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Could the welfare of the child demand an upper age limit of intended parents in surrogacy arrangements? Considerations from *Re Z (Unlawful Foreign Surrogacy: Adoption)* and *Mr K & Anor v Mr Z & Anor*

Abstract

Recent cases, *Re Z (Unlawful Foreign Surrogacy: Adoption)* and *Mr K & Anor v Mr Z & Anor*, highlight the potential impact of intended parents' age on judicial decisions regarding parenthood following surrogacy. Intended parents may establish legal parenthood through a parental order or an adoption order, neither of which imposes an upper age limit. When deciding whether to grant such orders, the courts are under a statutory obligation to have the child's welfare as the paramount consideration. This commentary examines whether, in light of these cases, the child's welfare could demand an upper age limit on intended parents. By analysing age-based restrictions in other parenting contexts and the Law Commissions' recommendations on surrogacy law, it argues that a strict upper age limit would be inappropriate. However, greater recognition of age as a relevant welfare consideration is necessary in judicial decision-making.

Key words

Surrogacy; parenthood; welfare; parental orders; age.

Introduction

The recent cases of *Re Z (Unlawful Foreign Surrogacy: Adoption)*¹ and *Mr K & Anor v Mr Z & Anor*² demonstrate an underexamined issue in the law on surrogacy: the age of the intended parents. In both cases, the intended parents seeking to establish legal parenthood of surrogate-born children were of advanced age. In *Re Z*, the intended parents seeking adoption orders were each 'over' or 'fast approaching' 70 years of age, whilst in *Mr K v Mr Z*, the intended parents were each 72 years old. Whilst there is no statutory upper age limit for an individual to become a parent, either by way of adoption or parental order (PO), the age of intended parents may be expected to have an impact on the welfare of the child. These cases examined this issue, enabling a closer analysis of the extent to which the intended parents' age interplays with the child's welfare.

It must be acknowledged that intended parents can be expected to be older than parents who conceive naturally. Particularly for opposite-sex couples and single female applicants, many will have been through the process of infertility diagnoses and attempts at assisted conception before deciding to pursue surrogacy. However, this alone cannot be used as a rationale for allowing intended parents to become parents at any age, particularly considering the paramountcy of the child's welfare. In this commentary, the two recent cases, along with other relevant case law, are examined, before considering age-based limits in other contexts and the surrogacy law reform recommendations made by the Law Commissions in relation to upper

¹ [2025] EWHC 339 (Fam).

² [2025] EWHC 927 (Fam).

age limits for intended parents. Ultimately, a strict age criterion could operate against the child's welfare and is therefore not advocated. However, this commentary asserts that age must be more explicitly recognised as a relevant welfare consideration, both by the courts and in practice, to encourage greater awareness and discussions of how the intended parents' age may impact on the lifelong welfare of the child.

Background

For intended parents to be recognised as the child's legal parents following surrogacy, they must apply for a judicial order to obtain legal parenthood. Until this process is undertaken, the surrogate (and spouse, if applicable) will be the child's legal parents. POs were designed as the judicial mechanism by which intended parents can obtain legal parenthood, with criteria outlined in s 54 or 54A Human Fertilisation and Embryology Act 2008 (HFE Act 2008). Should a PO not be possible owing to a key requirement not being satisfied, adoption orders are an alternative method of establishing legal parenthood. There is no explicit upper age restriction on applying for a PO or adoption order.

When the court is deciding whether to grant a PO or adoption order, they must be satisfied as to the child's welfare, under s 1(1) Adoption and Children Act 2002 (ACA) in England and Wales and s 14 Adoption and Children (Scotland) Act 2007 (ACSA). Under the ACA, there is an obligation on the court to consider the child's welfare throughout their life as the paramount consideration.³ The ACSA similarly requires that the court's paramount consideration is the need to safeguard and promote the child's welfare throughout their life,⁴ with s 28 stating that the court should not make an order unless 'it considers that it would be better for the child that the order is made than not.'

The child's welfare has regularly been used by the court to justify a departure from the prescriptive requirements for a PO outlined in s 54, on the basis that the child's welfare demands that the intended parents be recognised as the legal parents. As such, it has been extensively argued that the welfare standard has led to an inevitability of POs being granted.⁵ Furthermore, whilst some s 54 criteria – such as the genetic link requirement⁶ – are strictly applied, legal parenthood can still be achieved through adoption.⁷ Resultantly, intended parents pursuing surrogacy can be reasonably assured that they will acquire legal parenthood, in

³ Human Fertilisation and Embryology (Parental Orders) Regulations 2010; the Adoption and Children Act 2002 s.1.

⁴ Human Fertilisation and Embryology (Parental Orders) Regulations 2018; Adoption and Children (Scotland) Act 2007 s.14.

⁵ C Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law' [2015] 27 CFLQ 83; K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24 Medical Law Review 608; A Alghrani and D Griffiths, 'The Regulation of Surrogacy in the United Kingdom: The Case for Reform' [2017] 29 CFLQ 165; A Brown, 'Two Means Two, but Must Does Not Mean Must: An Analysis of Recent Decisions on the Conditions for Parental Orders in Surrogacy' [2018] 30 CFLQ 23; Sir James Munby, 'New Science, New Families, Old Law: Is the Human Fertilisation and Embryology Act Fit for Purpose?' [2019] Fam Law 364.

⁶ Human Fertilisation and Embryology Act (HFE Act) 2008 s.54(1)(b).

⁷ *Re L (Adoption: securing legal parental relationship in surrogacy)* [2021] EWFC 115.

accordance with the child's welfare, provided that the child has its family life with the intended parents.⁸

However, the paramountcy of the child's welfare may require consideration of factors not explicitly listed in s 54, such as the age of the intended parents. Although, to the best of the author's knowledge, legal parenthood has never been refused following surrogacy based on the welfare test, it remains possible that broader welfare concerns could lead to a refusal of a PO. The two cases examined in this commentary demonstrate the potential impact that the age of the intended parents may have on the child's welfare.

Re Z involved two female intended parents entering surrogacy arrangements in Northern Cyprus, a jurisdiction that the UK does not recognise, and that neither regulates surrogacy nor recognises same-sex parentage. Embryos were formed using donated eggs and sperm, and two separate surrogates were engaged. This meant that the two children were full genetic siblings but had different gestational parents. The children also had no genetic link to the intended parents as double gamete donation had been used. After the children were born, there were multiple problems relating to registering the births, establishing nationality, and entering the UK. The full extent of the issues posed by the way in which the intended parents engaged with surrogacy is outside the scope of this commentary, but there were various welfare concerns raised by their actions.⁹

The intended parents were unable to pursue a PO due to the requirement in s 54(1)(b), which mandates a genetic link between at least one intended parent and the child. Instead, they sought to formalise their relationship with the children through adoption orders. In deciding whether to grant an adoption order, the court must consider the child's lifelong welfare, applying the same statutory test as for POs. The children's statelessness meant that adoption would significantly benefit them by granting them British nationality. Additionally, as no one else held parental responsibility for the children, the only alternatives would have been the local authority or High Court in wardship - neither of which would have been desirable, especially given that the children were living with the intended parents and had a familial relationship with them. Therefore, there were clear welfare reasons supporting the adoption orders, and the orders were made.

In *Mr K v Mr Z*, the intended parents were 72 years old at the time of the PO hearing. As stated by Knowles J at the outset of the judgment, this means that the intended parents will be 76 years old by the time the child starts school, and 89 years old when he reaches adulthood.¹⁰ Although there were no aspects of the surrogacy arrangement that required detailed

⁸ One circumstance which may prevent legal parenthood being attributed to the intended parents is where the surrogate will not provide her consent to a PO or adoption order: for example, *Re Z (Surrogacy: step-parent adoption)* [2024] EWFC 20.

⁹ For a brief commentary of this case, see L Park-Morton, 'Renewed warnings of the risk of international surrogacy arrangements: *X v W & Another* and *Re Z* (Unlawful foreign Surrogacy: Adoption)' (20 Feb 2025, reformingsurrogacylaw.blog) <<https://reformingsurrogacylaw.blog/2025/02/20/renewed-warnings-of-the-risk-of-international-surrogacy-arrangements-x-v-w-another-and-re-z-unlawful-foreign-surrogacy-adoption/>> accessed 6th March 2025.

¹⁰ *Mr K & Anor v Mr Z & Anor* [3].

consideration regarding the s 54 criteria, Knowles J thought the case was significant enough to be reported owing to the welfare issues that it raised.

The intended parents, who were both retired and had been married for 35 years, turned to surrogacy after tragically losing their son when he was 27 years old. They decided to pursue surrogacy, having seen other parents find solace in having children after the death of a child. The surrogate was located in California, and the birth took place there. The intended parents followed the pre-birth processes, enabling them to be recognised as the child's legal parents from birth, and returned to the UK with the child a few months after his birth. They subsequently sought a PO to have their legal parenthood established in England and Wales.

Upon the PO application being made, directions were given to determine the arrangements for the child's care should either or both intended parent become incapacitated or die. This direction was given so that the judge could confirm that the child's welfare throughout his life would be satisfied by the granting of the order. Ultimately, Knowles J granted the PO, satisfied that both the s 54 criteria and welfare considerations were satisfied.

The judicial approach

Although orders recognising the intended parents as the children's legal parents were granted in both cases, the judgments are significant in examining the impact of the intended parents' age on the welfare assessment.

In *Re Z*, the Children's Guardian's report noted that by the time the children are in their early teens, one intended parent will be in her 80s, whilst the other will be in the mid-70s. However, the Guardian did not solely focus on the intended parents' age; rather, attention was also given to how the intended parents had failed to fully acknowledge how their age might affect the children's welfare. The report stated that '[t]he applicants had not given any consideration of the impact on the children of having parents who are so much older and all the attendant age-related health issues which follow'.¹¹ Sir Andrew Macfarlane, the President of the Family Division, was of the view that this was surprising given that 'to someone standing outside, the need to understand the impact on the children of the age difference is very plain'.¹²

In contrast with the *Mr K v Mr Z*, where the family court was satisfied that the child's welfare had been met through the intended parents' actions in making arrangements should they not see the child into adulthood, in *Re Z*, these provisions had not been made. More than merely failing to make arrangements, the intended parents' 'entirely self-centred' motive for becoming parents included:

no thought as to the long-term welfare of their resulting children. It was astonishing to learn, and have confirmed by their solicitor, that the applicants had not given any consideration to the impact on the children of having parents who are well over 60 years

¹¹ *Re Z (Unlawful Foreign Surrogacy: Adoption)* [21].

¹² *Op. cit.*, [21].

older than they are. It is likely that when they are in their early teens, these two young people will become carers for their 80 year old adopted parents.¹³

Notwithstanding the lack of consideration by the intended parents as to the impact their age may have on the children, adoption orders were made, with the judge having confidence that they would – prospectively – make arrangements for the child’s welfare, for at least their childhood and early adult years.¹⁴ The fact that such arrangements had not actually been put in place by the time that parenthood was established by way of adoption order suggests that, regardless of the actions and age of the intended parents, the welfare assessment demands recognition of the parent-child relationship following surrogacy.

In *Mr K v Mr Z*, the PO was granted as Knowles J was satisfied as to the arrangements that had been devised. There was a thorough and practical plan in place: if one intended parent died or became incapacitated, the other would continue to care for the child with the assistance of their nanny, with the child attending boarding school in the longer term; if both intended parents became incapacitated or died, a local couple had agreed to take on guardianship with financial provisions put in place for his further care. Both intended parents had also executed Lasting Powers of Attorney in relation to finance and health.¹⁵ As submitted for the intended parents, this comprehensive plan could be kept under review as the child gets older and circumstances change.¹⁶

Although approving of the practical provisions put in place, and granting the PO based on the child’s lifelong welfare, Knowles J reflected on how these plans were only confirmed after directions were given for the arrangements to be confirmed. As stated in the judgment, ‘given their age, these matters should have been addressed some time ago’.¹⁷ This, as with the *Re Z* case, emphasises how the age of the intended parents must be considered when deciding whether to embark on a surrogacy arrangement, not only after the event. In light of this, Knowles J, added to the list of issues, originally devised in *Re Z (Foreign Surrogacy)*¹⁸, that any person should address before entering into a surrogacy arrangement. The additional questions for consideration are: what steps have been made in relation to estate planning; what steps have been made in relation to the future care and financial arrangements for the child in the event of incapacity of the intended parents; and what steps have been taken in respect of future care and financial arrangements of the child in the event of the death of the intended parents.¹⁹

It is significant to note that the case and facts of *Re Z* were explicitly distinguished in *Mr K v Mr Z*: other than the age of the intended parents, the cases were said to share very few similarities. Unlike in *Re Z*, the intended parents were seen to have undertaken due diligence to minimise any risk or disruption to the child, and there were no concerns as to exploitation in how the arrangement had been carried out. Nonetheless, notwithstanding the more informed

¹³ Op. cit., [33].

¹⁴ Op. cit., [21].

¹⁵ Op. cit., [21] and [28].

¹⁶ Op. cit., [23].

¹⁷ Op. cit., [28].

¹⁸ [2024] EWFC 304.

¹⁹ *Mr K & Anor v Mr Z & Anor* [37].

approach the intended parents in *Mr K v Mr Z* had taken to the arrangement, the age-related concerns remained the same. As Knowles J stated:

It is not the purpose of this judgment to moralise about the wisdom of having a baby through surrogacy at an advanced age, but this court can and should ensure that the arrangements for that child's future care have been thought about, planned and actioned in case the worst should happen.²⁰

However, the focus of both judgments on the practical provision of care in assessing the child's lifelong welfare is notable. Knowles J alluded to broader welfare implications of older intended parents in terms of the emotional upset that may be experienced by the loss or incapacity of one of the parents: 'that experience may strike... at a time in his childhood when he is ill-prepared to understand or come to terms with it, upending his daily life and placing him in the care of adults to whom he is not emotionally close'.²¹ Despite seemingly recognising this additional welfare consideration, no further reference is made to it in the judgment.

Other judicial considerations of age

Alongside the cases from England and Wales discussed above, a similar issue was raised by the recent Scottish case of *Petition for a Parental Order in relation to A*.²² The intended father, the first petitioner, was 72 years old at the time of the hearing. The intended mother, the second petitioner, was deceased. She had suffered a stroke during the surrogacy pregnancy and resided in a nursing home until her death in December 2023. Her husband sought a PO on behalf of himself and his deceased wife, acting as the executor of her estate. Although satisfied that the s 54 criteria had been met, Sheriff Sheehan had to consider the child's welfare, stating:

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.²³

As was stated earlier in the judgment, 'whilst [the child's] current needs are met, the age of the first petitioner gives rise to concern regarding A's welfare throughout his childhood (and beyond)'.²⁴ The concern seemed primarily to be practical in nature, as to whether the intended father would be able to care for the child into adulthood, acknowledging that there was no other family who could provide care should it be required. Nonetheless, the court was satisfied that these welfare concerns as to the intended father's age did not preclude the ability to grant the PO. Although the intended father was 'outwith the normal accepted range of parenthood', he was described as 'active and energetic' and had put in place arrangements for the child's care, including research into boarding schools and securing agreement for guardianship by the nanny who had cared for the child directly after the birth: these factors were seen to demonstrate that

²⁰ Op. cit., [28].

²¹ Op. cit., [28].

²² 2024 Scot (D) 5/7, [2024] SC Edin 29.

²³ Op. cit., [37].

²⁴ Op. cit., [15].

the intended father understood the welfare concerns raised by his age.²⁵ As in *Mr K v Mr Z*, therefore, the PO was granted on the basis that practical arrangements had been put in place should the intended father not be able to see the child through their childhood.

The only other reported surrogacy case that explicitly considers the age of the intended parents is *RS v T (Surrogacy: Service, Consent and Payments)*,²⁶ which holds the same critique. In this case, the intended parents were in their early 60s by the time of the hearing, when the surrogate-born twins were 18 months old. Compared to the more recent cases, however, the issue of the intended parents' age was given even briefer consideration. When analysing whether the children's lifelong welfare would be satisfied through the making of a PO, Theis J referred only to the CAFCASS reporter's assessment that there were no health concerns for either intended parent, and that arrangements had been put in place through appointing a testamentary guardian should they become unable to care for the children.²⁷ Having accepted the assessment in the report, the remainder of the welfare discussion centred on ensuring the children's relationship with the intended parents was legally recognised to reflect their reality and to provide lifelong security.

Therefore, as in *Mr K v Mr Z* and the *Petition*, the court was satisfied that the child's welfare would be met through granting POs partly based on the evidence supporting that the intended parents were of good health and that there would be care arrangements in place should the intended parents die before adulthood. In *Re Z*, those arrangements had seemingly not yet been put in place, although there was confidence that it would be actioned. It therefore seems clear that the judges must satisfy themselves that the child's welfare will not be compromised by the age, or health, of the intended parents. However, this focus on the practical provision of care seems a narrow application of the welfare test, and there was no consideration of the wider implications for the surrogate-born children, as alluded to in *Mr K v Mr Z* in terms of emotional trauma in losing a parent at a young age.

These are the only four reported cases that explicitly considered the age of the intended parents, and there have been no cases to date where a PO or adoption order has been refused based on the age of the intended parents. That some judges reported feeling like they could not refuse a PO based on the intended parent's age, although feeling uncomfortable about,²⁸ is demonstrative of an issue: without a statutory upper age limit, judges may feel unable to explicitly assess the impact of the intended parents' age during proceedings and grant POs despite their welfare-based concerns. Similar sentiments could be observed during consultation by the Law Commissions where examples of POs being granted to intended parents in their 70s were given, of which judges and CAFCASS expressed 'significant reservations'.²⁹ Given that both cases analysed in this commentary were heard after the Law Commissions' report,

²⁵ Op. cit., [15] and [37].

²⁶ [2015] EWFC 22.

²⁷ Op. cit., [42].

²⁸ Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law, A Joint Consultation Paper* (Law Com No 244, 2019), p. 296.

²⁹ Op. cit., p. 295.

means that there have been other, unreported, instances of POs being sought by intended parents who were of an age that was a concern to the courts.

It is necessary for judges to feel empowered to undertake a neutral and holistic welfare assessment, without worries over expressly addressing any age-related concerns. If judges feel uncomfortable about the intended parents' age, and this is not being reflected in the judgments, their ability to undertake welfare assessments will be undermined. It fails to send a message to others that the intended parents' age is an active consideration for the court when determining the child's welfare. Without this messaging, intended parents may continue to engage with surrogacy without taking account of their age, giving rise to similar issues as demonstrated in the cases discussed. The fact that Sir Andrew Macfarlane in *Re Z* stated that in future cases, the court could refuse to grant a PO or adoption order if there were overwhelming policy concerns should be a stark warning for such considerations to be properly considered.³⁰ This would seemingly support the imposition of an upper age limit, or at least a framework by which the court can elucidate age-based concerns.

Age restrictions on alternative paths to parenthood

There are jurisdictions that impose upper age restrictions on intended parents engaging with surrogacy, demonstrating that it is possible to have an age-based limit in the legal framework.³¹ However, it is important to consider how the UK approaches age in relation to other methods of becoming a parent to ensure there is consistency in law and policy.

For an individual accessing in-vitro fertilisation (IVF) services, there is no statutory age limit and neither does the HFEA stipulate age restrictions,³² meaning the decision as to providing treatment sits with individual clinics. National Institute for Health and Care Excellence guidelines for NHS funding state that women up to 40 should be offered 3 cycles of IVF, and women 40-42 1 cycle,³³ although these guidelines are not mandatory, and each integrated care board (ICB) can set their own age-based limits. Across England, the most common upper age limits are 40 and 42, with no ICB policies extending beyond 42 years old.³⁴ Therefore, the eligibility requirements for NHS funding do operate to impose restrictions on individuals who are not able to self-fund treatment. However, there are additional medical considerations to the age restrictions in IVF, both in terms of gamete quality and risks associated with gestation. Therefore, it could be argued that the age limits, bearing in mind the need to allocate scarce NHS resources, are a protective measure for the person receiving treatment (in terms of both

³⁰ *Re Z (Unlawful Foreign Surrogacy: Adoption)* [35].

³¹ For example: in India, the intended mother must be no older than 50, and the intended father 55 (the Surrogacy (Regulation) Act 2021 s.4(iii)(c)(I); whilst in Greece and Israel, the upper age limit is 54 (Greek Civil Code Art.1455(1) and Law 3305/2005 Art.4(1); Embryo Carrying Agreements (Agreement Approval and Status of the Newborn) Law 5756-1996, s 5(1c)).

³² Although the HFEA does provide specific advice for women over 38 years old: 'Women over 38' (06 Mar 2024, hfea.gov.uk) <<https://www.hfea.gov.uk/i-am/women-over-38/>> accessed 06 Mar 2025.

³³ NICE, 'Fertility problems: assessment and treatment' (06 Sep 2017, [nice.org.uk](https://www.nice.org.uk)) <<https://www.nice.org.uk/guidance/cg156/ifp/chapter/in-vitro-fertilisation>> accessed 11 Mar 2025.

³⁴ Department of Health and Social Care, 'NHS-funded IVF in England' (22 Jul 2023, [gov.uk](https://www.gov.uk)) <<https://www.gov.uk/government/publications/nhs-funded-ivf-in-england>> accessed 10 Mar 2025.

medical risk and likelihood of a successful pregnancy and birth), as opposed to being based on the child's welfare.

Additionally, however, the treating clinic must conduct a pre-conception welfare of the child assessment prior to IVF treatment.³⁵ As part of this assessment, the HFEA Code of Practice specifies that clinics must decide if there is a 'risk of significant harm or neglect' to the potential child.³⁶ This is framed in a way that does not capture age-related concerns, and it explicitly states that the patient cannot be discriminated against on the basis of their age when undertaking the assessment.³⁷ The importance of maternal age in determining access to artificial reproductive technologies has decreased over time: earlier editions of the Code of Practice explicitly required consideration of the candidate's age, but this has been omitted since 2005, demonstrating that maternal age is no longer considered a risk factor.³⁸

Acceptance by the treating clinic, NHS restrictions on funding, and the possible impact of pre-conception welfare of the child assessments confirms that age is considered by healthcare professionals as a clinical factor, eligibility criterion, and child welfare issue.³⁹ Even in recognising that age considerations in IVF are centred differently than surrogacy owing to their medical framing, that the child's welfare does not demand a strict upper limit on parental age indicates it would be inappropriate to impose an age-based restriction in surrogacy. It would be incongruous to prevent individuals from becoming parents through surrogacy based on age alone if the same approach is not implemented in relation to IVF, given that both decisions should be centred on the child's welfare.

Similarly, there is no legal upper age limit on who can become a parent through adoption. The ACA does not refer to age or related eligibility criteria for prospective adopters, and the guidance is explicit that an adoption agency must not refuse prospective adopters based on age alone. The statutory guidance focuses on the 'health and vigour' of the prospective adopter.⁴⁰ These health-related determinations take place for approval and after matching.⁴¹ This is translated into local guidance in different ways. For example, some local authority adoption advice states that one must be able to meet the physical and emotional demands of meeting the child's needs throughout their childhood,⁴² whilst others refer to having suitable health and vitality to see the child through to adulthood.⁴³

³⁵ HFE Act 1990 s.13(5).

³⁶ Human Fertilisation and Embryology Authority, *HFEA Code of Practice* (Edition 9.4, 2023) [8.3].

³⁷ Op. cit., [8.6].

³⁸ A Büchler and K Parizer, 'Maternal Age in the Regulation of Reproductive Medicine: A Comparative Study' (2017) 31 *International Journal of Law, Policy and the Family* 269, p. 277.

³⁹ S Sheldon, E Lee and J Macvarish, "'Supportive Parenting'", *Responsibility and Regulation: The Welfare Assessment under the Reformed Human Fertilisation and Embryology Act (1990): "Supportive Parenting", Responsibility and Regulation* (2015) 78 *The Modern Law Review* 461, p. 481.

⁴⁰ Department for Education, *Statutory Guidance on Adoption* (July 2013) p. 63.

⁴¹ Op. cit., p. 66-67 and 115; FPR 2010, Part 14C Annex A Section C.

⁴² Adoption South East, 'Can I adopt?' ([adoptionsoutheast.org](https://www.adoptionsoutheast.org))

<<https://www.adoptionsoutheast.org.uk/eligibility#:~:text=Aged%201%20years%20and%20over,now%20and%20throughout%20their%20childhood.>> accessed 10 Mar 2025.

⁴³ Adoption West, 'The Adoption Process' (adoptionwest.co.uk) <<https://adoptionwest.co.uk/the-adoption-assessment-2/>> accessed 10 Mar 2025; Adopt South West, 'Can I adopt?' (adoptsouthwest.org) <

Therefore, absent specific legislative provisions relating to the eligibility of adopters, there are checks in place at various points of the process to ensure that prospective adopters are of sufficiently good health to look after, and bring up, the child into adulthood. While not explicitly an age-based determination, the age of the prospective adopters necessarily impacts on the assessment of their health and ability to bring the child up.

Considering that the average life expectancy in England and Wales is 79 for males and 83 for females,⁴⁴ an individual seeking to adopt a child beyond their early 60s would most likely not be approved for adoption on the basis that they would not be expected to survive the child's childhood, let alone be in sufficiently good health and vitality to provide care for the child into their future childhood. There is a lack of reported cases examining this issue, no doubt because the refusal to approve a prospective adopter would happen before a child is matched and therefore before any court hearing. Nonetheless, there have been reported examples of prospective adopters being refused due to their age, such as a 58- and 70-year-old couple who were refused as adopters to their grandchild who was in their care, allegedly due, in part, to their age.⁴⁵

The cases discussed in this commentary shine an interesting perspective on adoption and age, particularly when it is intended parents seeking to adopt the surrogate-born child. In the *Petition*, the intended father seeking legal parenthood was 72 years old, and the surrogate-born child 3 years old: there is a very real possibility that he will not survive the child reaching adulthood, sadly emphasised by the fact that the intended mother passed away so early in the child's life. He would not have been approved to become a parent through adoption, as alluded to in the judgment:

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.⁴⁶

However, in *Re Z*, where there were, equally, concerns of the intended parents seeing the children into adulthood, the adoption orders were granted. Had these intended parents sought to go through an adoption agency to become parents, it is unlikely they would have been approved as prospective adopters owing to the health-related considerations. Nonetheless, by engaging with surrogacy and then seeking parental recognition of the children, the court was satisfied that the child's welfare demanded that the adoption orders be granted: refusing to recognise their parental status would have left the children without legal parents in the UK, obviously detrimental to their welfare. It was seemingly the children's statelessness that was the biggest factor in the decision, with the adoption orders granting British nationality stated

<https://www.adoptsouthwest.org.uk/adopting-a-child/can-i-adopt/> accessed 10 Mar 2025; Adopt North East, 'Adoption is life changing' ([adoptnortheast.org.uk](https://www.adoptnortheast.org.uk/)) <<https://www.adoptnortheast.org.uk/>> accessed 10 Mar 2025.

⁴⁴ Office for National Statistics 'National life tables – life expectancy in England and Wales: 2021 to 2023' (23 Oct 2024, ons.gov.uk)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/bulletins/nationallifetablesunitedkingdom/2021to2023>> accessed 14 Mar 2025.

⁴⁵ 'Grandparents' adoption refusal 'down to age' ([bbc.co.uk](https://www.bbc.co.uk/news/uk-england-essex-33619446), 22 Jul 2015) <<https://www.bbc.co.uk/news/uk-england-essex-33619446>> accessed 10 Mar 2025.

⁴⁶ *Petition for a Parental Order in relation to A* [37].

as being ‘clearly a very significant benefit to them’.⁴⁷ However, from a child welfare perspective relating to the parents’ age, the same issues arise: if a parent is not of sufficient health (which may be due to age) to see the child into adulthood, the child is likely to suffer negative consequences of having disruption in their care arrangements and the experience of childhood grief and mourning. That the intended parents were able to obtain adoption orders following surrogacy in circumstances where they would not have been approved as prospective adopters could be seen as a work around restrictions to becoming a parent that are legitimately in place to support the welfare of children.

Notwithstanding the complexities seen in these cases and the interplay between adoption and surrogacy, there are still important comparisons to be drawn at a broader level. With both adoption and IVF, there is no specific restriction on having children based on age, although guidance allows treating clinics or adoption agencies to refuse the applicant based on their age, if there were concerns that they would not be able to adequately care for the child throughout their childhood. Therefore, it is coherent for eligibility for surrogacy to follow the same process, in not imposing a strict limit and being responsive to the circumstances of each case.

Law Commission Recommendations

When the Law Commission of England and Wales and Scottish Law Commission (the Law Commissions) undertook their review into the law on surrogacy, there was consultation as to whether there should be age restrictions for intended parents engaging with surrogacy. Under the Law Commissions’ recommendations for reform, there would be two routes to parenthood for intended parents: a new pathway to parenthood, enabling intended parents to be the legal parents from birth where appropriate pre-conception checks and safeguards have been undertaken by a Regulated Surrogacy Organisation (RSO); and the retention of the PO route, with some amendments to existing requirements. In relation to both routes to parenthood, the Law Commissions decided against imposing an upper age limit on intended parents. Although it was accepted that the intended parents’ age can impact on the child’s welfare, the Law Commissions recommended that it be a part of welfare assessments as opposed to a strict eligibility criterion.

New pathway to parenthood

A requirement for intended parents to proceed on the new pathway is a welfare of the child assessment undertaken by an RSO. The Law Commissions accepted the intended parents’ age may impact on the child’s welfare: ‘we do not think it is in the children’s interests for their parents to die when they are young, particularly when they are still a minor’.⁴⁸ Nonetheless, based on a variety of stakeholder views, it was ultimately proposed that no age limit be imposed on the new pathway. Instead, the intended parents’ age would be considered as part of the pre-conception welfare of the child assessment, on the basis that:

The underlying concern is to ensure a greater chance that the intended parents are alive throughout the child’s childhood: reducing this to a maximum age limit would

⁴⁷ *Re Z (Unlawful Foreign Surrogacy: Adoption)* [18].

⁴⁸ Law Commissions, *Joint Consultation Paper*, p. 296.

encourage box ticking, rather than a genuine assessment of the welfare of the child. We therefore propose that there should be no upper age limit for intended parents, but that age should be one factor taken into account when carrying out the welfare of the child assessment, to ensure an individualised assessment, rather than an arbitrary cut-off.⁴⁹

However, requiring age to factor into the child's welfare assessment on the new pathway places RSOs in difficult situations, having to make age-based determinations, whilst an objective age limit would relieve them of that subjective decision.⁵⁰ Judges have cited feeling like they have to grant POs despite age-related concerns, even with the regularity that they must make welfare-based decisions: it can be anticipated that this would be felt even more acutely by RSOs, who would be in the difficult position of refusing potential 'clients' based on age. Notwithstanding this difficulty in implementation, incorporating age considerations into the welfare assessment aligns with the approach seen in IVF and adoption.

Parental order route

The Law Commissions' recommendations may not be enacted, and even if implemented, there would be intended parents needing to secure legal parenthood by way of a PO (such as those who engage in private and international arrangements). In line with the recommendations for the new pathway, it was ultimately decided that there should not be a maximum age imposition for intended parents to obtain a PO. Instead, the court should continue to consider the intended parents' health and age as part of welfare concerns. As some consultees commented, age does not necessarily determine the quality of parenting, nor whether you will be healthy and energetic parents throughout the child's childhood.⁵¹ It was this view that seemingly led to the Law Commissions' recommendation not to impose an upper age limit for intended parents to obtain a PO.

Therefore, despite the intended parents' age being one of the 'most significant concerns' from stakeholders relating to the current law,⁵² and that judges have expressed they feel uncomfortable about some of the advanced ages of intended parents, the Law Commissions recommended retaining the current process of incorporating the intended parents' age within the welfare assessment when deciding whether to grant a PO. This could create a situation where the courts invariably grant the PO because 'age alone would not otherwise outweigh the best interests of the child',⁵³ acknowledging the *fait accompli* that the post-birth nature of POs create. If judges feel as though they cannot deny a PO based on the intended parents' age, the welfare assessment is not truly objective and undermines the statutory obligation.

Incorporating Age into Welfare Considerations

Any age restriction could act as an arbitrary line unable to account for the individuals' health and surrounding circumstances. This could unnecessarily restrict intended parents from engaging with the new pathway and operate against the child's welfare by preventing

⁴⁹ Law Commissions, *Full Report*, p. 152.

⁵⁰ Op. cit., p. 150.

⁵¹ Op. cit., p. 149-150.

⁵² Law Commissions, *Joint Consultation Paper*, p. 295.

⁵³ Law Commissions, *Full Report*, p. 150.

parenthood being granted by way of a PO to their social, and potentially genetic, parent who is in the best position to care for the child. Therefore, by incorporating age considerations into the welfare assessment, either pre- or post-birth, a more holistic determination of welfare can take place, enabling the intended parents' age to be balanced against other welfare factors.

It is essential that decision-makers, whether the RSO or judiciary, feel supported in considering the intended parents' age in their welfare assessments. If judges report feeling uncomfortable raising the intended parents' age, there must be more transparency in the decision-making process; this will be equally true of RSOs making pre-conception welfare assessments. This could be done in several ways, such as including the intended parents' age as an explicit consideration in the ACA welfare checklist, or ensuring the judiciary consider—and report on—specific factors weighing into the welfare assessment, including age.⁵⁴ The inclusion of estate planning and future care/financial arrangements into the judicial list of considerations in *Mr K v Mr Z* is supportive of this approach.

If a PO cannot be granted due to the intended parents' age overwhelming the welfare assessment, this could leave the child in a precarious legal position: adoption may not be possible, as alluded to in the *Petition* and *Re Z*, and the surrogate would retain legal parenthood. However, such cases are likely to be rare given the competing welfare factors supporting the granting of a PO or adoption order. The ultimate purpose of being more explicit as to the impact of age on the child's welfare would not be to prevent intended parents gaining legal parenthood, but to rather bring to the fore the importance of the issue and enable and encourage meaningful discussions on the issue, ideally before the surrogacy arrangement is entered into and as a last case, when making a determination as to parenthood.

Conclusion

The intended parents' age can have a direct impact on the child's welfare: there are risks of the intended parents not surviving to care for the children into adulthood, and concerns over their health and ability to be active parents during childhood. This was acknowledged by consultees during the Law Commissions' project and further highlighted in the recent cases of *Re Z* and *Mr K v Mr Z*. However, acknowledging the impact that intended parents' age may have on the surrogate-born child does not necessarily demand imposition of an upper limit on engaging with surrogacy. Such a hard-line imposition is arbitrary and would be unlikely to meet its intended purpose.⁵⁵ As evidenced by current practice and guidelines for other paths to parenthood, such as adoption and IVF, rather than a strict age-based limit, age can be incorporated into a broader assessment of the child's welfare.

The post-birth nature of judicial orders attributing legal parenthood is significant: the cases demonstrate, as with many PO cases dealing with other s 54 criteria, the current approach to regulating surrogacy results in limited judicial discretion. When presented with established

⁵⁴ For example, the Committee on the Rights of the Child recommend the use of Child Rights Impact Assessments to demonstrate what factors have been considered when making the decision: 'General Comment No 14: On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3. Para 1)' (2013) UN Doc CRC/C/GC/14

⁵⁵ A Büchler and K Parizer, 'Maternal Age in the Regulation of Reproductive Medicine' p. 282.

family life following surrogacy, in circumstances where the child's welfare would be detrimentally impacted by disruption to that familial dynamic, the court becomes duty-bound to grant a PO or adoption order. This post-birth process therefore leaves the court with a *fait accompli*, and legal parenthood is attributed even where there may be legitimate concerns as to impact of the intended parents' age on the child's welfare. To mitigate this, age should be included as an explicit welfare consideration in legislation: this would ensure that appropriate attention is paid by prospective intended parents as to the impact that their age may have on any child, and their ability to obtain legal parenthood. Given the report in the *Re Z* judgment that the intended parents had not considered what their age would mean for the children, there is clearly more that can – and should – be done to emphasise the importance of intended parents' age on the child's welfare.

Furthermore, if the recommended new pathway to parenthood were introduced, there would be greater ability for age-related welfare concerns to be elucidated. Including age as a specific welfare consideration in the pre-conception welfare assessment could facilitate meaningful conversations between RSOs and intended parents about their age, and any implications for the resulting child. It would empower RSOs to refuse prospective intended parents if their age gave significant cause for concern.

Age does not determine one's capability to parent. Nonetheless, truly prioritising the child's welfare necessitates better awareness and articulation of age-related implications on the child. This would empower decision-makers to elucidate legitimate concerns and ultimately encourage the responsible and ethical practice of surrogacy.