



Neutral Citation Number: [2024] EWHC 2849 (Fam)

Case No: ZC24P00996

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/11/2024

**Before :**

**THE HONOURABLE MR JUSTICE HAYDEN**

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**Between :**

(1) Mrs W

**First Applicant**

- and -

(2) Mr W

**Second Applicant**

- and -

(1) K

**First Respondent**

- and -

(2) E

**Second Respondent**

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**Andrew Powell** (instructed by **Fladgate LLP**) for the **Applicants**  
The **1<sup>st</sup>** and **2<sup>nd</sup>** **Respondents** did not attend and were not represented

Hearing dates: 31<sup>st</sup> October 2024  
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## **Approved Judgment**

This judgment was handed down remotely at 12pm on 8<sup>th</sup> November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE HAYDEN

The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**Mr Justice Hayden:**

1. I am concerned with an application for a Parental Order, dated 11<sup>th</sup> June 2024 (issued on 18<sup>th</sup> June 2024), in respect of F, a boy born on 15<sup>th</sup> December 2023, now aged 10 months. The first and second applicants are represented by Mr Powell, the respondents are not represented and were not present. They have had notice of the hearing which was originally listed on 11<sup>th</sup> December 2024. They were sent a further email, dated 25<sup>th</sup> October, from the applicants' solicitors also notifying them of today's hearing, 31<sup>st</sup> October 2024. There was no need for them to attend.
2. F was conceived via home insemination using the second applicant's (father's) gametes and the first respondent's egg, which was carried by the first respondent. The parties have been friends since October 2018. They met whilst on holiday in Germany. The respondents are a German same-sex couple who have four children together. The respondents are in a civil partnership. The two couples plainly got on well and the holiday friendship evolved into a solid enduring friendship.
3. The respondents, K and E told the applicants of their story as to how they became parents. In February 2023, the applicants, to whom I shall refer as Mr and Mrs W, travelled to Germany for a visit with their friends, and to meet the youngest of their children for the first time. Mr and Mrs W had always wanted children. However, by the time they met, Mrs W was unable to have children herself. The couple considered foster parenting and adoption. They were directed to an intensive course on becoming foster parents, delivered by Children Services and specialist childcare social workers. At the completion of the course however, both Mr and Mrs W felt that neither fostering nor adoption was the right option for them, and they turned their energies and research to surrogacy arrangements. They joined Surrogacy UK and attended various monthly meetings convened around the country involving meeting numerous intended parents and surrogates. The couple realised that whilst there were many who aspire to be parents, there were limited surrogates available. With heavy hearts, Mr and Mrs W decided that if they could not secure a surrogate within two years of joining Surrogacy UK, they would discontinue their journey towards completing their family, recognising the strain that the process placed on them.

4. In the visit in February 2023, K and E recognised in Mr and Mrs W their sadness at not being able to have a family. Nothing had been said, it was just intuitively understood. On the second day of the visit, K offered to be a surrogate. Mrs W, in particular, felt “*it was like a dream come true*”. K’s motivations were entirely altruistic. Explicitly, she did not wish for any payment. However, given that she would have to forego work as a teacher, Mr and Mrs W were eager to offer something by way of reasonable compensation. They were aware that reasonable compensation is all that is permissible in relation to surrogacy in England and Wales.

### **Parental Orders**

5. Surrogacy is legal in the UK, although surrogacy arrangements are not enforceable in law. At birth, the surrogate (and, if she is married or in a civil partnership, her consenting spouse or civil partner) will be the legal parent(s) of the child. Following the birth, a legal process – the Parental Order process – takes place to transfer legal parenthood from the surrogate to the intended parents ('IPs'). The application for a Parental Order is regulated by section 54 HFEA 2008, the Human Fertilisation and Embryology (Parental Order) Regulations 2018, and Part 13 of the Family Procedure Rules 2010. When IP(s) submit a Parental Order application, the court will usually ask CAFCASS to appoint a Parental Order reporter to investigate the circumstances of the case and submit a Parental Order Report.
6. Under section 54 (section 54A has similar provisions in the case of a single applicant) the court may grant a Parental Order to a couple in respect of a child born through a surrogacy arrangement where such an order meets the child's welfare needs in accordance with section 1 Adoption and Children Act 2002, and the following criteria are satisfied:
  - a) *The child has been conceived artificially and is genetically related to one of the IPs (subsection 1).*
  - b) *The IPs are married, in a civil partnership or living as partners in an enduring relationship (ss. 2).*
  - c) *The IPs have applied within 6 months of the child's birth (ss. 3).*

- d) *The child is living with the IPs and at least one of them is domiciled in the UK (ss.4).*
- e) *The IPs are over 18 years old (ss.5).*
- f) *The surrogate has been paid no more than reasonable expenses, unless authorised by the court (ss.8).*

7. Section 54(6) provides that:

- (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 [...],**have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.*

8. A Parental Order is a fundamental legal order in relation to personal status, being even more far-reaching than an adoption order. In *AB v CD* [2015] EWFC 12 at [70], Theis J described the difference between the two orders:

*"(3) ... Adoption orders create a presumption in law that the child is treated as if the biological child of the adopters. A parental order does not require that presumption to be made. Both orders are transformative, but a parental order proceeds on the assumption one of the applicants is the biological parent. That is one of the key criteria in s 54 HFEA. It doesn't change the child's lineage as an adoption order does; a parental order creates a legal parentage and removes the legal parentage of the birth family under the provisions of the HFEA 2008. Unlike adoption there is already a biological link with the applicants before the parental order application is made. Its purpose is to create legal parentage around an already concluded lineage connection.*

*(4) From the point of view of the child the orders are different. An adopted child is seen to have had a family created for it, whereas in a surrogacy arrangement the child's conception and birth has been commissioned by the parents, the child has a biological connection and the same identity as one of the parents. The latter arrangement is more congruent with a parental order than an adoption order."*

9. A further important distinction was identified by Hedley J in **G v G [2012] EWHC 1979 (Fam)** at [27]:

*"Let me say something about [the mother]'s position. Were she to have withheld her consent that would have been fatal to the application for, by Section 54(6), it is a true veto and the court, unlike in adoption proceedings, has no dispensing power. That provision no doubt exists in conformity with the policy objective of the 2008 Act, that whilst gratuitous surrogacy is not unlawful, a surrogacy agreement is unenforceable."*

### **The Surrogacy Arrangements**

10. Two attempts were made to inseminate the first respondent by way of a domestic arrangement in Germany (by syringe), in February and March 2023 respectively. These attempts proved unsuccessful. In April 2023, there was a further attempt by the same method. Shortly after which the first respondent notified Mr and Mrs W that she was pregnant. F was born in Germany in December 2023. Both Mr and Mrs W were present at the birth. Mrs W cut the umbilical cord and by the agreement of the parties in advance, it was she who was the first person to hold F in her arms, and he was placed on her chest. In her statement filed in support of the application, she described the moment:

*"It was a magical and precious moment becoming F's mother. It is a feeling I will never forget. [Mr W] was next to hold him..."*

11. Days later, the family returned to the UK. F has flourished and is meeting all his developmental milestones. He has, I have been told, recently had a growth spurt, described by his mother as “*massive*”. The couple is delighted to have “*such a healthy, strong little boy*”. F spends a lot of time with his extended family, particularly with his paternal grandmother, who lives close by and who “*adores her grandson*”. The surrogacy framework was created by the HFEA 2008, thus F is in the first generation of children and families afforded what, in my experience, they all regard as an extraordinary privilege.
12. A Parental Order Report dated 16<sup>th</sup> August 2024 and an Addendum dated 10<sup>th</sup> October have been prepared. The authors of the Report advance the following recommendation:

*“6.1 The surrogacy arrangement that has resulted in the birth of [F] has clearly been positive for Mr and Mrs [W] and [K]. In my view, through their initial friendship, extensive research, exploring all options available, communication, agreeing an altruistic way forward, has clearly all contributed to the success of this experience.*

*6.2 [K]’s own experience of being a parent has clearly allowed her to consider the dilemma of Mr and Mrs [W]’s situation due to the age of Mrs [W] and her natural inability to conceive and carry her own child and allow her to assist them with being able to have F and move forward with their life, as a family unit here  
....*

*6.3 As highlighted within this report, the parties appear to have shared a special experience which has resulted in also maintaining a friendship with one another, whilst also hopefully continuing to promote either a relationship between F and [K] or at the very least, ensuring that he is aware of his birth history and identity.*

*6.4 From observation, [F] presented as a healthy, happy and thriving little boy who appeared content in the care of Mr and Mrs [W], who he associates clearly as his father and mother. Mr and Mrs [W] appeared confident in their care of [F] and have*

*engaged with his health visitor and already considered a local ... school for him to attend in the near future.*

*6.5 Mrs [W], whilst perhaps not wishing to focus on her age, made references to initial discussions with friends, some of whom have a child of similar age to [F], around their role in his life moving forward, namely being godparents. This is a clear indication that Mr and Mrs [W] have considered [F]'s needs in every aspect and that they are child centred.*

*6.6 Due to these factors and through interviews, we are quite satisfied that [K]'s primary motivation to engage in surrogacy was borne out of her strong feelings to help facilitate Mr and Mrs [W]'s journey into establishing a family of their own.”*

13. Accordingly, there are only two issues with which I am concerned:

*“8. There are two issues the court is concerned with at this hearing:*

- i. Whether the statutory criteria for a parental order is met; and*
- ii. Whether [F's] lifelong welfare will be met by the making of a parental order.”*

### **Statutory Criteria**

14. The Parental Order application was issued on 18<sup>th</sup> June 2024. The court is required to examine the relevant criteria. As can be seen from the above passages, the grounds have been met. Mr Powell in his succinct and helpful Position Statement conveniently summarises the relevant factual evidence by reference to the applicable criteria. They require no addition from me:

*“i. S54(1) – the first applicant’s gametes were used to conceive a child with the first respondent, and the first respondent carried the child. A DNA paternity test dated*



*29<sup>th</sup> February 2024 also confirms the second applicant’s paternity;*

*ii. S54(2) – the applicants are married;*

*iii. S54(3) – the application was received by the court on 11<sup>th</sup> June 2024, within 6 months of the child’s birth;*

*iv. S54(4)(a) – [F] had his home with the applicants when the application was made - and he continues to have his home with them in the event an order is made on 31<sup>st</sup> October 2024;*

*v. S54(4)(b) – both applicants’ domicile of origin is in this jurisdiction - the first and second applicants having been born in the Northwest of England respectively. Neither has spent any significant time out of the jurisdiction or has any intention for their domicile of origin to change);*

*vi. S54(5) – both applicants are over the age of 18;*

*vii. S54(6) – the respondents signed the A101A consent form witnessed by a notary in Germany; and*

*viii. S54(8) – the court will be required to consider whether it is necessary retrospectively authorise any aspects of the surrogacy arrangement.”*

15. Two areas of the s54 criteria require particular focus, s54(6), ‘consent’ and s54(8) the requirement to consider sums paid in respect of the surrogacy agreement.

#### **Consent – S54(6)**

16. The statute makes plain that consent must be given freely and unconditionally, with a full understanding of all that is involved. The importance of consent is crystallised in clear terms in the judgment of Jackson LJ in **Re C [2023] EWCA Civ 16**:

*“61. The right of a surrogate not to provide consent is a pillar of the legislation and the assumption by the court of such a power would go far beyond permissible judicial interpretation of the kind found in A v P and in Re X.”*

17. As I have identified above, the respondents signed the A101A consent forms on 30<sup>th</sup> July 2024 (i.e. more than 6 weeks after F's birth). This was witnessed by a German notary. Further, on 1<sup>st</sup> October 2024, the Parental Order reporter, met with the respondents (remotely). They described their relationship with Mr and Mrs W as having a "lifelong friendship", also adding their desire that Mrs W should be allowed "to adopt F", as they put it. I have no hesitation at all in concluding that both respondents have given their consent freely and with a clear understanding of all that is involved. The arrangements, from the very beginning and through to this hearing, are suffused with altruism and kindness.
18. I should also note that the consent of both respondents is required, given that they are Lebenspartnerschaft, the German equivalent of a civil partnership in this jurisdiction. This is expressly provided for in Section 42 HFEA 2008:

*(1) If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership [with another woman] [or a marriage with another woman], then subject to section 45(2) to (4), the other party to the civil partnership [or marriage] is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).*

*(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1).*

### **Reasonable Expenses**

19. The Court is required to be satisfied that no money or benefit, other than reasonable expenses, has been received by the surrogate. As this was a home insemination, there were no costs payable to a surrogacy agency or fertility clinic. The first applicant sets out the sums paid to the first respondent in her witness statement. She confirms that £12,454 was paid to cover loss of earnings and medical expenses, including health checks for K and F. Private midwifery services were also provided.

20. The Parental Order reporters have discussed this with the respondents and set it out in their report. They have not in fact made any mention of the reasonableness of the payments, but in my view, this is largely self-evident. I note that in her statement, Mrs W records that the concept of “*reasonable compensation*” was something that she had learned about during the couple’s time with Surrogacy UK. As K did not ask for expenses, Mr and Mrs W researched via the Internet as to what might be reasonable in such circumstances. The parties had felt that due to their “*close friendship*”, they did not need “*a contract...documenting our surrogacy arrangement. We all trust/ trusted each other implicitly.*” The good faith of these arrangements, like the altruism that has driven it, is manifest. I have no hesitation in concluding that the payments were all reasonably incurred, and as such, require no respective authorisation.
21. In the circumstances therefore, I am delighted to make a Parental Order in respect of F, who has attended court with his parents, whom the law now, by virtue of my order, recognises as such. A family, in the eyes of the law, like any other. F has a wonderful life story which will be unfolded to him in the years to come. He is a much wanted and loved child. His birth was generated by adult kindness, friendship and empathetic cooperation. This is a generous legacy of which, I am confident, F will be rightly proud.