

# Royal Faculty of Procurators in Glasgow

## Aspects of Child Law

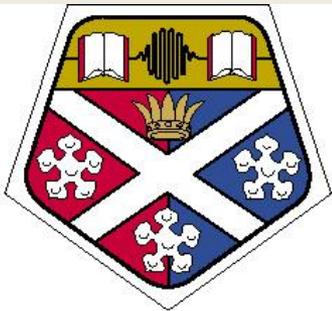
### 9<sup>th</sup> March 2016

Adoption and Surrogacy Compared

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# The Legislation

- Adoption and Children (Scotland) Act 2007
- Human Fertilisation and Embryology Act 2008, s. 54: parental order after surrogacy
- Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010/985), reg 4:
  - “The provisions of the 2007 Act set out in column 1 of Schedule 3 have effect in relation to parental orders made in Scotland and applications for such orders as they have effect in relation to adoption orders and applications for such orders, subject to the modifications set out in column 2 of that Schedule”.

# Human Fertilisation and Embryology Act 2008, s. 54: the Conditions

- **(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 —
  - (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.
- **(2)** The applicants must be—
  - (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.
- *A v P* [2011] EWHC 1738 (one applicant died before order made)
- *Re Z (A Child)* [2015] EWFC 73 (single applicant)

# Human Fertilisation and Embryology Act 2008, s. 54: the Conditions

- **(3)** Except in a case falling within subsection (11), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born.
- ***Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (child 2 and a half years old)**
- *AB & CD v CT* [2015] EWFC 12 (twins almost 4 years old)
- *A v X* [2015] EWHC 2080 (twins 3 years old)
- *Re A (A Child)* [2015] EWHC 911 (children 5 and 8 years old)

# Human Fertilisation and Embryology Act 2008, s. 54: the Conditions

- (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.
- *A v P* [2011] EWHC 1738 (one applicant dead)
- *Re X (A Child) (Surrogacy: Time Limit)* (above) (applicants living apart when application made; reconciled by date of court hearing)
- *A v X* [2015] EWHC 2080 (applicants living apart – and non-molestation order in force). Could they be an “enduring family relationship”?

# Human Fertilisation and Embryology Act 2008, s. 54: the Conditions

- **(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 ... have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.
- *C v S* 1996 SLT 1387: mother changed her mind and refused consent: adoption order made instead, dispensing with her consent
- *Re G (Surrogacy: Foreign Domicile)* [2008] 1 FLR 1047 (estranged husband of surrogate (and presumed father) refused consent therefore no parental order possible)
- *Re X and Anor (Children) (Parental Order: Foreign Surrogacy)* [2009] Fam 71 (parenthood to be determined by domestic law and not law of putative parent's domicile)

# Human Fertilisation and Embryology Act 2008, s. 54: the Conditions

- **(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.
- *Re C (Surrogacy: Payments)* [2002] 1 FLR 909 (£12,000 authorised)
- *Re X And Anor (Children) (Parental Order: Foreign Surrogacy)* [2009] Fam 71 (€25,000 authorised)
- *Re S (Parental Order)* [2010] 1 FLR 1156 (US\$23,000 authorised)
- *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (£6875, or 550,000 Indian Rupees, authorised)
- *R, S and T* [2015] EWFC 22 (€31,000 authorised)

# Why Not Adoption?

- *Re X (A Child) (Surrogacy: Time Limit)* (above): denying the PO (requiring the applicants to seek an adoption order instead) would create “immense and irreparable prejudice” (at [65]; adoption “is not an attractive solution given the commissioning father’s existing biological relationship with X” (at [7])).
- *AB & CD v CT* [2015] EWFC 12: Adoption creates a presumption that applicants are treated “as if” parents; a PO makes the applicants parents (at [70]). So POs “are a more honest order which reflects the reality of what is intended, the lineage connection that already exists and more accurately reflects the child’s identity” (at [71]).

# Legal differences between an adoption order and a parental order

## ADOPTION

- Consent given when P or G “understands the effect of the order (whether or not knowing the identity of the applicants)”
- Consent dispensed with if P or G cannot be found
- Other grounds of dispensation (welfare)
- Child over 12 must consent

## PARENTAL ORDER

- Consent: parents must have “freely and with full understanding of what is involved, agreed unconditionally to the making of the order”.
- Consent not necessary if P or G cannot be found
- No grounds of dispensation
- Child’s consent should not arise (except for transitional case)

# Legal differences between an adoption order and a parental order

## ADOPTION

- “Relevant couple” includes couple *“living together in an enduring family relationship”*
- Both applicants must be over 21
- One or both applicants must be domiciled in UK, or both habitually resident for at least a year

## PARENTAL ORDER

- “Relevant couple” includes couple in “living as partners in an enduring family relationship *not within forbidden degrees*” (reflecting English FD, excluding great-grandparents)
- Both applicants must be over 18
- Either or both applicants domiciled in UK

# Legal differences between an adoption order and a parental order

## ADOPTION

- Child must have had home with applicant for preceding 13 weeks (or 12 months)
- Sole applicant permitted

## PARENTAL ORDER

- Child must have home with applicant at time of making application.
- Sole applicant not permitted

# Legal differences between an adoption order and a parental order

## ADOPTION

- No genetic connection necessary
- Method of conception irrelevant
- Order may be made even when offence (e.g. regarding payment) committed (Scottish legislation only)

## PARENTAL ORDER

- Genetic connection with at least one applicant essential
- Child must be conceived artificially
- Nothing specified in Act: but see *A, B v A Local Authority* [2014] EWHC 4816 (English adoption case)

# Social differences between an adoption order and a parental order

## ADOPTION

- Two very different scenarios: child protection and family reconstitution, both often strongly contested
- Child already exists before question arises
- Designed to change child's very identity
- Monetisation strongly disapproved of

## PARENTAL ORDER

- One scenario: surrogacy, usually consensual
- Child deliberately brought into existence for purpose of order
- Designed to reflect the reality of the child's existing identity
- Monetisation increasingly accepted by the courts (virtually no case in which court not asked to authorise payments to surrogate mother giving up her child)