply many of the crucial provisions in the adoption legislation to parental orders:²⁵ examples include s.46 of the 2002 Act and s.35 of the 2007 Act, which set out the effect of making an

²² *Ibid.*, col. 249.

²³ Surrogacy Arrangements Act 1985, s. 1A, inserted by s.36 of the 1990 Act. Both the existence of s.27 of the 1990 Act (now s.33 of the 2008 Act), under which the surrogate mother is always recognised as mother, and the absence in s.30 (now s.54) of any power to dispense with her consent, were designed to ensure that she retains control and cannot be held to any prior agreement to give up her child.

²⁴ See Lord Mackay at HL Deb. 20th March 1990, vol. 517 cols. 205-206 when he emphasised that unenforceability was necessary for the surrogate’s sake.

²⁵ These provide not only that specified provisions in the 2002 and 2007 Acts apply to parental orders (Schs 1 and 3 for England and Wales and for Scotland respectively) but also that various references in other legislation to adoption orders are to be read as including parental orders (Sch 4).

adoption order; and s.67 of the 2002 Act and s.40 of the 2007 Act, which provide that an adopted person is to be treated in law as if born as the child of the person(s) who obtained the order and no-one else.²⁶ These provisions ensure that the overall effect of both orders is virtually identical: a radical transference not only of the responsibility and right to bring up the child but also of parenthood itself from one set of parents (commonly called the “birth parents” in adoption and the “surrogate mother” and her partner²⁷ in surrogacy) to another. In *G v G (Parental Order: Revocation)*²⁸ Hedley J described the effect of a parental order as ensuring that each applicant is “in the position of an adopted or married parent with lifelong status and inalienable parental responsibility.” He went on: “Like an adoption a parental order both confers lifelong status on the applicant and deprives those who until then had parental status of that status on a lifelong basis.”²⁹ The decision in that case, that neither order, once made, is (generally speaking)³⁰ revocable, except by the making of an adoption order, or a further adoption order,³¹ serves to emphasise both the unique nature of the two orders and their unity of purpose.

Not only the effect of the two orders but also the factors to be taken into account by the court in considering whether to make the order are deliberately the same, with s.1 of the 2002 Act and s.14 of the 2007 Act being applicable to both orders.³² The most important element of these sections is that the need to safeguard and promote the welfare of the child throughout the child’s life is the court’s paramount

²⁶ The consequences are life-long and not limited to upbringing: *Forman v Advocate General for Scotland* [2016] CSOH 94.

²⁷ Occasionally referred to as “the surrogate father”: see *Re X (A Child)(Surrogacy: Time Limit)* [2014] EWHC 3135 [2015] 1 FLR 349 at [6]. Terminological ambiguity as to who is the real “surrogate” mother has long been recognised, but is replicated with men too. *Re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73 [2015] 1 WLR 4993 has the law reporter (but not the judge) using “surrogate father” to describe the commissioning (and genetic) father.

²⁸ [2012] EWHC 1979 [2013] 1 FLR 286 at [29].

²⁹ *Ibid* at [33].

³⁰ Revocability of adoption orders is possible in exceptional cases: as a recent example, see *PK v K* [2015] EWHC 2316.

³¹ The Scottish provision allowing an adopted child to be further adopted (2007 Act, s.28(6)) is applied in modified form by the 2010 Regulations. The modification is inept and makes sense only by reading it to allow an adoption order to be made over a child who is subject to a parental order. The equivalent English provision (2002 Act, s.46(5)) is not applied to parental orders. The application in Scots law may simply be for the avoidance of doubt, for there seems no basis upon which an English court could reject an adoption application on the ground that the child is already subject to a parental order.

³² 2010 Regulations, Schs 1 and 3.

consideration. To which issues that principle applies will be the subject of much of the discussion below.

Likewise the court rules governing the application processes show close similarities. In Scotland the court, for both types of application, must appoint a curator *ad litem* and a reporting officer,³³ who must investigate and report on similar facts, except that in applications for parental orders there is no requirement for the curator to obtain particulars on the home circumstances of the petitioners or of the child's and petitioners' racial origin, cultural and linguistic background. The equivalent rules for England and Wales are found in the Family Procedure Rules 2010,³⁴ which require that either a parental order reporter or an adoption reporting officer be appointed.³⁵ And the 2010 Regulations provide for the establishment and maintenance of parental order registers on the same terms as for adoption registers.³⁶

Dissimilarities Between the Two Orders

In terms of process, the major difference between adoption orders and parental orders is that local authorities have a central role in adoption that is entirely missing with parental orders. All local authorities are obliged to maintain adoption services,³⁷ while there is no such "service" in relation to surrogacy and agencies to assist parties seeking to utilise surrogacy, such as they exist, are entirely private and charitable. Local authorities are also involved in the court process in relation to adoption: where a child has been placed by an adoption agency (as all local authorities are) a report by the agency must be submitted to the court;³⁸ if the child has not been so placed (that is to say, typically, in cases of step-parent adoptions) notice of the application

³³ Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997/291 (S.19)), r.2.50 for parental orders and Sheriff Court Adoption Rules 2009 (SSI 2009/284), r.12 for adoption orders.

³⁴ SI 2010/2955. Part 13 governs applications for parental orders and Part 14 for adoption orders.

³⁵ Family Procedure Rules, r.13.5(1)(a)(iii); r.14(6)(1)(iii) and (iv).

³⁶ 2010 Regulations, Sch 1 adapting ss.77 and 79 and Sch 1 paras 1 and 4 of the 2002 Act; Sch 3, adapting ss.53 and 55 and Sch 1 paras 1, 2 and 4 of the 2007 Act. Revealingly, the National Records of Scotland classify parental orders as a separate "Type of Adoption" (the other "types" being "Regular" and "Foreign"): see NRS *Vital Events Reference Tables*.

³⁷ 2002 Act, s.3; 2007 Act, s.1.

³⁸ 2002 Act, s.43; 2007 Act, s.17.

must be given to the local authority,³⁹ which must then investigate the matter and submit a report of that investigation to the court.⁴⁰ The transference of parenthood through adoption, even in the private setting of family reconstitution, is perceived to give the state an interest, manifested in the responsibilities of the local authority. The application for a parental order after surrogacy, however, is more purely a private law process, and subject therefore to far less state oversight. This is seen once again by comparing the heavily regulated practice of international adoption (including an absolute ban on commercial adoption⁴¹) with the virtually complete lack of regulation of international surrogacy.⁴²

Dissimilarities Between the Two Jurisdictions

The design of the 2010 Regulations implies that any differences in the approach to parental orders between Scotland and England and Wales will be explained by their differing adoption rules, but on at least two occasions the equivalent rules are included in the 2010 Regulations for Scotland but not for England and Wales. First, in Scotland parental orders may be subject to such terms and conditions (typically in relation to post-order contact) as the court thinks fit because the adoption rule to this effect is applied.⁴³ In England and Wales on the other hand the equivalent general power to impose conditions on adoption orders that previously existed⁴⁴ was replaced in the 2002 Act by a requirement that the adoption court must consider whether there should be arrangements for allowing any person contact with the

³⁹ 2002 Act, s.44, 2007 Act, s.18.

⁴⁰ 2002 Act, s.44, 2007 Act, s.19. For the information to be contained in these reports see the Sheriff Court Adoption Rules, rule 8(4) (for Scotland) and rule 14.11 of the Family Procedure Rules 2010 (for England).

⁴¹ Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 4(c)(3).

⁴² The nearest English law has come to regulating international surrogacy is *Re L (Children)* [2015] EWFC 90 where Russell J required that applications for parental orders over children born abroad be allocated to judges of the High Court. An Experts' Group at the Hague Conference on Private International Law on the issue determined to focus its attention on recognition rather than international regulation: see para. [16] of the *Report of the February 2016 Meeting of the Experts' Group on Parentage/Surrogacy*, available from the Hague Conference's website, under "The Parentage/Surrogacy Project".

⁴³ 2007 Act, s.28(3), applied to parental orders by the 2010 Regulations Sch 3.

⁴⁴ Adoption Act 1976, s.12(6).

child:⁴⁵ that provision, however, was *not* applied to parental orders by the 2010 Regulations.⁴⁶ It follows that parental orders are always unconditional in England and Wales (unlike adoption orders), but in Scotland may (like adoption orders) be conditional.

Secondly, in Scotland the rules permitting adopted persons over the age of 16 to obtain information about themselves contained in the register of births are applied to parental orders.⁴⁷ In contrast, the English mechanism to allow the tracing of birth families, the Adoption Contact Register whereby persons over the age of 18 may be registered as “expressing their wishes as to making contact with their relatives”,⁴⁸ has not been replicated for parental orders. The subject of a parental order wishing to trace their genetic parent in England will have to rely on the rules on disclosure of donor information,⁴⁹ but these rules do not accommodate the identification of the (non-genetic) birth mother. This means that the subject of a parental order can always trace their birth mother in Scotland but may do so in England and Wales only if the birth mother is also the genetic mother.

The curious result of these differences between the jurisdictions is that parental orders are closer to adoption orders in Scotland than in England. This may go some way to explaining the Scots lawyer’s bemusement at the English courts’ antipathy to using adoption as a mechanism to achieve the aim of a surrogacy arrangement.

Conditions for Making a Parental Order

The very structure of s.54 serves to obscure the nature of its terms, and in particular whether the conditions it lays down are absolute or are qualified by welfare considerations.

Subsection (1) provides as follows:

⁴⁵ 2002 Act, s.46(6).

⁴⁶ The 2010 Regulations, Sch 1 para 1 applies only the rules in s.46(1) – (4) of the 2002 Act to parental orders. Likewise, ss.51A and 51B, which concerns post-adoption contact, do not apply to parental orders.

⁴⁷ 2007 Act, s.55(1)-(4), applied by 2010 Regulations, Sch.3.

⁴⁸ 2002 Act, s.80.

⁴⁹ Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004/1511).

“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 (8) are satisfied.”

Paragraphs (a) and (b) contain what look like competency determining conditions- precedent which must be satisfied before the court has jurisdiction to examine the merits of the case, but are they of a different nature from the conditions in subsections (2) to (8)? If not, why are they structurally separated? It is tempting to see subsection (1) as simply setting out the factual circumstances in which it is envisaged a parental order will be suitable, but the terms contained therein have not been treated by the courts any differently from the conditions in subsections (2) to (8). Probably all that can be done is to treat each condition, wherever it appears in s.54, as a separate condition which may or may not be as absolute as it sounds.

The Time-limit Condition

Though not the first mentioned, it is appropriate to start with the condition laid down in s.54(3). The major difference at the heart of *Re X (A Child)(Surrogacy: Time Limit)*⁵⁰ between adoption and parental orders concerned the time-limit for the making of the order. With adoption the time-limit for the application to be made is the child’s eighteenth birthday.⁵¹ With parental orders, the 2008 Act requires that the application “must” be made within six months of the child’s birth,⁵² though this rule

⁵⁰ [2014] EWHC 3135 (Fam) [2015] 1 FLR 349.

⁵¹ 2002 Act, s.49(4); 2007 Act, ss.28(4). The English Act (but not the Scottish) additionally provides that the subject of the adoption order must not have reached their 19th birthday by the time the order is made: 2002 Act, s.47(9).

⁵² 2008 Act, s.54(3).

does not apply when subsection (11) does.⁵³ Now, the normal canons of construction provide that where one exception is specified to a statutory rule there are likely to be no others,⁵⁴ but that is not the approach that the English court has taken in relation to s.54(3) and, on numerous occasions, starting with Munby P's decision in *Re X*, applications have been allowed to proceed beyond the specified time-limit even although the case is not within the single stated exception, on the ground that Parliament's purpose with s.54 was to ensure the child's welfare.⁵⁵

There are two major flaws in Munby P's reasoning. First, it effectively leaves the provision meaningless, contrary to another well-established rule of statutory interpretation, that statutory language needs to be construed in such a way as gives it some substantive effect.⁵⁶ To hold that "must" means "may" means that "must" means nothing at all. Secondly, it asserts without establishing that the furtherance of the child's welfare is the predominant purpose of the condition in s.54(3) – if not s.54 as a whole. This purpose was not reflected in the minimal parliamentary debates on the section, which focused as we have seen more on the emotional needs of the commissioning couple and the imperative to protect the surrogate mother from exploitation. It seems more likely that the time limit was included simply to reflect the typical fact scenario of surrogacy: a child being handed over to the commissioning couple shortly after birth. In that scenario it is to the benefit of all parties (and not just the child) that their status, vis-à-vis each other, be regularised without delay.⁵⁷

⁵³ Section 54(11) is a transitional provision, allowing an application to be made in relation to a child of any age, so long as it is made within six months of the provision coming into force and is made by a couple who would not have been eligible to make the application before then. The exception is now, of course, spent.

⁵⁴ F Bennion *Statutory Interpretation* (6th edn), p.1130 sets out s.394 of his Code: "The principle *expressio unius est exclusio alterius* is often applied to words of exception," though he does go on to suggest that with stated exceptions "particular caution" is needed in applying the *expressio unius* principle for fear of attributing "too much rationality to Parliament".

⁵⁵ See n.16 above.

⁵⁶ Bennion p.515 sets out s.198 of his Code "It is a rule of law that the legislator intends the interpreter of an enactment to observe the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void)". He elaborates in his Comment: "An Act must be construed so that its provisions are given force and effect rather than being rendered nugatory". Note the imperative.

⁵⁷ Munby P in *Re X (A Child)(Surrogacy: Time Limit)* at [50] speculated that Eleanor King J's conclusion to this effect in *JP v LP and others (surrogacy arrangement: wardship)* [2014] EWHC 595 [2015] 1 All ER 266 at [30] was "little more than speculation".

The time limit in adoption reflects and indeed furthers the very purpose of adoption itself – to ensure an appropriate upbringing for *a child*. As such, there is no possibility of the court interpreting the rule to allow an adoption order to be made over an adult.⁵⁸ It follows that an adoption order made after the child has become an adult suffers from a radical incompetency and cannot stand.⁵⁹ With an application for a parental order, the child older than six months remains a child with many years of upbringing still required, though that could equally be assured by adoption, at the cost only of the self-defined hurt of those who would be parents.

The “Couple” Condition

It has been a feature of parental orders since their creation that they must be applied for by two people,⁶⁰ acting together.⁶¹ Single applications for adoption orders, on the other hand, have always been possible.⁶² While this includes both the single stranger and the natural parent of the child (if certain conditions are satisfied),⁶³ the most common form of single person adoption is the so-called “step-parent adoption”. Originally, step-parent adoption could be effected only by a joint application with the parent, who had to give up their natural parental responsibilities and parental rights and reacquire them through the adoption order.⁶⁴ This clumsiness was removed in Scotland by s.97 of the Children (Scotland) Act 1995, which amended the then extant legislation to permit a sole application to be made by a step-parent, with their spouse retaining their own natural parenthood. The 2007 Act completed the process by making it incompetent for a joint application to be made when one or both

⁵⁸ In *Re B (A Minor) (Adoption Order: Nationality)* [1999] 2 AC 136 the House of Lords allowed an adoption order to stand which had been made shortly before the child’s 18th birthday (to confer British nationality). Lord Hoffmann accepted that an adoption order ought not to be made in circumstances in which the applicants would not thereafter exercise any parental responsibility.

⁵⁹ *Cameron v MacIntyre’s Executor* 2006 SLT 176.

⁶⁰ Human Fertilisation and Embryology Act 1990, s.30(1); 2008 Act, s.54(1).

⁶¹ Since the 2008 Act, s.54(2), the applicants must be married, civilly partnered or two persons who are living as partners in an enduring family relationship and are not within the prohibited degrees of relationship in relation to each other.

⁶² See now s.51 of the 2002 Act and s.30 of the 2007 Act. The prior legislation in both jurisdictions contained restrictions on applications by single men but these were not, in principle, incompetent.

⁶³ 2002 Act, s.51(4); 2007 Act, s.30(7).

⁶⁴ See *A and B, Petitioners* (1931) 47 Sh. Ct. Rep. 255.

applicants is the natural parent of the child.⁶⁵ Such joint applications remain competent in England and Wales,⁶⁶ though (as in Scotland) the parent's partner may now also apply singly.⁶⁷

Most adoption applications in both jurisdictions are made by couples. Originally a joint adoption application could be made only by a married (necessarily opposite-sex) couple⁶⁸ and this was reflected in the original rules relating to parental orders.⁶⁹ The current adoption legislation extended this to include cohabiting and same-sex couples,⁷⁰ though the definition of cohabiting couple in the Scottish Act ("persons who are living together as if husband and wife [or as civil partners] in an enduring family relationship") is rather narrower than in the English Act ("two people (whether of different sexes or the same sex) living as partners in an enduring family relationship"): it would seem that the Scottish court could not make an adoption order, as the English court did in *Re T and M (Adoption)*,⁷¹ in favour of a stable couple who happened not to live together. The definition of "couple" in the UK 2008 Act adopts the English rather than the Scottish formulation, with the result that the Scottish court, unable to make an adoption order when the couple live apart, would nevertheless be able to follow *DM v SJ*⁷² where the English court made a parental order in favour of an enduring couple who did not live together. It is to be noted that Hedley J in *Re T and M (Adoption)* dealt with the question of whether the applicants were a qualifying couple explicitly before turning to considerations of welfare, which governed the question of whether to make the order only once it had been determined to be competently sought. Likewise in *DM v SJ* Theis J described the question of whether the couple were living as partners in an enduring family relationship as "a question of fact",⁷³ which is not of course answered by reference to the child's welfare. It follows that this condition is, as the time-limit condition was not,

⁶⁵ 2007 Act, s.29(1)(b).

⁶⁶ 2002 Act, s.50.

⁶⁷ 2002 Act, s.51(2). Section 46(3)(b) provides that an adoption order in favour of the partner of a parent does not affect the parental responsibility of that parent.

⁶⁸ Adoption (Scotland) Act 1978, s.14; Adoption Act 1976 (England and Wales), s.14.

⁶⁹ Human Fertilisation and Embryology Act 1990, s.30(1).

⁷⁰ 2002 Act, s.144(4); 2007 Act, s.29.

⁷¹ [2010] EWHC 964 (Fam) [2011] 1 FLR 1487.

⁷² [2016] EWHC 270 (Fam).

⁷³ [2016] EWHC 270 at [38].

a competency determining condition-precedent. If it is not satisfied then a parental order may not be made, irrespective of the effect on the child's welfare.

That this is so was affirmed in *Re Z (A Child) (Surrogate Father: Parental Order)*,⁷⁴ where the rule excluding single applicants for a parental order was challenged as a discriminatory interference with a single person's right to private and family life as protected by articles 8 and 14 of the European Convention on Human Rights. The applicant, a single man who became the father of a child born through a surrogacy arrangement in the USA, asked the court to "read down" the provisions in s.54(1) and (2) and allow his application to proceed. Munby P refused to do so, on the ground that the limitation of parental orders to couples had been a clear and consistent feature of the legislation since its enactment, just as the absence of any such limitation had been a clear and consistent feature of the adoption legislation. This was taken to signify a very deliberate policy difference between the two orders, confirmed by the Parliamentary debates referred to earlier, and as such the Human Rights Act 1998 could not be used to interpret s.54 of the 2008 Act in any other way than its literal meaning. It followed that any application by a single person had to be dismissed as incompetent, irrespective of the merits of the case.

The same judge did, however, subsequently hold that the limitation of parental orders to couples was incompatible with article 14 taken with article 8 of the ECHR.⁷⁵ This decision was based solely on the discrimination argument and, interestingly, Munby P accepted that there was no breach of article 8 alone since family life would be sufficiently protected by the making of an adoption order. Though inevitable in light of existing ECHR jurisprudence,⁷⁶ this conclusion very much calls into question the same judge's assertion in *Re X (A Minor) (Surrogacy: Time Limit)* that adoption would not be a satisfactory solution. Of course, protecting the child's welfare is different from protecting its family life but the point remains good that welfare comes into play only when the order sought has been established to be competently applied for.

⁷⁴ [2015] EWFC 73 [2015] 1 WLR 4993.

⁷⁵ *Re Z (A Child)(No2)* [2016] EWHC 1191 [2016] 2 FLR 327.

⁷⁶ The European Court of Human Rights had found no infringement of family life when France refused to recognise the parentage of a commissioning couple in *Menesson & Labasse v. France* (App. No. 65192/11 and 65941/11, judgment 26th June 2014) because the parties' family life was respected in other ways by French law.

The Consent Condition

A parental order is an order that is designed to follow a surrogacy arrangement, under which the surrogate mother has agreed to become pregnant in order to hand over her child at birth to the commissioning couple. But until the order is made she remains in law the mother,⁷⁷ and her original agreement is not enforceable.⁷⁸ In order to ensure that her fulfilling her side of the bargain remains completely voluntary, the court must be satisfied that she has freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.⁷⁹ The protection of the mother's free will is reinforced by the fact that there is no power of the court to dispense with her (or anyone else's) consent. And she has the same protection as is found in the adoption legislation that her agreement will be ineffective if given less than six weeks after the child's birth.⁸⁰

As well as the mother's consent, any other person who is the parent of the child (unless an applicant) must consent also. The mother's husband or partner will be deemed parent by other provisions in the 2008 Act, so long as he or she consented to the mother's impregnation: without his or her additional consent to the parental order that order simply cannot be made,⁸¹ irrespective of the merits of the case. So, as with the "couple" condition, the obtaining of the necessary consents is a condition- precedent that must be satisfied before the court can turn its attention to the welfare of the child. As Russell J put it in *A and B v X and Z* "the lack of consent of X [the mother] to a parental order ... means that there is no question of any action under the HFEA for a parental order which had been the applicant's original intention when they entered into a surrogacy agreement with X".⁸²

The same is true for adoption orders, though the major difference with adoption is that judicial dispensation of consent is possible⁸³ – and indeed is the overwhelming

⁷⁷ 2008 Act, s.33.

⁷⁸ Surrogacy Arrangements Act 1985, s.1A.

⁷⁹ 2007 Act, s.54(6).

⁸⁰ 2008 Act, s.54(7): cf 2002 Act, s.52(3); 2007 Act, s.31(11).

⁸¹ See for example *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam) [2008] 1 FLR 1047.

⁸² [2016] EWFC 34 at [7], repeated at [84].

⁸³ 2002 Act, s.52; 2007 Act, s.31.

source of dispute with opposed adoptions – while dispensation is not possible under the parental order legislation. Only if a parent cannot be found⁸⁴ or is incapable of giving agreement is their agreement not necessary.⁸⁵ English courts have occasionally referred to their finding that a parent cannot be found as a ground to “dispense” with parental agreement,⁸⁶ (as it would be with adoption applications) but in principle if a parent cannot be found then his or her consent to a parental order is not required.⁸⁷ The child’s welfare is one of the statutory bases for the decision to dispense with parental consent to adoption⁸⁸ but the question simply does not arise in parental order applications. If the child’s welfare requires transference of parenthood from a refusing parent then adoption provides the only mechanism to achieve it.

There is no requirement that the child provide any consent to the making of a parental order, doubtless because the drafters assumed that the child will be no more than six months old at the date of the making of the order, though (presumably having in mind the transitional case of a couple becoming eligible to apply for a parental order when they were previously not eligible⁸⁹) there is provision in the subordinate legislation for ensuring that the child’s views are taken into account.⁹⁰ However, the issue may become more significant than was originally intended since the judicial repealing of the six month time limit. Scottish (but not English) adoption law has always required the older child’s consent,⁹¹ and if a parental order is sought in respect of a child of 12 or more the lack of requirement of consent will be a lacuna only very partially filled by the requirement to take account of the child’s views.

⁸⁴ As in *AB & CD v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12 [2016] 1 FLR 41.

⁸⁵ 2008 Act, s.54(7).

⁸⁶ *Re D (Children)(Parental Order: Foreign Surrogacy) Practice Note* [2012] EWHC 2631 [2013] 1 WLR 3135.

⁸⁷ As Hedley J said in *G v G (Parental Order: Revocation)* [2012] EWHC 1979 [2013] 1 FLR 286 at [27], s.54(6) is “a true veto and the court, unlike in adoption proceedings, has no dispensing power”.

⁸⁸ 2002 Act, s.52(1)(b); 2007 Act, s.31(3)(d).

⁸⁹ 2008 Act, s.54(11).

⁹⁰ 2007 Act, s.14(4)(b), as applied to parental order applications by the 2010 Regulations, Sch 3 para 1 (and see also the curator *ad litem*’s duty in this regard under the Child Care and Maintenance Rules, r. 2.51(2)(h)); s.1(4)(a) of the 2002 Act, as applied by the 2010 Regulations, Sch 1 para 1.

⁹¹ Adoption of Children (Scotland) Act 1930, s.2(3). See now 2007 Act, s.32.

The No Payments Condition

Before making a parental order, 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 consent to the making of the order, (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, all of this unless authorised by the court.⁹² One may be confident that this condition is traced to a Parliamentary desire to avoid the commercialisation of surrogacy, earlier encapsulated in the Surrogacy Arrangements Act 1985. Yet the policy of discouraging commercialisation is given effect to only very half-heartedly in the 2008 Act. Oddly, the rule in s.54(8) does not in its terms prohibit payments to the surrogate. Rather, it is directed to the applicants: no money must be given *or received* by either of the applicants. This focus is surprising given that the applicants will be the receivers of money only vanishingly rarely. The adoption legislation, similarly aimed at avoiding commercialisation, is in rather wider terms. The Scottish Act prohibits as a criminal act “any payment made to any person”⁹³ while the English Act prohibits “any payment”.⁹⁴ In both cases certain specified payments are “excepted payments” which do not constitute the criminal offence. The difference means that payments made by a third party to the birth parent (unlikely, but by no means outwith the bounds of imagination) would not be an offence under the surrogacy legislation but would be under the adoption legislation.

These differences are subtle and perhaps more apparent than real. More substantial is the different judicial approaches to monetisation, which remains a matter of significant concern with adoption but has become an accepted (or at least tolerated) feature of the practice of surrogacy.⁹⁵

Authorising payments is indeed by far the most common issue that the English courts face in respect of s.54 of the 2008 Act. The Act does not set out the grounds

⁹² 2008 Act, s.54(8).

⁹³ 2007 Act, s.72(1).

⁹⁴ 2002 Act, s.95(1).

⁹⁵ It passed entirely without comment that the document setting out the mother’s agreement in *Re X (Foreign Surrogacy: Child’s Name)* [2016] EWHC 1068 (Fam) expressed it as agreement that “the child contractually and genetically belongs to” the applicants (at [17]). Nor indeed was any adverse comment made on the fact that of the USD \$48,333.49 paid by the applicants only \$5,600 was received by the mother (at [27]-[28]).

upon which the court should determine whether to grant authorisation or not, and while the child's welfare will doubtless be at the forefront of the court's mind, it is noticeable that no court has suggested that this is the primary test for authorising payments. In *C v S Lord Weir* in the Court of Session pointed out that the child's welfare should not be used in a way that undermines the public policy of discouraging child-trafficking.⁹⁶ In determining whether that public policy is subverted, the English courts have concentrated on the good faith of the parties: if there is no deliberate attempt to bypass the law's protections authorisation will usually be granted where it is in the interests of the child for the order to be made. Having reviewed the authorities in *Re X and Anor (Children) (Parental Order: Foreign Surrogacy)*⁹⁷ Hedley J said this:

“In relation to public policy issues, the cases in effect suggest (and I agree) that the court pose itself three questions: (1) was the sum paid disproportionate to reasonable expenses? (2) Were the applicants acting in good faith and without ‘moral taint’ in their dealings with the surrogate mother? (3) Were the applicants party to any attempt to defraud the authorities?”⁹⁸

The issue of authorisation of payments arises far less frequently in the adoption situation, where monetisation of the process has long, and for obviously good reasons,⁹⁹ been met with visceral distaste. Even with adoption, however, the interests of the individual child involved tend to encourage us to put that distaste to one side. The Scottish adoption legislation permits the court to grant authorisation of

⁹⁶ 1996 SLT 1387 at 1399. See also Baker J in *Re D and L (children)(surrogacy: parental order)* [2012] EWHC 2631 (Fam) [2013] 1 All ER 962. P. Beaumont and K. Trimmings, “Recent Jurisprudence of the European Court of Human Rights in the Area of Cross-Border Surrogacy: Is There Still a Need for Global Regulation of Surrogacy?”, Aberdeen University School of Law Working Papers No 2016/3, p.3, suggest that most recent ECtHR decisions “point to the conclusion that the principle of the best interests of the child should prevail over public policy considerations regarding surrogacy and adoption”. But these cases need to be read bearing in mind the clear ban on the sale of or traffic in children: UN Convention on the Rights of the Child, art. 35 and Optional Protocol on the Sale of Children, arts. 1 and 2.

⁹⁷ [2008] EWHC 3030 (Fam) [2009] Fam 71 at [21].

⁹⁸ See also *Re Human Fertilisation and Embryology Act 2008: Re A, B and C (Infants)* [2016] EWFC 33 where authorisation of payments was granted notwithstanding the attempt by the applicants to mislead (admittedly slightly) the courts as to their extent.

⁹⁹ One need only read the facts and the powerful words of Munby J in *Re M (Adoption: International Adoption Trade)* [2003] EWHC 219 (Fam) [2003] 1 FLR 1111 to understand the dangers.

payments which, in the absence of authorisation, would amount to a criminal offence.¹⁰⁰ Authorisation was granted in *C v S*,¹⁰¹ the court emphasising that the welfare of the child was relevant but not determining. Court authorisation (sensibly) no longer features in the English adoption legislation.¹⁰² Also, the Scottish Act explicitly allows the court to make the adoption order even where an unlawful payment has been made,¹⁰³ but that too is omitted from the English Act. Nevertheless, in *A, B v A Local Authority, C*¹⁰⁴ Keenan J held that the absence in English law of any prohibition on making an adoption order in face of unlawful payments (which, it may be noted, appeared in the Scottish adoption legislation until 1997¹⁰⁵ and the English legislation until 2005¹⁰⁶) meant that he was free to do so.

The 2008 Act (once more) follows the English adoption model here and makes no mention of whether the parental order may or may not be made if payments are not authorised but if Keenan J is to be followed, then the omission does not matter and the order may be made even in favour of applicants who have committed a criminal offence. The issue may be more theoretical than real, however, since in no reported English case has the court ever, in fact, refused to grant authorisation of an otherwise unlawful payment in connection with the making of a parental order. This is in contrast to adoption where orders have been refused – if only very rarely and not in the very recent past.¹⁰⁷

Conditions Relating to Child's Gestational and Genetic Origins

A parental order is available only if the surrogate mother became pregnant as a result of the placing in her of an embryo or sperm and eggs or her artificial

¹⁰⁰ 2007 Act, s.73(2)(c).

¹⁰¹ 1996 SLT 1387.

¹⁰² The Adoption Act 1976 permitted, by s.57(3), the court to authorise unlawful payments but there is no equivalent in the 2002 Act.

¹⁰³ 2007 Act, s.34.

¹⁰⁴ [2014] EWHC 4816 (Fam).

¹⁰⁵ The Adoption (Scotland) Act 1978 contained such a prohibition until the Children (Scotland) Act 1995 Sch 2(16) reversed the rule and the wording of the new s.24(2) was replicated in s.34 of the 2007 Act.

¹⁰⁶ Adoption Act 1976, s.24(2), repealed with the rest of that Act by the 2002 Act.

¹⁰⁷ See *Re C (A Minor)(Adoption Application)* [1993] 1 FLR 87.

insemination.¹⁰⁸ It cannot plausibly be argued that the method of conception affects the child's welfare throughout his or her life and this limitation on the availability of parental orders is likely traced to the fact that the 2008 Act as a whole determines parenthood for artificially and not naturally conceived children. It is difficult to identify any good social policy achieved by the rule – other than, perhaps, the maintenance of some distance between surrogacy and prostitution. Factual disputes could arise as to whether or not the insemination was artificial,¹⁰⁹ and these would be resolved (like all factual disputes) without regard to the welfare of the child.

There is of course no equivalent rule with adoption where the overwhelming majority of adopted children will have been conceived by natural means. Adoption does not need any distance to be created between it and prostitution, because the mother is not being paid to fall pregnant (by any means): the child already exists. So it would seem that the difference in the rules applicable to each order is traced to the child's existence or otherwise when the plans for the order are made. The one order is designed to provide a home for an existing child while the other order is designed to provide a child for a couple – starkly illustrating once again that the focus of parental orders is on the needs (desires) of adults.

A related condition for a parental order to be available is that the (surrogate) mother¹¹⁰ is not one of the applicants.¹¹¹ This is in stark contrast to the adoption legislation, where it has always been possible for a mother to adopt her own child.¹¹² The difference in approach between the two orders reflects the difference in intention behind the application. The purpose of a parental order is to transfer parenthood from the mother who never intended to act as such to those who were always intended to act as parents; the making of an adoption order will never have been the intent with which the subject of an adoption application was conceived. Intent is thereby revealed as one of the major points of distinction between the two orders.

¹⁰⁸ 2008 Act, s.54(1)(a).

¹⁰⁹ See *M v F (Legal Paternity)* [2013] EWHC 1901 (Fam), where such a dispute arose in a non-surrogacy context.

¹¹⁰ 2008 Act, s.33, provides that the woman who carried the child, and no other woman, is to be treated (for all purposes of law: s.48) as the mother of the child.

¹¹¹ 2008 Act, s.54(1)(a).

¹¹² Adoption of Children Act 1926 s.1, Adoption of Children (Scotland) Act 1930, s.1: see now 2002 Act, s.51(4) and 2007 Act, s.30(1)(d) and (7).

Though the surrogate mother must not be an applicant, the embryo she carries must have been created with the gametes of at least one of the applicants.¹¹³ During the debates on the 2008 Act, the Government minister explained this condition as one “that recognises the magnitude of a situation in which a person becomes pregnant with the express intention of handing the child over to someone else, and the responsibility that that places on the people who will receive the child”.¹¹⁴ The whole point of both parental orders and adoption orders is to effect a transference of parenthood and its associated responsibilities from legal to social parents. But unlike with adoption, an additional aim of parental orders is to align genetic and legal parenthood with one and sometimes with both applicants. If neither of the commissioning couple is the genetic parent then that alignment is impossible and the only way to achieve the desired transference of parenthood is through adoption, which does not seek any such alignment.

Each of these conditions to the making of a parental order may well justify treating surrogacy and adoption differently, but none of them implicates the child’s welfare. The factual scenarios behind applications for parental orders and adoption orders may be different (though overlapping) but the assertion that a child is better being brought up by his or her genetic as opposed to gestational mother is one that undermines the rest of the 2008 Act – and perhaps the very concept of adoption itself.

The “Home” Condition

At the time both of the application for a parental order and of its making, the child's home must be with the applicants.¹¹⁵ This condition caused the court some difficulty in *A v P (Surrogacy: Parental Order: Death of Applicant)*,¹¹⁶ in which a married couple had applied for a parental order but one of the applicants died before the order was made: could it be said, in these circumstances, that the child had his

¹¹³ 2008 Act, s.54(1)(b). “Gametes” do not include donations of mitochondrial (rather than nuclear) DNA: 2008 Act, s.54(1A), inserted by Reg.18 of the Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015/572.

¹¹⁴ HC Public Bill Committee, 12 June 2008, col.248.

¹¹⁵ 2008 Act, s.54(4)(a).

¹¹⁶ [2012] EWHC 1738 (Fam) [2012] 2 FLR 145.

home “with the applicants”? The court answered the question affirmatively, on the basis that s.3 of the Human Rights Act 1998 required the condition to be interpreted expansively. Theis J held that to refuse the order in this case would amount to an interference in the family life that had been established between the child and the surviving applicant, with whom he had lived all of his short life. The judge found reinforcement in this conclusion in article 8 of the UN Convention on the Rights of the Child, which protects the child’s right to identity. Yet an adoption order in the circumstances would equally have protected the established family life¹¹⁷ and it is difficult to see how such an order would interfere with the child’s identity any more than a parental order would.

This condition has, indeed, proved surprisingly troublesome for the courts. In *Re X (A Child) (Surrogacy: Time Limits)*¹¹⁸ the child was held to have had his home at all times with the applicants even although they had separated but then reconciled before the order was applied for. More startling was the decision of Theis J to make a parental order in favour of a commissioning couple who remained separated (and one having obtained a non-molestation order against the other), holding that the children had homes with each of the couple, and with no-one else.¹¹⁹ What these cases illustrate is a strong preference on the part of the English courts to find this condition satisfied, so as to avoid holding an application incompetent which is, usually, not opposed by anyone.¹²⁰

The same strong preference is shown in adoption cases, even when contentious. The rule is that an adoption order may only be made if the child is living with the adopters, and has been for a specified period (which varies depending upon the child’s existing relationship with the adopters).¹²¹ This rule requires a period of residence rather than, as with parental orders, residence at particular points in time

¹¹⁷ See *Re Z (A Child)(No2)* [2016] EWHC 1191 [2016] 2 FLR 327)(No2) [2016] EWHC 1191 [2016] 2 FLR 327, per Munby P to this effect (discussed above).

¹¹⁸ [2014] EWHC 3135 [2015] 1 FLR 349.

¹¹⁹ *X v Y* [2015] EWHC 2080. See also *DM v SJ* [2016] EWHC 270 (Fam).

¹²⁰ In *G v G (Parental Order: Revocation)* [2012] EWHC [2013] 1 FLR 286 1979 Hedley J warned against granting applications for parental orders without giving detailed consideration to the statutory requirements merely because the application was unopposed. Parental orders are *designed* to be unopposed and Hedley J’s wise words are all the more apposite because that lack of opposition means that the granting of a parental order is effectively unappealable.

¹²¹ 2002 Act, s.42; 2007 Act, s.15.

but that difference is probably more apparent than real. There are no Scottish cases in which an adoption order has been made in favour of a couple who do not live together (requiring the court to interpret “the child’s home ... with the applicants” to include two homes with the applicants severally) but the issue arose in *Re T and M (Adoption)*¹²² where a couple who lived apart but had been in a family relationship for over 20 years were permitted to adopt as a couple “living as partners in an enduring family relationship”. In the circumstances the judge declared himself satisfied that the rule in s.42(3) of the 2002 Act had also been satisfied, without detailed discussion but with reference to the closeness of the family as a whole.¹²³

The Applicants’ Domicile Condition

To be eligible to apply for a parental order, either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.¹²⁴ This is rather narrower than the equivalent rule in the adoption legislation where, as an alternative to domicile,¹²⁵ an adoption application may be made if both applicants (or the sole applicant) have been habitually resident in the British Islands for a period of at least one year ending with the date of the application.¹²⁶ So the range of people eligible to apply for an adoption order is wider than the range eligible to apply for a parental order.¹²⁷ The application of the rule has caused little conceptual difficulty in relation to either order, but its true importance, at least in English law, lies in the fact that s.49(2) of the 2002 Act has been held to provide the fundamental rule of jurisdiction of the English court for adoption applications.¹²⁸ If, as seems likely, the

¹²² [2010] EWHC 964 (Fam) [2011] 1 FLR 1487.

¹²³ The issue need not arise if the applicants are married or civilly partnered because there is no condition that they be a stable family unit, though whether they are or not will, of course, be relevant to the welfare test. See *Re CC (Adoption Application: Separated Applicants)* [2013] EWHC 4815 (Fam) [2015] 2 FLR 281.

¹²⁴ 2008 Act, s.54(4)(b).

¹²⁵ 2007 Act, ss.29(2)(a), 30(6)(a) and 119(1); 2002 Act, s.49(2).

¹²⁶ 2007 Act, ss.29(2)(b), 30(6)(b) and 119(1); 2002 Act, s.49(3).

¹²⁷ See *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam) [2008] 1 FLR 1047 where the domiciliary requirements were not satisfied and an order was made under s.84 of 2002 Act to give the applicants parental responsibility prior to their seeking an adoption order from a foreign court.

¹²⁸ *Re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112 [2016] 2 WLR 713 (CA), per Munby P at [76] and Black LJ at [182]. See also Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, 2012) at [20-096]. The outcome in *Re N* was of course reversed by the

same approach is followed in the surrogacy situation then s.54(4)(b) of the 2008 Act will govern both eligibility to apply and jurisdiction: the result would be that English courts will have jurisdiction to make parental orders only when either or both applicants is domiciled in the British Islands, and their habitual residence in England would be insufficient to establish jurisdiction (unlike with adoption orders). This is a competency determining rule in the sense that the application would require to be dismissed without an examination of its merits if jurisdiction is not established, irrespective of the effect on the child's welfare. It may be noted in passing that with both orders, the focus is on the domicile or habitual residence of the applicants, and not of the mother (or other parent) – even when, in adoption, she is opposing the application. Nor, as the Court of Appeal in *Re N* emphasised, is the domicile or habitual residence, or nationality, of the child of any relevance.

The position in Scotland is radically different because the Scottish rule of jurisdiction in adoption is traced to s.118 of the 2007 Act, which defines “the appropriate court” (that is to say the court that may make an adoption order¹²⁹) as either the Court of Session (if the child is or is not in Scotland) or the sheriff court of the (local) sheriffdom within which the child is: in other words, jurisdiction in adoption is determined by the child's presence.¹³⁰ This excludes the possibility of using the eligibility rules¹³¹ as the basis for jurisdiction.¹³² This jurisdiction rule based on the child's presence was extended to Scottish parental orders by the 2010 Regulations,¹³³ with the result that the Scottish court may make parental orders in substantially broader circumstances than the English court. Section 54(4)(b) of the 2008 Act, as it applies in Scotland, then, is not the source of the court's geographical jurisdiction (as it might be in England) but is an additional rule to be satisfied before the court, with jurisdiction, can make the parental order. Yet the applicants' domicile rule is just as likely in Scotland as in England to be conceptualised as a condition-

Supreme Court (*Re N (Children) (Adoption: Jurisdiction) (AIRE Centre and others intervening)*) [2016] UKSC 15 [2016] 2 WLR 1103), but the jurisdiction point was not challenged on appeal.

¹²⁹ 2007 Act, s.28(1).

¹³⁰ See P. McNeill and M. Jack: *Adoption of Children in Scotland* (4th edn, 2010) at [5.18]; G. Maher and B. Rodger *Civil Jurisdiction in the Scottish Courts* (2010) at [10.100].

¹³¹ 2007 Act, ss.29 and 30.

¹³² “These rules relate more to competence than jurisdiction”: Maher and Rodger, *op. cit.* at [10.101].

¹³³ 2010 Regulations, Sch.3, applying with only terminological amendments ss.28(1) and 118 of the 2007 Act.

precedent to be satisfied before welfare can be considered.¹³⁴ There is therefore no scope to bypass this condition on the ground that the child's welfare requires that the order be made.

The Applicants' Age Condition

At the time of the making of a parental order both the applicants must have attained the age of 18.¹³⁵ This condition is less restrictive than the equivalent rules in the adoption legislation, where both applicants (or the sole applicant) must be over the age of 21, except when one of the applicants (or, in Scotland, the sole applicant) is the partner of the parent of the child in which case the parent must be over the age of 18 years.¹³⁶ It would be implausible to suggest that the decision to create a child through surrogacy demands less maturity than the decision to join in the adoption of an already existing child.

There is no law preventing the surrogacy arrangement itself from being made by persons under 18: the legislation merely makes a parental order unavailable. If a child is born through surrogacy and handed over to a couple one or both of whom is under 18, then it might be possible to wait until the applicants have reached the appropriate age, utilising if necessary the (deeply flawed but precedential) reasoning in *Re X (A Child) (Surrogacy: Time Limit)* to make the application out of time once the applicants have attained that age. Since adoption would not be available until the couple are both over 21 (neither yet being recognised as parent) this is one of the few scenarios in which the child's welfare might well justify an expansive interpretation of the conditions for the making of a parental order.

Conclusion

¹³⁴ The form of application certainly suggests that the domicile requirement is a condition that goes to competency: see para. 1 of Form 22 in the Child Care and Maintenance Rules 1997, Sch. 1.

¹³⁵ 2008 Act, s.54(5).

¹³⁶ 2002 Act, ss.50 and 51; 2007 Act, ss.29(1) and 30(1).

In *Re A (A Child)*¹³⁷ Russell J said this:

“The very existence of parental orders is a testament to the decision of Parliament that adoption orders do not befit children born through surrogacy. Parliament provided parental orders to be the legal remedy designed for surrogacy situations and it is a contrivance to use adoption as an alternative solution unless there is no other option within the court’s discretion”.

There is no doubt that parental orders were designed for a very different fact scenario from adoption orders. The defining difference is that with the former a child was deliberately created in circumstances that require to be regularised by means of court order while with the latter the child is already in existence before any question of court intervention arises. There is another important difference in practice, which is that parental orders are designed never to be opposed, while adoption (especially when the end result of a child protection process) is often a most bitterly fought action.

Yet these distinctions are less significant than they might appear. They are differences of fact that do not in themselves require to be reflected in different orders. Adoption as a process was designed in the 1920s to deal with social problems of the interwar era,¹³⁸ and has been adapted since then to deal with a variety of emerging social issues.¹³⁹ Today, the single concept of adoption serves at least two very different fact scenarios: after family reconstitution in which the process attempts to reflect a new reality by tying the child to a parent’s new partner who is performing the role of social parent; and after child protection processes have compulsorily removed the child from inadequate parents and delivered the child to legal strangers. A process that is capable of accommodating such widely differing scenarios is no less capable of accommodating the surrogacy situation – and has frequently been used in that very situation, even after parental orders became available in 1990.¹⁴⁰ This being so, it may be concluded that the creation of parental orders was an entirely unnecessary legal response to an emotional issue – adults’

¹³⁷ [2015] EWHC 911 (Fam) at [68].

¹³⁸ Such as illegitimacy: see *D, Petitioner* 1938 SC 223.

¹³⁹ See M. Ross “Adoption in the 21st Century: Still Image Against a Moving Picture”, in J. Scoular, ed. *Family Dynamics: Contemporary Issues in Family Law* (Butterworths 2001).

¹⁴⁰ Examples include *Re MW (Adoption: Surrogacy)* [1995] 2 FLR 759; *C v S* 1996 SLT 137; *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam) [2008] 1 FLR 1047.

desires for their “own” child. And it has proved a socially disastrous response by creating an environment in which our justified distaste at the commercialisation of child-creation has become progressively blunted. To the commissioning couple who feel affronted at having to “buy their own child back” the hard answer is: the child is not yours. An order under s.54 is not a declaratory order recognising a pre-existing reality of parenthood (however much the applicants might conceive it that way), but is instead one that transfers parenthood from those who are, in law, parents to those who, before the order is made, are not. The welfare of the child alone can never justify such a transfer.¹⁴¹ In the surrogacy situation it is the altruism – even when bought – of the child’s mother that does so.

Likewise, Russell J’s dictum quoted above says less than it seems to. That adoption ought not to be used “unless there is no other option” begs the question: which of the conditions contained in s.54 of the 2008 Act is so absolute that the failure to fulfil it means that there is indeed no other legal option? Of the conditions discussed above, it is clear that the great majority are absolute, with no scope at all for the court to make a parental order when they are not satisfied, with adoption remaining the only option to achieve a transference of parenthood. The absolute conditions are (i) that the application be made by a qualifying “couple”, (ii) that the existing parents agree unconditionally to the making of the order, (iii) that the mother is not one of the applicants, (iv) that the conception has come about artificially, (v) that the gametes of at least one of the applicants have been used for that conception, (vi) that either or both applicants are domiciled in the British Islands, and (vii) that both applicants have attained the age of 18. The non-satisfaction of any of these conditions means that an application for a parental order must be rejected as incompetent irrespective of its merits – irrespective, that is, of the effect of the rejection on the child’s welfare. There are two other conditions that, by their very nature, involve an element of judicial discretion: that no payments have been made unless authorised by the court (which requires the court to exercise judgment), and that the child has his or her home with the applicants at particular points in time (which envisages the court assessing the meaning of “home”). How that discretion is exercised is affected by considerations of welfare but that cannot be the determining factor of whether the

¹⁴¹ S v L 2012 UKSC 30.

condition is satisfied or not.¹⁴² There is only one condition – the six month time-limit – that has been held to be governed by the child’s welfare. The basis of the extension (or, better, abolition) of the time-limit – that the child’s best interests would not be served by adoption – is fatally weakened by the non-availability of that argument in respect of every other condition in s.54.

Virtually every surrogacy case that reaches the higher courts involves the judges emphasising the need for caution, warning against the dangers of lack of regulation and of international agreement, and bringing attention to the emotive challenges before the court when faced with children whose interests are palpably served by remaining with the loving couple bringing them up but for whom the legal process has thrown up counter-considerations. The safest solution would be to abolish parental orders and allow the existing adoption legislation to tackle these problems utilising principles already developed over the course of many decades. That is unlikely to happen and so the clash between social policy and individual welfare can only properly be resolved, without emotion and in a manner consistent with the Rule of Law itself, if the child’s interests are confined to the appropriate stage of the judicial decision-making process – which is the determination of the outcome of the case once the competency determining conditions-precendent for the making of the order sought have been satisfied. The cases involving the time-limit failed to do so but at the end of the day that particular condition is the one with the least rationale: it achieves, in other words, no obvious benefit to anyone. So long as these cases are kept within their own boundaries, and considerations of welfare are constrained as suggested above, they will have no wider impact and if, as is probably inevitable,¹⁴³ Parliament eventually repeals s.54(3) children will neither benefit nor suffer disadvantage. But the correct balance between the judicial and the legislative roles in our legal system(s), disrupted by *Munby P*, will have been restored.

¹⁴² See n.7 above.

¹⁴³ The (English and Welsh) Law Commission is (at the time of writing) consulting on whether to include surrogacy and parental orders within its 13th Programme of Law Reform.