SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2024] SC EDIN 29

EDI-B1012-23

JUDGMENT OF SHERIFF WENDY A SHEEHAN

in the petition

For a Parental Order in relation to A in terms of Section 54 of the Human Fertilisation and Embryology Act 2008

Act: Scott KC; Gilmour Solicitor

EDINBURGH, 27 June 2024

Introduction

[1] Following a hearing on 23 May 2024, I pronounced the following order:

The sheriff having heard from counsel, agents and the petitioner; grants the prayer of the amended petition, number 23 of process, and pursuant to section 54 of the Human Fertilisation and Embryology Act 2008, makes a Parental Order in favour of the petitioners PM and DM in respect of the child A; directs the Register General for Scotland to make an entry regarding the parental order in the Parental Order Register in the form prescribed by him or her giving * as the forenames and * as a surname of the child; finds that the child who was born on the 21st day of August in the year 2020 and is identical with the child to whom an entry numbered 2020-034520 and made on the second day of October in the year 2020, in the Register of Births for the registration district of the State of Oklahoma, USA, relates notwithstanding to the misspelling of the second name of the second petitioner as * when the correct spelling is *; and directs the Register General for Scotland to cause such birth entry to be marked with the words "Parental

Order" and to include the above mentioned date of birth in the entry recording the Parental Order in the manner indicated in that form; further orders that an extract of this order be issued.

[2] Senior counsel requested a written note explaining the approach I had taken to determining this application as it raises to novel matters of law. I now do so.

[3] **The statutory framework**

Human Fertilisation and Embryology Act 2008: s.54 Parental orders: two applicants

> "(1) On an application made by two people ('the applicants'), the court may make an order providing for a child to be treated in law as the child of the applicants if -
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> > (a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,
> >
> > (b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and
> >
> > (c) the conditions in subsections (2) to (8A) are satisfied.
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> (2) The applicants must be –
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> > (a) husband and wife,
> >
> > (b) civil partners of each other, or
> >
> > (c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.
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> (3) Except in a case falling within subsection (11), the applicants must apply for the order during the period of six months beginning with the day on which the child is born.
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> (4) At the time of the application and the making of the order -
>
> > (a) the child's home must be with the applicants, and
> > (b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.

(5) At the time of the making of the order both the applicants must have attained the age of 18.

(6) The court must be satisfied that both -

(a) the woman who carried the child, and

(b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43),

have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

(7) Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement, and the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

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

(a) the making of the order,

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

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

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

[4] Section 55 of the 2008 Act provides that the Secretary of State may make regulations providing for provision of enactments relating to adoption, including the Adoption and Children (Scotland) Act 2007, to have meaning and effect in relation to orders under s 54. The relevant regulations are the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 (''the regulations''). Article 3 in Schedule 2 of the regulations applies the following provisions of section 14 of the 2007 Act:

"S14 Considerations applying to the exercise of powers

(1) Subsections (2) to (4) apply where a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The court or adoption agency must have regard to all the circumstances of the case.

(3) The court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.

(4) The court or adoption agency must, so far as is reasonably practicable, have regard in particular to –

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

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

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

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

(5) Where an adoption agency is placing a child for adoption it must have regard, so far as is reasonably practicable, to the views of the parents, guardians and other relatives of the child.

(6) In carrying out the duties imposed on it by subsections (2) and (4) an adoption agency must, before making any arrangements for the adoption of a child, consider whether adoption is likely best to meet the needs of the child or whether there is some better practical alternative for the child."

[5] Section 28 of the 2007 Act also applies and directs the court not make a parental order unless it considers that it would be better for the child that the order is made than not.

[6] Section 40 of the 2007 Act is applied with modification by paragraph 9 of Schedule 2 of the regulations and provides:

"a person who is the subject of a parental order is to be treated in law as if born as the child of the person or persons who obtained the order and not as being the child of any person other than the person or persons who obtained the order."

The issues

[7] The following issues arose in this petition:

(a) Section 54(3) provides that the applicants must apply for the order during the period of six months beginning with the day on which the child was born. The child, A was born on 21 August 2020. The application was made on 31 August 2023.

(b) Section 54(4)(a) requires that at the time of the application and the making of the order, the child's home must be with the applicants. The first petitioner makes this application both in his own right and *qua* executor to his late wife. At the date of making the application the second petitioner resided in a nursing home having suffered a severe stroke. The first petitioner obtained a guardianship order on 15 May 2023 and initially made this application in his own right and jointly as his wife's guardian. On 12 December 2023, after this application was lodged, the second petitioner died. The application was then amended, the first petitioner seeking a parental order in favour of himself and on behalf of his late wife jointly acting *qua* her executor.

Procedure

[8] When this application was lodged, the issues with the timeframe of the application and the second petitioner's capacity were immediately apparent to the court. I queried these competency issues before warranting the application. I was persuaded by the petitioners' agent's written submissions, which referred to the case of *AB and XY* [2023] CSOH 46 and a number of reported cases from England and Wales, that the application should be warranted and that the competency issues ought to be determined by the court once the

facts were established and reported on by the curatrix *ad litem* and having heard senior counsel's submissions.

Unopposed application

[9] The child A was born in Oklahoma on 21 August 2020. The first petitioner's gametes were used to bring about the creation of the embryo of the child along with the gametes of an American donor. The woman who carried the child and her husband (who would but for the granting of a parental order, be the presumed father of the child) have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order in terms of s.54(6). The application was re-intimated to them following the death of the second petitioner. The child was subject to completed court proceedings in the Superior Court of California, County of San Diego, USA in which a pre-birth order establishing the parent-child relationship between the petitioners and the child was granted on 13 August 2020. The State of Oklahoma issued a birth certificate in 2 October 2020 (5/1/1 of process) which records the petitioners as the father and mother of the child. The present application is not contested.

Curatrix *ad litem's* reports

[10] The *curatrix ad litem* reported to the court on 12 November 2023 and further on 6 May 2024 (following the death of the second petitioner). Her reports were positive in their terms and recommend the granting of the order sought.

Background

[11] The salient facts of this case are stated shortly to avoid the risk of identification of the child A in circumstances where this note may be published given the novelty of the issues.

The factual issues pertinent to the application of s.54(3)

[12] The child A was born in Oklahoma on 21 August 2020. By the date his birth, the second petitioner had suffered a severe stroke and was resident in a nursing home. On account of the Covid-19 travel restrictions, the first petitioner was not present at the child's birth and was unable to travel to the USA until July 2021. During the intervening period A was cared for by a professional nanny. The first petitioner travelled to the USA in July 2021, obtained a US passport for the child and brought him back to Scotland on 19 August 2021. The first petitioner intended to make a joint application for a parental order with his wife as which reflected the reality of their family unit and the circumstances in which the child's birth was commissioned. He wished A to be treated in law as the child of both petitioners and for the parental order to reflect the pre-birth order of the Superior Court of the State of California and the birth certificate issued in Oklahoma. The first petitioner made a deliberate decision not to apply for an order as a single parent in terms of s.54A of the 2008 Act. He could not submit an application *qua* guardian of the second petitioner until he obtained a guardianship order in Dundee Sheriff Court on 15 May 2023. The present application was lodged on 31 August 2023. After sundry procedure and the requisite time required for the curatrix *ad litem* and reporting officer to report on the child's circumstances and to obtain the necessary forms of consent, a hearing on the application was fixed for 14 December 2023. The second petitioner died on 12 December 2023. The hearing was discharged and the application continued to allow for a period of mourning, for the first

petitioner to obtain confirmation to the second petitioner's estate and to be appointed as her executor. The application was then amended to reflect the changed circumstances. The curatrix *ad litem* was re-appointed on 18 March 2024 to investigate and provide an updated report to the court. The matter then called before me for a hearing on 23 May 2024. The child A is now 3 years and 10 months old.

The factual findings pertinent to the application of s.54 (2) and (4)(a)

[13] The applicants were married and in an enduring family relationship at the time the application was made. They were not living in the same household but operated as a family unit. The first petitioner visited the second petitioner at least three times a week. The child, A met the second petitioner on 30 August 2021. He visited her three times a week for 21 months. He developed a relationship with her as his mother and recognised her as such. The second petitioner established a family life with A before her premature death. But for the second petitioner's death, A would have remained in the care of both of the petitioners.

Factual findings pertinent to s.54(8)

[14] The curatrix *ad litem* was satisfied that other than agreed expenses paid to the surrogate mother, no other payment or reward was given.

Factual findings pertinent to the Regulations applying s.14 and s.28 of the Adoption and Children (Scotland) Act 2007

[15] The child A has a happy and stable home with the first petitioner. He is healthy and well cared for. The first petitioner is 72 years of age. He is outwith the normal accepted range of parenthood but is active and energetic. He has secured a nursery place for A and

involves him in various age-appropriate activities with his peer group. The first petitioner has no other family members who are able to support him with A's care. The second petitioner's close friend is the child's godmother and cares for him at least once a week. She is aged 73. Whilst A's current needs are met, the age of the first petitioner gives rise to concern regarding A's welfare throughout his childhood (and beyond). The first petitioner is researching boarding schools for A's secondary education. The professional nanny who cared for A during the first year of his life (and her family) have maintained a close relationship with A. She has agreed to act as A's guardian should the first petitioner die before A reaches adulthood. She lives in the USA.

[16] The child, A is too young to express a view in these proceedings.

[17] The effect of making a parental order is to treat A in law as if he were the birth child of the petitioners which reflects the circumstances of his conception and the reality of his family life. The child recognised the second petitioner as his mother and developed a relationship with her. If the first petitioner were to make an application for a parental order as a single parent, A's birth certificate would record the first petitioner as his father and record him as having no mother. This would differ from the birth certificate issued in the USA. It may present difficulties for A in later life. Were a parental order not to be granted then A would have no identity in the UK, may be unable to apply for UK citizenship or to obtain a UK passport. His immigration status in the UK is unclear. As the child of the second petitioner, he would have a substantial legal rights claim on her estate. The granting of a parental order in favour of both petitioners would provide him with emotional, social, practical and financial benefits. It is in his best interests for the order to be granted in favour of both petitioners. It is better for him that the order is granted than that no such order is

granted. There are no alternative legal remedies which would offer A the same transformative effect as the parental order sought.

Submissions and authorities

[18] The courts in both Scotland and England have applied a liberal and purposive approach to interpretation of s.54(3) and have held that there is no statutory bar on making a parental order in the event that the application is made more than six months after the child was born. In the case of *AB and XY Petitioners* [2023] CSOH 46, 2023 SLT 893 Lady Carmichael reviewed and set out extracts of a series of persuasive English decisions as follows:

> 10. "54. **In Re X (A Child) (Parental Order : Time Limit) [2014] EWHC 3135 (Fam) Sir James Munby, P,** wrote this at paragraph 54 and following, allowing an application 2 years and 2 months after the birth of the child:
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> > 'Section 54 goes to the most fundamental aspects of the status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether an as individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about X's identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt. Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound, emotional psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what **Thorpe LJ in re J (A Minor) (Adoption Non-Patrial) [1998] INLR 424 at 429**, referred to as to 'the psychological relationship of parent and child with all its far reaching manifestations and consequences'. Moreover, these consequences are lifelong and, for all practical purposes, irreversible: see **G v G (Parental Order: Revocation) [2013] 1 FLR 286**, to which I have already referred. And the court considering an application for a parental order is required to treat the child's welfare throughout his life as paramount: see **In re L. (A Child) (Parental Order: Foreign Surrogacy) [2011] FLR 106**. X was born in December 2011, so his expectation of life must extend well beyond the next 75 years. Parliament has

therefore required the judge considering an application for a parental order to look into a distant future.

55. Where in the light of all this does the six-month period specified in section 54(3) stand? Can Parliament really have intendfed that the gate should be barred forever if the application for a prental order is lodged even one day late? I cannot think so.'

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

12. Courts in England and Wales have followed the approach in ***Re X*** on a number of occasions. In ***Re A (A Child) (Surrogacy): s.54 criteria)*** **[2020] EWHC 1426 (Fam)** is another case in the which the application was made outwith the six month time limit, and the applicants had separated, and in which the court was satisfied it should make the orders ought. Keehan J surveyed a number of relevant authorities, including ***A v P*** and in ***Re X.*** His summary of the propositions to be drawn from them is as follows:

'54. In light of the various authorities… I must apply the following principles when considering whether or not the statutory criteria are satisfied on the facts of this case and whether I should make a parental order in favour of the applicants'.

i) When interpreting legislative provisions, the court must have regard to the underlying purpose of the requirement and ensure the interpretation does not 'go against the grain' of the intentions of Parliament;

ii) S.3 of the HRA requires the court, where possible, to give a Convention compliant interpretation of statutory provisions;

iii) A failure to adhere to the six-month time limit to make an application for a parental order is not fatal to the making of the order;

iv) The questions whether the applicants are in an enduring family relationship and whether the child has his home with the applicants are matters of fact for the court to determine;

v) Where the court finds that the Article 8 and/or Article 14 rights of the child are engaged, the biological and social reality of the child's life must prevail over legal presumption;

vi) The existence of family life is not defined nor is its existence constrained by legal, societal or religious conventions;

vii) There are no minimum requirements that must be shown if family life is to be held to exist;

viii) What is required is an unambiguous intention to create and maintain family life, and secondly, a factual matrix consistent with that intention which is clearly a question of fact and degree;

ix) The mere fact that the parents are now separated is not fatal to the application for a parental order;

x) Similarly, the mere fact that the parents live in separate homes is not fatal to the application

xi) If a parental order is not made, the child is likely to be denied the social and emotional benefits of recognition of his relationship with his parents and would not have the legal reality that matches his day to day reality;

xii) The transformative effect of a parental order cannot be overstated: and

xiii) The ultimate test for the making of a parental order is the welfare best interests of the child'".

[19] Lady Carmichael agreed with the reasoning of Sir James Munby in *Re X (a Child) (Parental Order: Time Limits) supra* that there was no particular policy consideration underpinning the six month time limit. Whilst she recognised that it is clearly desirable that applications relating to children should be made and dealt with promptly, this required to be balanced with the circumstances of the particular case and the consequences of an order not being made. Lady Carmichael approached the matter as one of statutory construction, without reference to s.3 of the Human Rights Act 1998, but agreed that a reading down s.54(3) would lead to the same result.

[20] On considering the dicta in *Re X supra*. and the cases that followed, Lady Carmichael found that a parental order goes to the most fundamental aspects of status, and transcending even status, to the very identity of a child as a human being, it goes to the practical and psychological realities of the child's identity.

[21] In the present application the court is asked to go a step further and to grant a parental order jointly to the petitioners despite death of the intended mother. There is English authority to the effect that s.54(4) can be read down under s.3 of the Human Rights Act 1998 to allow a parental order to be made which recognises both of the intended parents, despite the death of one of them. In *A* v *P* [2011] EWHC 1738 (Fam) Theis J granted a parental order, despite the death of the intended father, reasoning that Article 8 of the ECHR was engaged. She found that the consequences of not making the order were:

1. That there would be no legal relationship between the child and his biological father who was also the commissioning father.
2. That the child would be denied the social and emotional benefits of recognition of that relationship.
3. That the child may be financially disadvantaged if he were not recognised legally as the child of his father (in terms of inheritance).
4. That the child would not have a legal reality which matched his day to day reality.
5. That the child would be further disadvantaged by the death of his biological father.
6. That no other order would be sufficient to transform the child's legal status such that both commissioning parents would be recognised as being the legal parents of the child.

[22] In *Re X (Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39 (Fam) Theis J granted a parental order under s.54 to an intended mother together with her late husband who died before the birth of the child. She did so by reading down s.54(4)(a) in terms of s.3 of the Human Rights Act 1998 with reference to the House of Lords decision in *Ghaidan* v *Godin-Mendoza* [2004] 2 AC 577, before coming to the following proposed reading down of s.54:

> "Section 54(1) on an application made by two applicants (or an application brought on behalf of two applicants who, but for the fact that one of the applicants has died after the conditions in S54(1)(a) were met, would have met the requirements of S54(1)(b) and S54(2) ('the applicants') the court may make an order providing for a child to be treated in law as a child of the applicants"

[23] In the later case of *X and Y (Deceased)* v *W and Z* [2022] EWFC 34 a parental order was granted where a father died before the birth of the child who had been conceived by IVF using his gametes adopting the same approach.

[24] Senior counsel submitted the court should adopt the reasoning in *A* v *P* and *Re X (Parental Orders; Death of Intended Parent Prior to Birth) supra* to read down s.54 in the same terms, and that when going on to consider the welfare of the child A, the court should further consider the applicability of the following factors identified by Theis J:

i. That the transformative effect of a parental order will be to give the child the status of being the child of both of the petitioners. He should not be deprived of that by the tragic death of his intended mother.

ii. That it is important to the child's identity that his status reflects the second petitioner's determination for his conception, birth and life. It is marked that he was wanted and loved by her, even if she is not now here to tell him.

iii. That the child knows that the second petitioner was his mother. Once he arrived in Scotland he saw her an average of three times a week. He developed a

relationship with her, has memories of her, misses her and grieves for her. The lack of legal recognition of his status with respect to her will be difficult for him to comprehend and may be distressing and damaging for him.

iv. That a birth certificate which gives him but one parent (his father) would leave him with longstanding issues as to his status and identity. A normal birth certificate showing a mother and father is a proper reflection of his status and identity. In contrast, a birth certificate showing his only parent is his father will single him out and is liable to give him serious difficulties in the future.

v. That it is important that the relationship between the child and the first petitioner and the mutual connection they both have to the second petitioner is fully recognised in the child's status.

vi. That as a child of the second petitioner A will have a legal rights claim on her estate. She died with a significant moveable estate. A's legal rights claim which could only be made on the granting of a parental order as craved, would provide him with financial security.

vii. That it is better for the child A that a parental order is granted than that no such order be granted. It would be seriously damaging to A for no such order to be granted. It would result in them having no suitable birth certificate which would recognise his parentage and may present in barriers to him obtaining UK citizenship, having a right to remain in the United Kingdom or obtaining a UK passport.

Decision

[25] Insofar as the application of s.54(3) is concerned (pertaining to the six month time limit), I followed the reasoning of Lady Carmichael in *AB and XY Petitioners supra* at paragraphs 16 and 17:

> "16. So far as s.54(3) is concerned the question, in constraining the statute, is whether it was the intention of Parliament that no order could be granted in the event that the time limit of six months was not complied with: see for example **R v Soneji [2006] 1AC 340.** The line of authority referred to above from the courts in England and Wales is highly persuasive. The 2008 Act extends to England and Wales, Scotland and Northern Ireland. As Sir James Munby P pointed out **Re X (A Child: Parental Order - Time Limit)**, there is no particular policy consideration which appears to underpin s.54(3) or its predecessor provision, s.30(2) of the Human Fertilisation and Embryology Act 1990. It is clearly desirable that applications relating to children should be made and dealt with promptly, but that requires to be balanced with the circumstances of the particular case and the consequences of an order not being made: ***X v Z and Others***, paragraph 50.
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> 17. I agree with the reasoning in the cases from England and Wales to which I have referred. It cannot have been the intention of Parliament that a failure to apply within six months should operate as a barring application, given the consequences for the child if no competent application were possible. The question of construction must be approached bearing in mind the character of the order as one which goes to the most fundamental aspects of status, identity, family and legal relationships. I have approached the matter primarily as one of statutory construction without reference to s.3 of the Human Rights Act 1998. I do, however, agree with Sir James Mundy P that reading down s.54(3) would lead to the same result."

[26] Given the liberal and purposive approach to the construction of s.54(3) adopted by Lady Carmichael following this line of English authorities and the nature of the order sought, I do not consider that the petitioners' failure to apply to the court for a parental order within six months should operate as a bar to their application. There are cogent reasons which account for the various delays in this application.

[27] The circumstances of this case may be differentiated from those in *Re X (Parental Order: Death of Intended Parent Prior to Birth)* and *X and Y (Deceased)* v *W &Z supra* as at the point at which this application was made the parties were both alive and were husband and

wife in terms of s52(2)(a). The second petitioner had a relationship with the child A prior to her death which amounted to an established family life.

[28] The next hurdle to the petitioners' application is in terms of s.54(4)(a) *viz.* that at the time of the application and the making of the order that the child's home must be with the applicants. The liberal and purposive approach to the construction of s.54(3) has also informed the interpretation and application of this subsection in terms of the English case law and was adopted by Lady Carmichael in *AB and XY Petitioners* at paragraph 18:

> "What is required is an unambiguous intention to create and maintain family life, and secondly, a factual matrix consistent with that intention which is clearly a question of fact and degree. If a parental order is not made, the children are likely to be denied the social and emotional benefits of recognition of their relationships with their parents and would not have the legal reality that matches their day to day reality. A broad and flexible construction of those provisions should be adopted where that is necessary to secure the effective protection of the rights protected by article 8 ECHR."

[29] The circumstances of this case differ from those considered by Lady Carmichael in *AB and XY petitioners* in that the second petitioner died before this application could be determined. The issue which now arises is whether "applicants" in terms of s.54 of the 2008 Act may be construed by the court to allow a joint application to be made but not require that there be two living applicants at the time of making the order. This situation was considered by Theis J in the case of *A* v *P* [2011] EWHC 1738 (Fam) at paragraphs 24-26:

> "24 .The primary aim of s.54 of the HEFA 2008 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants. The effect of the order is that the child is treated as though born to the applicants. It has clear implications as regards the right to respect for family life under article 8. Family life exists in this case if the child has lived with both Mr and Mrs A. The child is biologically related to Mr A and perhaps Mrs A. The effect of not making an order will be an interference with that family life in that the factual relationship will not be recognised by law. The courts responsibility is to guarantee not to rights that are theoretical and illusory but rights that are practical and effective: see ***Marckx* v *Belguim* 2 EHRR 330, paragraph 31.**

> 25.A further element consideration is that family life is not only a matter of fact and degree but also the significance of legal relationships. In this case if an order is not made then there is no legal connection between the child and his deceased biological father. Protection of the right to family life presupposes the factual existence of family life*: **Pini** **v** **Romania* **(2004) 40 EHRR 312, paragraph 143**. Once that is established (and it is in this case) the state must facilitate and protect that right.
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> 26. The consequences of not making an order in this case are:
> (1)There is no legal relationship between the child and his biological father who is also the commissioning father; (2)The child is denied the social and emotional benefits of recognition of that relationship; (3)The child may be financially disadvantaged if he is not recognised legally as the child of his father (in terms of inheritance); (4)The child does not have a legal reality which matches the day to day reality; (5)The child is further disadvantaged by the death of his biological father."

[30] The United Nations Convention on the Rights of the Child 1989 (UNCRC) has been incorporated into Scots Law by virtue of the United Nations Convention on the Rights of the Child (Incorporation)(Scotland) Act 2014. Article 8 requires the State to protect the child's right to identity:

> "States undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without lawful interference.
> "

[31] At paragraph 28 of *A* v *P supra* Theis J referred to the decision of Baroness Hale in *ZH (Tanzania)* v *Secretary of State for the Home Department* [2011] 2ACC 166 at paragraphs 22-25 as authority for the proposition that the concept of identity includes the legal recognition of relationships between children and parents. She went on to conclude that the combined reading of Article 8 ECHR and Article 8 UNCRC may require the court to construe s.54(4) of the 2008 Act so as to preserve the child's identity with his parents.

[32] At paragraph 30, Theis J also recognised that only a parental order would have the effect of transforming the legal status of the child such that both commissioning parents are recognised as being the legal parents of the child. An adoption order would not provide a remedy to the alleged breach of Article 8 rights (which would arise if a parental order were

not to have been made) as a joint adoption application is not possible in circumstances where one of the intended parents has died. An adoption order would also have had a distorted effect because the first petitioner who was the child's genetic parent would not have been recognised as such on his birth certificate. The practical barriers to the making of an application for adoption were also acknowledged.

[33] At paragraph 31, Theis J concluded that she was able to interpret s.54(4)(a) of the HFEA 2008 in such a way to allow the court to be satisfied that the relevant requirements were met in circumstances where one of the applicants had died before the parental order was granted because no other order or combination of orders would have recognised the child's status with both parents equally. Article 8 ECHR was engaged and any interference with those rights must be proportionate and justified. She concluded that interpreting s.54(4)(a) of the HFEA 2008 in the way proposed did not offend against the clear purpose or policy behind the requirements listed in s.54. The applicants were lawfully entitled to apply for a parental order jointly at the time when they made their application. It was in the child's best interests that a parental order was made to secure his legal status with the applicants in circumstances where the child's home was with both them from the time of his birth up until the date of the intended father's death and he had thereafter remained in the care of the intended mother (and but for the intended father's death, would have remained in the care of them both). She further concluded that the following interpretation of the s.54(4) would protect the identity of the child and the family unit in accordance with Article 8 UNCRC and accordingly read down section 54(4) so as to provide;

> "54(4) At the time of the application and the making of the order (a) the child's home must be with the applicants (or in the case of an application where an applicant has died and the application is brought on his or her behalf by the surviving applicant, the child's home must be with the surviving applicant".

[34] Following this approach in the later case of *Re. X (Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39 (Fam), Theis J concluded that it was not the intention of Parliament, in circumstances where the father died after the embryo transfer but before the child's birth, that the gates should be barred forever to an application and went on to say at paragraph 94(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 the s.3 provisions, s.54(1), (2)(a), (4)(a) and (5) could prevent a parental order being made."

On reading down s.54(4) in the above terms she commented that such a reading did not go against the grain of the legislation and that:

> "on the contrary it seeks to provide the order that it is accepted best meets the needs of a child born as result of this type of arrangement. The Parental Order was specifically created for a child born as result of a surrogacy arrangement, such as in this case….. The HEFA sought to provide a comprehensive legal framework of those undertaking assisted conception, with the aim of securing the rights of any child born as a result. That policy and legislative aim remains in tact if the order sought in this case is made."

[35] I agree with Theis J's reasoning. The liberal and purposive approach to construction which has underlined the court's approach to s.54(3) should also inform the correct approach to the interpretation and application of s.53(4). A broad and flexible approach to interpretation of these proceedings should be adopted when this is necessary to secure the effective protection of the rights preserved by Article 8 ECHR and Article 8 UNCRC. That interpretation results in s.54(4) being read down so as to read:

> "At the time of the application and the making of the order (a) the child's home must be with the applicants (or in the case of an application where an applicant has died and the application is brought on his or her behalf by the surviving applicant, the child's home must be with the surviving applicant".

On applying that interpretation to the factual matrix of this case, the requirements of s.54 are met.

[36] In terms of the regulations, the court is then required to consider s.14(1)-(4) and s.28 of the Adoption and Children (Scotland) Act 2007 which require the court to safeguard and promote the welfare of the child throughout his life as its paramount consideration, to have regard to the value of a stable family unit in the child's development not to make a parental order unless the court considers that it would be better for the child that the order is made than not.

[37] Surrogacy remains an ethically controversial area of public policy and different countries take different approaches to it. When applying the provisions of sections 14 and 28 of the 2007 Act to the circumstances of this case, I pause to reflect that an adoption order would not have been granted by the court in circumstances where the first petitioner, at the age of 72, is outwith the normally accepted range of parenthood and where the second petitioner is deceased at the point at which the order is sought. Welfare concerns arise in relation to the child A in such circumstances. The clinic in Oklahoma who supported the petitioners when they entered into the gestational parenting agreement (5/1/8 of process) carried out an initial assessment before approving them as intended parents. That assessment has not been provided to the court. Despite the reassuring terms of the curatrix *ad litem's* reports, there are obvious welfare issues that arise. The fact that the first petitioner is researching the availability of a suitable boarding school place for A for his secondary education and has considered appointing a guardian in the event of his death during A's childhood demonstrates that he understands these issues. These concerns must be balanced with the fact that A's welfare would be gravely compromised by the court's refusal to make an order. He would be put in a position where he has no UK birth certificate mirroring the terms of the birth certificate granted in the USA, potentially no leave to remain in the UK, right to apply for UK citizenship or for a UK passport. His gestational carrier has had no

contact with him since birth. He is now aged 3 years and 10 months. The lack of a parental order would result in a failure to recognise his genetic relationship with the first petitioner and would deny him the social and emotional benefits of recognition of his relationship with his parents with a legality that matched his day to day reality. A is well cared for and thriving in the care of the first petitioner. Overall, am satisfied that the orders sought will safeguard and promote his welfare and that it is better for him that I make a parental order than that none is made.

[38] Therefore, in all the circumstances of this application I am satisfied that all of the conditions imposed by s.54 are met as are the requirements of the 2007 Act as they apply in modified form to decisions under the 2008 Act and I grant the order as craved.