Article

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The tension between competing statutory obligations in the granting of parental orders: A systematic review of the case law

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Abstract

This article critically examines the judicial approach to granting parental orders following surrogacy under s 54 Human Fertilisation and Embryology Act 2008 in England and Wales. Whilst the child's welfare is the court's paramount consideration, the statutory requirements of s 54 can, at times, conflict with this principle. Through a systematic review of the case law, this article explores how courts have navigated the tension between fulfilling statutory obligations and guaranteeing the lifelong welfare of the child. It reveals that certain s 54 criteria – such as time limits, the home requirement, and restrictions on payments – have been interpreted flexibly to prioritise welfare, whilst others – including the genetic link requirement and surrogate's consent – remain rigidly applied, occasionally to the detriment of the child's welfare. The analysis highlights the doctrinal and legal incoherence that arises when courts are forced to reconcile competing statutory duties. This tension must be recognised and reflected in any reform of the law. The findings offer valuable insights for jurisdictions considering surrogacy regulation and underscore the need for a coherent legal framework that enables courts to make welfare-driven decisions without statutory compromise.

Keywords

surrogacy, parenthood, parental orders, welfare

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Introduction

The law in England and Wales is clear that, when a decision is being made about a child, the child's welfare must be the paramount consideration.[1] In many decisions relating to the child, this is the court's only guiding principle. However, when a child is born through a surrogacy arrangement, and legal parenthood needs to be determined, a tension exists between the welfare principle and the statutory framework that determines parenthood. Surrogacy is an arrangement where an individual (the surrogate) carries and gives birth to a child with the intention for another individual(s) (intended parent(s)) to be the child's parent(s). As a result of the *mater semper certa est* presumption, the surrogate will be the child's legal mother at birth,[2] and if she is married or in a civil partnership, the spouse will be the second legal parent.[3] Therefore, for the intended parents to become the child's legal parents, they must obtain a parental order (PO) under s 54 or s 54(A) Human Fertilisation and Embryology Act (HFE Act) 2008.[4] The effect of a PO transferring legal parenthood carries lifelong implications for the child in replacing the original birth certificate on the birth register. Although adoption may also be used to establish legal parenthood following surrogacy,[5] POs are the preferred mechanism with comparatively few reported judgments where legal parenthood following surrogacy has been secured by way of adoption.[6] As such, consideration of adoption cases involving surrogacy is outside the scope of this article.

The conditions contained in s 54 broadly reflect the original requirements in s 30 HFE Act 1990, although – as examined in this article – various requirements have been revised, either through the implementation of the HFE Act 2008 or other legislative instruments. One significant change was to import the welfare standard from the Adoption and Children Act (ACA) 2002 into PO cases:[7] this demands that when deciding whether to grant a PO, the court's paramount consideration must be the child's welfare, throughout their life.

As surrogacy has become more prevalent, and the court has increasingly had to make decisions concerning POs, there is now a body of established case law which demonstrates the challenges the judiciary face when trying to balance their statutory obligations under both s 54 HFE Act 2008 and s1(1) ACA 2002. Whilst there is often sympathy to the plight of the courts in having to creatively interpret s 54 to enable a PO to be made in accordance with the welfare of the child, it is consistently acknowledged that there are limits to the extent that the court can – and should – deviate from the provisions of s 54.[8] As such, there have been numerous calls for reform that would reconcile the challenges that the court face.[9] Others are more critical of

[1] Children Act 1989, s 1; Adoption and Children Act (ACA) 2002, s 1.
[2] Human Fertilisation and Embryology (HFE) Act 2008, s 33.
[3] Unless it can be shown that they did not consent to the arrangement: HFE Act 2008, ss 35 and 42.
[4] HFE Act 2008, s 54A enables single applicants to apply for a parental order. Throughout the article, unless stated otherwise, reference to s 54 should be understood to also include s 54A.
[5] ACA 2002, ss 50(1) and 51(2).
[6] Some examples of adoption orders following surrogacy include: *Re H (Surrogacy: step-parent adoption)* [2023] EWFC 214; *Re N (Adoption - Surrogacy)* [2024] EWFC 41.
[7] Human Fertilisation and Embryology (Parental Orders) Regulations 2010.
[8] C Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law' [2015] 27 CFLQ 83; 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.
[9] 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

the approach towards POs generally, being of the view that the benefits of such an order are too marginal to justify departing from clear statutory wording, thus seeing the courts approach to s 54 as exceeding their judicial role.[10] Nonetheless, the judiciary has consistently re-iterated that POs are the most appropriate, transformative, and welfare-aligned order following surrogacy.[11]

The normative position adopted in this article is that the welfare of the child must drive the legislative and judicial response to surrogacy. Treating the child's welfare as the paramount consideration reflects a fundamental tenet of family law and aligns with the UK's obligations under the UN Convention on the Rights of the Child.[12] Through this positioning, the article offers a comprehensive contribution to the existing literature by undertaking a systematic review of the entire s 54 landscape, critically examining the judicial approach to each requirement and the ways in which these have been balanced against the child's welfare. This analysis provides a panoramic view of the operation of s 54, exposing key areas of legal difficulty and doctrinal tension, and ultimately reinforcing the growing calls for reform to alleviate the untenable position that the courts are currently placed when navigating the competing demands of s 54 and welfare.

As other common law jurisdictions look to introduce or revise their regulation of surrogacy, the law in England and Wales is likely to be perceived as a potential model due to the length of time that the legal framework has been in place.[13] It is therefore imperative that there is a clear understanding of how the judiciary have applied and interpreted the s 54 requirements, and the extent to which the HFE Act 2008 aligns with the obligation to have the child's welfare as the paramount consideration.

The first section of this article provides an overview of the two statutory obligations that apply to the court when making PO decisions, demonstrating how they can act in tension. The subsequent sections examine how each s 54 requirement has been balanced against, and interpreted in light of, the child's lifelong welfare.[14] Ultimately, it is demonstrated that many of the s 54 requirements are becoming increasingly redundant, subsumed by judicial attempts to satisfy the welfare of the child, whilst other requirements, which have not been capable of such judicial interpretation, can prevent a PO being granted, potentially contrary to the welfare of the child.

Competing statutory obligations: S 54 Human Fertilisation and Embryology Act 2008 and s 1(1) Adoption and Children Act 2002

When the court is deciding whether to grant a PO, there are two statutory provisions that must be applied. First, s 54 (or s 54A) HFE Act 2008 lays down the criteria for a PO to be granted following a surrogacy arrangement, applying regardless of whether the surrogacy pregnancy was

[10] K Norrie, 'Surrogacy in the United Kingdom: Inappropriate Application of the Welfare Principle' in E Sutherland and L Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016).

[11] *A v P* [2011] EWHC 1738 (Fam) [24]; *AB v CD and Others* [2018] EWHC 1590 (Fam) [76].

[12] The UNCRC was ratified by the UK in December 1991, although it has not been incorporated in England.

[13] For example, in Ireland, the Health (Assisted Human Reproduction) Act 2024 is awaiting commencement, the Australian Law Reform Commission is currently undertaking a review of surrogacy laws, and in New Zealand, a review of surrogacy has taken place, and a Bill is currently under consideration.

[14] Beyond liberal statutory interpretation of some s 54 requirements, others have been read down in accordance with Human Rights Act 1998, s 3.

established through a licensed clinic or by way of home insemination.[15] There are eight (or seven, under s 54A if the intended parent is a sole applicant) requirements listed: each of these will be examined in this article, considering the judicial treatment and interpretation of the statutory wording of the requirements. The wording of the criteria is mandatory in tone, with all but one of the requirements specifying that the condition 'must' be satisfied.[16]

Second, the court must also ensure the application of s 1 ACA 2002. This provision was extended in its application to the HFE Act 2008 through the HFE (POs) Regulations 2010. S 1(1) ACA 2002 states that when coming to a decision relating to a child, the court's paramount consideration must be the child's welfare throughout his life, with s 1(4) listing matters to be considered when undertaking this welfare assessment. Such considerations include the wishes and feelings of the child, their needs and how capable the intended parents are of meeting these, the effect of any change in circumstances on the child, and any harm, or risk of harm, that they may suffer. The court is not limited to these statutory factors, however, and can consider anything that may have an impact on the child's welfare. For example, recent PO cases have included in the welfare discussion the importance of the child being aware of their origins as they grow up.[17]

Originally enacted to be the court's guiding principle when making decisions in relation to adoption, the application of the lifelong welfare test to POs reinforces the significance of the judicial determination of parenthood. However, in PO proceedings, in addition to considering the welfare of the child, the court must also apply the s 54 requirements, which preceded the importation of the welfare test into PO decision-making. It can be seen in all reported PO cases that the courts undertake a thorough and often systematic analysis of the s 54 requirements, yet it is apparent in most cases that the ultimate decision is based on the welfare principle. This dual framework creates a tension between the two statutory obligations. There may also be instances where welfare concerns indicate against a PO despite the s 54 requirements being satisfied, such as in relation to criminal allegations or the age of intended parents.[18]

As this article will evidence, when presented with this tension, the courts have generally – and justifiably – prioritised the welfare of the child over the s 54 requirements. It was stated in *Re L (Commercial Surrogacy)* that the effect of importing the welfare standard into s 54 is that when balancing public policy considerations (in this case, in relation to the prohibition of payments to the surrogate) and welfare, the court must decide 'decisively in favour of welfare… It will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making'.[19] This evidences how priority is given to the child's welfare when deciding whether to grant a PO, even where there may be concerns over whether the precise wording of the s 54 requirements have been met. Resultantly, refusals of POs are rare: the nature of s 54 means that the court is asked to authorise the actions of the intended parents retrospectively. s 54(7) stipulates that consent to an application cannot be given within the first 6 weeks of birth, and often the child will be living with the intended parents from birth, meaning it becomes almost inevitable that the child's welfare will

[15] *AY & Anor v ZX* [2023] EWFC 39.
[16] The remaining requirement, for there to be a genetic link between the intended parent and child, although not using the word 'must' has been treated by the court as an essential requirement for a PO.
[17] B Olaye-Felix et al, 'Surrogacy and the law in the UK' (2023) 99 Postgraduate Medical Journal 358; *X v W & Anor* [2025] EWFC 25; *R & Anor v A & Anor* [2024] EWFC 341.
[18] *Re W (Foreign Surrogacy: Consent and Welfare)* [2025] EWFC 85; *K & Anor v Z & Anor* [2025] EWHC 927 (Fam).
[19] *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam) [10].

demand that the PO be made, whether or not all of the requirements under s 54 are satisfied.[20] Several judges have highlighted this concern and Connolly has argued that the retrospective nature of POs is ineffective as a safeguard.[21]

It must therefore be considered whether this approach has rendered the prescriptive requirements under s 54 redundant. The creative approach taken to some s 54 requirements, as will be evidenced throughout this article, indicates that the judiciary have been left grappling with a law which requires the welfare of the child to be the paramount consideration whilst still laying down specific, seemingly compulsory, requirements for granting a PO. The tension between s 54 and the welfare principle raises broader constitutional questions about the separation of powers: the judiciary's approach of prioritising welfare over statutory wording could be seen as encroaching upon the legislative domain, particularly in the absence of clear Parliamentary intent.[22]

However, some of the s 54 requirements have been treated as hard lines of the legislation, thus meaning that a PO cannot be granted – potentially contrary to the welfare of the child, and s 1(1) ACA 2002. For example, in *Re AB (Surrogacy: Consent)*,[23] a PO was not granted owing to the surrogate's refusal to provide consent under s 54(6). Whilst child arrangements orders (CAO) for residence were put in place, giving the intended parents parental responsibility, and enabling the intended parents and children to maintain their family life, Theis J stated that only POs would secure the children's lifelong emotional and psychological welfare,[24] thus acknowledging that the lifelong welfare of the children had not been guaranteed in the decision. As such, Theis J made the unusual decision to adjourn the application for POs rather than refusing it, in the hope that the surrogate would subsequently provide her consent.[25]

The following sections of this article map the judicial approach to different s 54 requirements in relation to the welfare of the child to ascertain the approach of the court when dealing with this statutory tension. Certain s 54 requirements remain mandatory and have the potential to prevent a PO being granted, contrary to the welfare of the child, whilst other requirements have been displaced, or liberally interpreted, to enable the PO to be granted. This haphazard approach leads to questions around the continued relevance or suitability of the legal framework under the HFE Act 2008. In the firt section, The erosion of s 54: Paramountcy of welfare, the requirements that have been eroded in light of the welfare test are examined: s 54(3), for the application to be made within 6 months of the child's birth; s 54(4)(a), for the child to be living with the applicants; and s 54(8), for no payments beyond reasonable expenses to have been made to the surrogate. The second section, 'Revising s 54: Welfare in legislative reform and continued judicial interpretation' reflects on the requirement that has been legislatively reformed: s 54(2), relating to the relationship status of the applicants. The final section,' What remains of s 54: Where welfare meets its limits' scrutinises the requirements that have remained essential for a PO to be

[20] *X v Z (Parental Order: Adult)* [2022] EWFC 26; *Y v V* [2022] EWFC 120.

[21] B Connolly, 'Best Interests of the Child v the Right to Procreate: Or How Far Does the Law on Surrogacy Protect the Best Interests of the Child?' (2016) 2 International Family Law 111, 113.

[22] This was seemingly acknowledged by Munby P in *Re Z (A Child*) [2015] EWFC 75 where he refused to read down the requirement for intended parents to apply as a 'couple' given the clear Parliamentary intent to limit parental orders to two applicants.

[23] [2016] EWHC 2643 (Fam).

[24] Ibid [32].

[25] Ibid. Although the judgment has not yet been released, the surrogate has since provided consent and POs have been granted.

granted: s 54(6) for the surrogate to provide her consent to the PO; 54(4)(b), for the applicants to be domiciled in the UK; s 54(1)(b), for there to be a genetic link between the intended parent and child; and s 54(5), for the applicants to be at least 18 years of age.

The erosion of s 54: Paramountcy of welfare

As aforementioned, numerous s 54 requirements have effectively been disregarded by the court based on the child's welfare. The three requirements examined within this section are the time limit under s 54(3), home requirement under s 54(4)(a), and restriction on payments beyond reasonable expenses under s 54(8). The judicial approach has been consistent in granting POs despite there being potential barriers to these requirements being satisfied. However, there are notable differences in how the requirements are expressed in the HFE Act 2008: the time limit is expressed in a mandatory manner, stating that the order 'must' be applied for within 6 months; the 'home' requirement is equally mandatory, but without defining 'home', meaning there can be creative interpretation as to its definition; and the requirement for no more than reasonable expenses to have been paid to the surrogate has an express provision enabling additional payments to be 'authorised by the court'. This section of the article will examine these three requirements, the approach of the court in interpreting the provisions, and the role of the child's welfare in the decisions.

The application must be made within 6 months of the child's birth

S 54(3) requires that the PO application be commenced within 6 months of the child's birth. Whilst the time limit may be justified based on the child's best interests in ensuring parenthood is established as soon as possible after birth, creating certainty,[26] and through giving 'speedy consensual regularisation of the legal status of the child's carers',[27] some earlier cases demonstrated that the time limit could in fact operate against the child's welfare.[28] Denying a PO on the basis that the time limit had been exceeded would result in legal parenthood not reflecting the child's lived reality, contrary to their best interests.[29] There are many reasons why a PO may not be applied for within the time limit, which may be particularly pertinent in international arrangements due to potential delays in bringing the child to the UK to commence the application, as well as misunderstandings about how the law recognises parenthood for children born overseas.[30]

The strict application of s 54(3) was first departed from in 2014 in *Re X (A Child) (PO: Time Limit)*, where an order was made 2 years and 2 months after the birth of the child, with Munby P stating:

> Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible; it is almost nonsensical.[31]

[26] R Cabeza et al, *Surrogacy: Law, Practice and Policy in England and Wales* (Family Law 2018) 51.
[27] *JP v LP (Surrogacy Arrangement: Wardship)* [2014] EWHC 595 (Fam).
[28] *Re X (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam); *Re S (Parental Order)* [2009] EWHC 2977 (Fam).
[29] *JP v LP (Surrogacy Arrangement: Wardship)* (n 27).
[30] *Re X, Y & Z (Children: Parental Orders: Time Limit)* [2022] EWHC 198 (Fam).
[31] *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 [55].

In coming to this view, Munby P noted that there were no reasons given for the time limit during Parliamentary debate, leading to the view that the legislature could not have intended the time limit to be an absolute bar. Having reviewed debates leading up to the implementation of the HFE Acts, it is apparent that the time limit was not discussed, meaning it is not possible to ascertain the reason for imposing this requirement other than, as some practitioners have suggested, that it was included for 'procedural and administrative purposes'.[32]

Nonetheless, the decision of Munby P to depart from the statutory wording is notable. Statutory interpretation, and considering Parliamentary intent, is only usually appropriate where the statutory language is unclear. However, the wording of the statute is clear, requiring that the 'applicants must apply for the order during the period of 6 months beginning with the day on which the child is born'.[33] Therefore, this case could be seen as an example of judicial overreach: given that the statutory language was clear, this was not a case of interpreting an ambiguous legislative provision, but rather a decision to disregard a clearly drafted requirement to enable the PO to be granted.

In reaching his conclusion, Munby P stated that the best interests of X 'plainly demand[ed]' that the order be made, with consideration of the guardian's positive report.[34] As such, the judgment can be seen to align with the statutory obligation for the child's welfare to be the paramount consideration, even whilst going beyond the judicial role in effectively disapplying the requirement under s 54(3). When faced with two competing statutory tests, welfare prevailed.

In cases concerning the time limit since *Re X (A Child) (PO: Time Limit),*[35] POs have consistently been granted despite the application being made more than 6 months after the child's birth.[36] In *Re A & B (Children),* practical considerations relating to the child's welfare were listed, such as security within the family, inheritance rights and financial responsibilities, enabling a PO to be made in relation to an 8-year-old child.[37]

In more recent cases concerned with the time limit, there has been a shift in focus to the child's identity, as opposed to welfare. In the case of *X v Z,* which granted a PO in relation to a 23-year-old adult, the welfare of the child could not be used to justify a departure from the statutory wording because he was no longer a child.[38] Instead, Theis J reasoned that granting the PO would 'cement and secure' the child's right to family life, including recognition of his identity as the legal child of the intended parents.[39] Brown and Wade have argued that this demonstrates an increasing reliance on the concept of identity as necessitating the granting of a PO,[40] and this was more recently exemplified in *X v B* when it was stated that denying an order based on the time limit would have a 'fundamental impact on the child's identity'.[41]

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[32] E Isaacs et al, 'Parental Order Time Limits: Policy – What Policy?' [2014] Fam Law 1723, 1728.
[33] HFE Act 2008, s 54(3).
[34] *Re X (A Child) (Parental Order: Time Limit)* (n 31) [7] and [77].
[35] Ibid.
[36] *AB & CD v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12; *A and another v C and another* [2016] EWFC 42.
[37] *Re A & B (Children)* [2015] EWHC 911 (Fam) [60].
[38] *X v Z (Parental Order: Adult)* (n 20).
[39] Ibid [53].
[40] A Brown and K Wade, '"Everyone Remains the Child of Someone": A Parental Order for an Adult' (2022) 44 Journal of Social Welfare and Family Law 411, 413.
[41] *X v B* [2022] EWFC 129 [26].

Regardless of how the court justify the departure from the wording of s 54(3), it is clear that the requirement is effectively redundant, enabling POs to be granted – irrespective of the time frame – to ensure the child's lifelong welfare is satisfied.

The child's home must be with the applicants

A further requirement that has not prevented the court from granting POs is s 54(4)(a), for the child's home to be with the applicants. This requirement ensures that the intended parents have taken on a parental role for the child, in providing their care. This requirement aligns with the child's welfare in allocating parenthood to their primary caregivers. However, there may be circumstances resulting in the applicants not having their physical home with the child and this has not prevented the court from granting POs. The judicial approach to s 54(4)(a) is a generous and creative one: for example, the court has been satisfied that the requirement is met in a range of circumstances such as where the child was having limited contact with one intended parent,[42] or where the child's home was split across two countries following a relationship breakdown.[43] There will be many children in non-surrogacy situations who have their home in two different places, and the judicial interpretation of s 54(4)(a) aligns with this.[44]

However, there are more challenging interpretations of the home requirement in the case law, such as where the court was satisfied the requirement was met where the child was living in a different country to the intended parents due to travel restrictions[45] and the child was living with foster parents under public law care.[46] The extent to which the child not living with either intended parent can be said to have their home with the applicants is debateable. There are limits to how far interpretation can stretch, and it appears that in these cases, rather than being liberally interpreted, the home requirement, similar to the time limit under s 54(3) has been disregarded in favour of the child's welfare.

Where the child is splitting their time between two homes because of separated parents, or is not physically living with the intended parents, the impact of this may also have welfare implications. In *Re Z (A Child)*, despite ultimately concluding that a PO would secure the child's welfare and provide security in relation to his identity,[47] Theis J stated that the intended parents' conduct and ongoing dispute was 'inimical to Z's welfare and identity'.[48] It is contradictory that the intended parents' conduct was negatively impacting on the child's welfare, yet a PO was granted based also on welfare arguments: this highlights the different ways in which the welfare test must be applied, with the conduct of the parents being dealt with separately (through ongoing local authority involvement) to the identity issues posed in relation to legal parenthood. Seemingly, where the child is under the care of the intended parents, whether or not that can be interpreted as in the 'home', the conduct of the intended parents, even where detrimental to the child's welfare, will not prevent a PO being granted because the intended parents will often be the only family the child has known. It would still support the child's welfare to have legal

[42] *Re C (A Child: Parental Order and Child Arrangements Order)* [2020] EWHC 2141 (Fam).
[43] *X v B* (n 41) [30].
[44] Thanks to one anonymous reviewer who drew my attention to this point.
[45] *W and another v Y and another* [2021] EWFC 119.
[46] *Re Z (Parental Order: Child's Home)* [2021] EWHC 29 (Fam) [31].
[47] *Re Z (A Child) (Surrogacy)* [2022] EWFC 18 [66].
[48] Ibid [16].

parenthood vested with the parents they have known than for the surrogate, who has not been involved in the child's care, to remain the legal mother.

As such, the continued role of the 'home' requirement can be challenged: if generous interpretation has resulted in effective redundancy of the provision, and the court has to centre the decision on the child's welfare, it seems that how the 'home' is constructed is not relevant to the PO determination. Nonetheless, there may remain circumstances where the home requirement operates as an essential safeguard, such as to prevent child trafficking: by focusing on how the intended parents intend to care for the child through their construction of the home, a PO could be refused if that intention was not evident.

The applicants must not have given or received any payment beyond reasonable expenses

A final requirement notable for a liberal judicial approach in favour of the child's welfare is s 54(8), that no money is given or received beyond those reasonably incurred. This underpins the altruistic nature of surrogacy in England and Wales, and has public policy foundations such as avoiding the circumvention of childcare laws, buying children from overseas, and overbearing the will of the surrogate.[49] The limits on allowable payments can also relate to the welfare of the child: there may be an effect on the child's sense of identity, and therefore welfare, in knowing that their parents acted outside of the legal framework, or that payment had been made in relation to their gestation and birth.

The s 54(8) requirement has been criticised for the opaque nature as to what a reasonable expense would be – both in terms of what is classed as an expense and how 'reasonable' would be measured.[50] However, the issue has not been judicially examined in depth owing to the fact that the legislation expressly allows payments beyond reasonable expenses to be 'authorised by the court'. The focus of the judgments when dealing with payments has been on whether such payments should be authorised, as opposed to whether they can be regarded as a reasonable expense.

Because the PO process is initiated after the child's birth, any consideration by the court about the level of payment made to the surrogate is done retrospectively. The challenge for the court is therefore balancing the policy reasons behind the prohibition on payment and the welfare of the child who will usually be in a family unit with the intended parents. As Hedley J stated in *Re X (Children),* 'it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child would not be gravely compromised (at the very least) by a refusal to make the order',[51] reinforced in *Re L* where it was confirmed that POs would only be refused in the 'clearest case of the abuse of public policy'.[52] There are examples of the court considering whether this high threshold relating to public policy may be met such to refuse a PO, particularly in circumstances where intended parents have engaged in international arrangements that are precarious and lacking in appropriate safeguards.[53]

[49] *Re S (Parental Order)* [2009] EWHC 2977 (Fam) [7].
[50] A Brown, 'Surrogacy law reform in the UK: the ambiguous position of payments to the surrogate' (2021) 32(2) CFLQ 95, 102.
[51] *Re X (Children) (Parental Order: Foreign Surrogacy)* (n 28) [24].
[52] *Re L (Commercial Surrogacy)* (n 19) [10].
[53] *Re Z (Foreign Surrogacy)* [2024] EWFC 304; *X v W & Anor* (n 17).

However, no PO has been refused on the ground of excessive payments having been made contrary to s 54(8),[54] with judgments often referring to how the child's welfare demands that the payments be authorised. This supports the proposition that the prohibition on payment is 'an illusion rather than a reality',[55] even more notable in international commercial arrangements where payments will exceed an understanding of reasonable expenses in a domestic context.[56]

Despite the apparent willingness of the courts to approve payments to surrogates in line with the child's welfare, some cases demonstrate an inquisitorial approach relating to expenses.[57] In *Re Z (Leave to Withdraw Application for Parental Order)* the intended parents withdrew their application because they objected to a request for more information relating to payments.[58] Theis J opined that granting a PO without the extra evidence would ensure the child's welfare but maintained that there were evidential gaps relating to the payments which meant a PO could not be granted.[59] Had the information been forthcoming, the court may have granted the order; however, without that further evidence, the public policy and child welfare assessment could not be undertaken. This demonstrates that s 54(8) is not merely a 'tick-box' exercise where payments will inevitably be authorised, but an important requirement that safeguards against the commercialisation of surrogacy. The decision, however, will have negative lifelong implications for the child because their legal parenthood will not reflect their reality, with the surrogate retaining legal parenthood. Concerns over whether a PO may be refused on the basis of the level of payments made can create anxiety for all parties to the surrogacy arrangement, and it has been said that this could discourage honesty with intended parents citing sums that they think the court will accept.[60]

A survey on international surrogacy arrangements found that some intended parents paid an 'all-inclusive package' to the agency, meaning they were not aware of how much was paid to the surrogate.[61] Since no intended parents in the study reported difficulty in obtaining legal parenthood,[62] it appears that POs have been granted despite the inability of the court to interrogate the breakdown of payments in accordance with s 54(8). This would suggest the *Re Z (Leave to Withdraw Application for Parental Order)* case is an exception to the general experience of obtaining a PO following commercial surrogacy payments having been made overseas. The courts have consistently granted POs and authorised payments exceeding 'reasonable expenses', often explicitly on welfare grounds.

The role of the court in eroding s 54

The combined effect of the judicial approach to the time limit, home requirement and prohibition on payments demonstrates how the child's welfare has been met by moving away from the

[54] C Fenton-Glynn, 'Re-Interpreting Section 54 HFEA: How Far Is Too Far?' (2016) 46 Family Law 656, 656. A systematic review of reported s 54 cases since this publication confirms this is still the case.
[55] M Elsworth and N Gamble, 'Are Contracts and Pre-Birth Orders the Way Forward for UK Surrogacy?' [2015] International Family Law 157, 158.
[56] *Y v V* (n 20).
[57] *Re C (Parental Order)* [2013] EWHC 2413 (Fam); *Re P-M (Parental order: Payment to Surrogacy Agency)* [2013] EWHC 2328 (Fam).
[58] [2019] EWFC 43.
[59] Ibid [21].
[60] A Leigh, 'A Review of the Current UK Surrogacy Laws, the Law Commission Recommendations and Suggestions For Reform' (2023) 35(3) CFLQ 305, 312.
[61] C Fenton-Glynn, 'International Surrogacy Arrangements: A Report' (Cambridge Family Law 2022) 13.
[62] Ibid, 17.

statutory wording of the requirements. S 54(8) expressly allows the court to authorise payments beyond reasonable expenses. The logical circumstance to permit this, which the court has adopted, is where the child's lifelong welfare demands it. Contrastingly, in relation to the time limit and the requirement for the child's home to be with the applicants, the statutory wording is 'must', suggesting there is no discretion to grant a PO where the requirements are not satisfied. Notwithstanding the mandatory tone of the requirements, the courts have liberally interpreted (in relation to the 'home' requirement), or disregarded (as for the time limit), the requirements to grant the PO based on the child's welfare. When faced with two mandatory but conflicting legal requirements – to apply the s 54 HFE Act requirements and to meet the s 1(1) ACA welfare standard – the courts have given precedence to the welfare of the child.

Although this has been criticised for over-stepping the judicial role, and undermining legislative intent,[63] it rests on solid foundations. First, there was equally legislative intent in incorporating the welfare standard into PO cases, which happened more recently than the last substantive review of the HFE Act. Second, there is limited evidence of the legislative purpose behind the s 54 requirements, meaning there is no clear Parliamentary intent to constrain the court's interpretation.

Revising s 54: Welfare in legislative reform and continued judicial interpretation

The original requirement under the HFE Act 1990 for applicants to be 'husband and wife' was amended in 2008 to include civil partners and those in an 'enduring family relationship'.[64] Whilst this change was positive, in allowing those who had engaged with surrogacy outside a traditional married relationship to have their parenthood legally recognised, subsequent case law demonstrates that the judiciary still had to liberally interpret the provisions within s 54(2) to satisfy the child's welfare. Further, in 2018 eligibility extended to single applicants.[65] These judicial and executive developments demonstrate attempts to overcome issues around how the s 54 requirements interact with the welfare test – nonetheless, the tension continues to exist.

For applicants that are married or in a civil partnership, the judiciary will not assess the nature of the relationship,[66] in contrast with the inquisitorial approach for those in an enduring family relationship.[67] Judicial scrutiny of the relationship arguably ensures the applicants are in a relationship that will provide the basis of an appropriate family for the child. However, the lack of inquiry into the nature of marriages and civil partnerships ignores that some couples in formalised relationships may not be conducting their relationship as may be expected, as demonstrated in *Re X (A Child)*.[68] As Welstead has stated, the failure to look into the circumstances of a marriage with an 'unusual nature' (in this case because one of the intended parents applying for the PO was gay and did not live in the same house as the other intended parent) might have

[63] K Norrie (n 10).
[64] HFE Act 2008, s 54(2).
[65] Human Fertilisation and Embryology Act 2008 (Remedial Order) 2018 (SI 2018/1413) following the case of *Re Z (A Child) (Surrogate Father: Parental Order) (No 2)* [2016] EWHC 1191.
[66] *Re X (A Child)* [2018] EWFC 15.
[67] Cabeza et al (n 26) 51. This inquisitorial approach can be seen in *Re Z (Parental Order: Child's Home)* (n 37).
[68] *Re X (A Child)* (n 66).

an impact on the welfare of the child.[69] This may be mitigated by the fact that a PO could be refused based on the child's lifelong welfare in such circumstances; however, the trend of the case law suggests this is unlikely.

During the passage of the HFE Act 2008 it was stated that the concept of 'enduring family relationship' should be without definition, allowing the judiciary to adopt a flexible approach that would best satisfy the best interests of the child.[70] This statement appears to endorse the approach of liberally interpreting legislative requirements in order to meet the welfare of the child in individual cases, and various cases have demonstrated this flexible interpretation.[71]

S 54(2) states that the applicants 'must be' in the relationship, the present tense indicating the applicants should be in a relationship when the application and order are made. Notwithstanding this, in *Re N (A Child)* Theis J stated that s 54(2) was not linked to time, granting an order in favour of two applicants who were no longer in a relationship by the time of the hearing.[72] A purposive approach can be seen, liberally stretching the definition to allow a PO to meet the child's welfare, consistent with how non-surrogacy families are treated. As stated by Holden, 'a child being loved and looked after properly, albeit by separated parents, should not affect the finalisation of a PO'.[73] It is clear that judges have been able to interpret 'enduring family relationship' widely in order to grant POs for applicants who have started the journey alone,[74] are undertaking the journey separately (or alone)[75] by the time of the PO,[76] or made a commitment to become parents within a platonic relationship.[77] In doing so, as ever, the welfare of the child was the determinative factor in reaching the conclusion about the nature of the relationship.

However, the basis upon which the child's welfare was formative in making these decisions is not always clear or consistent. In *Re F & M,*[78] and *X v B,*[79] the judgments rely heavily on the PO Reporter's findings of the child's welfare,[80] meaning it is possible to see practical considerations that went into the welfare assessment. In contrast, in *Re N (A Child)* the PO was stated to meet the child's welfare interests without articulating the reasons why.[81] In balancing the tension between s 54(2) and the welfare standard, there should be greater judicial attention given to substantive considerations about how the relationship status of the intended parents may impact on the child's welfare – particularly given cases such as *Re Z (A Child),*[82] outlined earlier, where

[69] M Welstead, 'Sex and Marriage: No Concern of the Judges or of the State' [2018] Fam Law 758, 759; the subsequent case of *Re Z (A Child) (Surrogacy)* (n 47) is another example of where the marriage was never romantic in nature and had since ended.
[70] HFE Bill (Bill 70) 12 Jun 2008, col 251 (Dawn Primarolo MP).
[71] *Re F & M (Children) (Thai Surrogacy: Enduring Family Relationship)* [2016] EWHC 1594 (Fam); *Re N (A Child)* [2019] EWFC 21; *X & Anor v B & Anor* [2022] EWFC 129.
[72] Ibid.
[73] K Holden, 'When Intended Parents' Relationship Breaks down' [2019] Fam Law 1095 [4].
[74] *Re F & M (Children)* (n 71).
[75] *A v P* (n 11); *X v B* (n 41).
[76] *Re N (A Child)* (n 71).
[77] *X v B* (n 41), *W and another v Y and another* (n 45).
[78] *Re F & M (Children)* (n 71).
[79] *X v B* (n 41).
[80] *Re F & M (Children)*, (n 71) [47]; *X v B* (n 41) [35].
[81] *Re N (A Child)* (n 71).
[82] *Re Z (A Child) (Surrogacy)* (n 47).

the conduct of the separated intended parents was acknowledged to be contrary to the welfare of the child.

The assumption behind the original requirement for two applicants, that the responsibility was 'likely to be better handled by a couple than a single man or woman',[83] was subject to criticism.[84] In *Re Z (Surrogate Father: Parental Order)* it was held that s 54(2) was incompatible with Article 8 (right to respect for family and private life) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights, and the Court was not prepared to read down the provisions of the statute.[85] Fenton-Glynn supported the refusal to read down s 54(2), stating it would 'strike a death blow to the eligibility criteria for intended parents' and 'strip [s 54] of what little content it had left'.[86] However, Brown questioned why the requirement could not be interpreted in a manner consistent with the best interests of the child given the approach to other s 54 requirements.[87] The liberal interpretation of other s 54 requirements makes Munby P's refusal to read down s 54(2) notable. However, Parliamentary intent is significant. Broadening the time limit or interpretation of 'living with the applicants', for example, could be justified because it is not clear from Parliamentary debate whether the requirements were intended to be a complete bar. In contrast, the requirement for there to be two applicants was a positive choice by Parliament at the time of passing the HFE Acts,[88] and it therefore would have been inappropriate, and beyond the scope of the judicial role, to disregard the requirement.

In 2019, the incompatibility was remedied by the introduction of s 54A, which permits an application to be made by one applicant where there is a genetic link between the intended parent and child.[89] Data analysed by My Surrogacy Journey and Horsey found that there had been 66 s 54A applications between the remedial order coming into effect and February 2021,[90] and there have been a limited number of subsequent reported judgments relating to s 54A,[91] evidencing the fact that most applications are unproblematic in satisfying the PO criteria. In *A v B & C* it was stated that the interpretation given to the s 54 requirements should apply similarly under s 54A,[92] thus supporting a liberal interpretation of the criteria in accordance with the child's welfare.

The judicial interpretation evident throughout this section, as well as the legislative changes in 2008 and 2018, mean that the relationship status of applicants will be less of a barrier for intended parents than previously; an individual as a sole applicant, or individuals outside traditional formalised relationships, can be reasonably assured that a PO will be granted so long as the child's welfare supports this. This demonstrates that it is not necessarily the nature of the

[83] HFE Bill (Bill 70) 12 Jun 2008, col 248–249 (Dawn Primarolo MP).
[84] For example, Horsey (n 9) 617.
[85] *Re Z (A Child)* (n 65).
[86] Fenton-Glynn (n 61).
[87] Brown (n 8). See also P Bremner, 'Surrogacy and Single Parents Following Re Z' (2012) 21 Edinburgh Law Review 281.
[88] *Re Z (A Child)* (n 65) [36]; HFE Bill (Bill 70) 12 Jun 2008, col 248–249 (Dawn Primarolo MP).
[89] HFE Act 2008 s 54A; introduced by Human Fertilisation and Embryology Act 2008 (Remedial Order) 2018 (SI 2018/1413).
[90] M Johnson-Ellis, 'Surrogacy Trends for UK Nationals; Our Exclusive Findings' (*mysurrogacyjourney.com*, 3 August 2021) <https://www.mysurrogacyjourney.com/blog/surrogacy-trends-for-uk-nationals-our-exclusive-findings/> accessed 17 Nov 2025.
[91] *A v B and C* [2021] EWFC 103; *X v W & Anor* [2025] EWFC 25; *Re W (Foreign Surrogacy: Consent and Welfare)* (n 18).
[92] Ibid [18].

relationship that the judiciary will assess, but rather how the parties to that relationship will ensure the child's welfare. As with the s 54 requirements examined in the previous section, therefore, allowing the welfare standard to take precedence over the strict statutory wording ensures that a PO can be made where it best serves the child's welfare.

What remains of s 54: Where welfare meets its limits

Despite the approach, amounting almost to a disregard, of the above s 54 requirements, other 'mandatory gateway' requirements,[93] or 'pillar[s] of the legislation',[94] continue to be necessary for a PO to be granted. The requirements that have retained their mandatory nature are for the surrogate (and her spouse, if applicable) to have consented to the PO under s 54(6), for an applicant to be domiciled in the UK contained within s 54(4)(b), for the child to be genetically related to at least one applicant under s 54(1)(b) and for the applicants to be at least 18 years old (s 54(5)).

As a result of the requirements being regarded as mandatory by the court, there is more limited consideration of how the requirements interplay with the welfare of the child. However, even within these requirements, it is evident that the court is willing to make 'borderline' decisions or stretch the requirements to the extent possible to meet the child's welfare.

The surrogate must consent to the parental order

One mandatory requirement which can see a PO being refused, despite potentially being contrary to the child's welfare, is the requirement for the surrogate to consent to the making of a PO. The requirement is significant in being the only provision within s 54 where an individual other than the intended parent(s) will be able to determine whether the requirement can be satisfied and the PO granted. The emphasis of the requirement is on the substance of the consent rather than procedural compliance, evident by the fact that the courts have granted POs without correct documentation where there is extrinsic evidence of the surrogate's post-birth and ongoing consent.[95] Whilst this requirement has been regarded as 'obvious' based on the allocation of legal parenthood and the bond that may develop between the surrogate and child during pregnancy,[96] the absolute nature of the requirement has led to circumstances where the child's legal parenthood does not reflect their lived reality, to the detriment of the child's welfare.

When the surrogate refuses to consent to the PO, the court can grant adoption orders,[97] or CAOs for residence and parental responsibility.[98] Whilst these alternative mechanisms ensure the child's welfare on a day-to-day basis, it is unsatisfactory from the child's perspective. In relation to adoption, the courts have perceived adoption orders to be a less honest order than a PO, for failing to recognise the nature of the surrogacy arrangement.[99] With regard to CAOs, the child's legal parenthood will not reflect their reality or their 'social, psychological

[93] *Z & Another v C & Another* [2011] EWHC 3181 (Fam) [3].
[94] *Re C (Surrogacy: Consent)* [2023] EWCA Civ 16 [61].
[95] *Re Z (Foreign Surrogacy)* (n 53); *X v W & Anor* (n 17); *Re W (Foreign Surrogacy: Consent and Welfare)* (n 18).
[96] *Re D (Children) (Surrogacy: Parental Order)* [2012] EWHC 2631 (Fam).
[97] *Re N (Adoption - Surrogacy)* (n 7).
[98] *Re AB (Surrogacy: Consent)* (n 23). The surrogate in this case has since consented to a PO, overcoming the critique raised in relation to the impact on the surrogate-born children.
[99] *AB & CD v CT* (n 36) [71].

parenthood',[100] parental responsibility resulting from a CAO can be changed or removed,[101] and CAOs only last until the child is 18 years old, thus not reflecting their lifelong welfare. As Welstead stated in relation to *Re AB (Surrogacy: Consent)*,[102] the children will be reminded throughout their lives of this disparity in parenthood because the birth certificates will show 'total strangers' as their legal parents,[103] and their full genetic siblings (also born through surrogacy) had different legal parents. It is difficult to see how, in these circumstances, the absolute requirement for the surrogate's consent can accord with the child's lifelong welfare.

Whilst the court cannot override a refusal of consent, s 54(7) does provide for consent to be dispensed with when the surrogate or her husband cannot be found or is incapable of giving consent.[104] There has only been one reported case where the surrogate was incapable of giving consent. In *R & Anor v A & Anor,* the surrogate suffered hypoxic brain injury and cognitive impairment as a result of the surrogacy birth:[105] broadly adopting the standard for capacity for the Mental Capacity Act 2005, Judd J held that the surrogate could not consent to the PO and therefore dispensed with the consent requirement to enable the PO to be granted. It was emphasised, however, that had the surrogate been able to, the evidence suggested that she would have been in support of the PO.[106]

There have been more cases relating to s 54(7) as regards the inability to locate the surrogate: this is more likely to occur in international arrangements, and provided reasonable steps have been taken to locate the surrogate, consent can be dispensed with if the child's welfare requires it.[107] Recent cases involving anonymous surrogates demonstrate the challenges that can be faced when the international agency or clinic is not willing to provide the necessary information in order for consent to be obtained.[108] Whilst the courts are increasingly warning of the risks associated with such practices, emphasising that POs may be refused should there be a lack of transparency as to the arrangement,[109] it is clear that if the surrogate cannot be located, the child's welfare would demand consent be dispensed with because to do otherwise would leave legal parenthood with an untraceable individual. Therefore, the prioritisation of the child's welfare means that the repeated judicial warns in relation to refusing a PO are unlikely to ever be realised.[110]

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[100] Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law, A Joint Consultation Paper* (Law Com No 244, 2019) 265.

[101] *JP v LP (Surrogacy Arrangement: Wardship)* (n 27).

[102] *Re AB (Surrogacy: Consent)* (n 23).

[103] M Welstead, 'Parental Orders and the Refusal of Consent' [2016] Fam Law 1501, 1503.

[104] *Y v V* (n 20) is an example of a case where the surrogate's estranged husband could not be located so the court dispensed with the requirement for his consent.

[105] *R & Anor v A & Anor* (n 17).

[106] Ibid [34].

[107] *Re D & L (Minors Surrogacy)* [2012] EWHC 2631 (Fam) [28]; further guidance was proved in *RS v T (Surrogacy: Service, Consent and Payments)* [2015] EWFC 22; *Re QR (Parental Order: Dispensing with Consent: Proportionality)* [2023] EWHC 3196 (Fam).

[108] *Re H (Anonymous Surrogacy)* [2025] EWHC 220 (Fam); *X (Foreign Surrogacy: Consent)* [2025] EWFC 71; *B & Anor v D & Anor* [2025] EWFC 366.

[109] *X (Foreign Surrogacy: Consent)* ibid [7].

[110] Lottie Park-Morton, 'Another anonymous surrogacy case, another judicial warning – how many before the court draws a line?' (*reformingsurrogacylaw.blog*, 06 Nov 2025) <https://reformingsurrogacylaw.blog/2025/11/06/another-anonymous-surrogacy-case-another-judicial-warning-how-many-before-the-court-draws-a-line/> accessed 17 Nov 2025.

The justification of the child's welfare for dispensing with the need for consent where the surrogate is unable to be located or incapable of consenting arguably applies equally in situations where the surrogate is refusing to give consent. For example, in *Re AB (Surrogacy: Consent),* the reasons for refusing consent were entirely unrelated to the children and who was in the best position to care for them;[111] in such cases, refusal to recognise the intended parents as the legal parents would not align with the child's welfare. Nonetheless, the appeal case of *Re C (Surrogacy: Consent)* confirmed that the requirement for the surrogate's consent cannot be read in such a way as to allow the court to dispense with it, describing s 54(6) as a 'pillar of the legislation' which to deviate from would 'go far beyond permissible judicial interpretation'.[112]

It is surprising that the court has not stretched the use of s 54(7) to allow POs to be made in support of the child's welfare when a surrogate is refusing to consent, particularly considering the liberal interpretation of other s 54 requirements. However, this literal interpretation of s 54(6) reflects the fundamental status of motherhood given to the woman who carries the child that the judiciary may be cautious to undermine.[113]

The applicants must be domiciled in the UK

A further mandatory requirement is for at least one applicant to be domiciled in the UK; failure to demonstrate domicile means the court would not have jurisdiction to make a PO because parenthood is determined by individual jurisdictions, as seen in the case of *Y v Z.*[114] Given the wealth of case law which states that it is in the child's welfare for the intended parents to have legal parenthood, the refusal to allow the application to proceed demonstrates the mandatory nature of s 54(4)(b), even where the outcome potentially does not support the welfare of the child.

Nonetheless, whilst the requirement cannot be interpreted to the extent of abolition, there is still judicial flexibility in applying s 54(4)(b) due to the fact-specific determination of domicile. Acquiring a domicile of choice, meaning the intended parent resides in the UK with an intention to indefinitely remain in the jurisdiction, does not require establishing citizenship or a complete cut of ties with the domicile of origin.[115] The court has the ability to make decisions which appear 'close to the margin of facts'.[116] For example, domicile of choice has been established in circumstances which would appear to avoid the more restrictive determination of parenthood in the applicant's domicile of origin,[117] whilst domicile of origin has been applied in cases where the applicant had not lived in the UK for multiple years.[118] The case of *AB v GH* exemplifies how the welfare of the child may tip the scale in relation to the 'margin', where it was

[111] The surrogate and her spouse were refusing consent due to a breakdown in their relationship with the intended parents and in an aim to increase awareness about the need for intended parents to support the surrogate: *Re AB (Surrogacy: Consent)* (n 23) [26].
[112] *Re C (Surrogacy: Consent)* (n 94) [61].
[113] The concept of motherhood being determined by gestation has been affirmed in *R (Alfred McConnell) v Registrar General for England and Wales and others* [2020] EWCA Civ 559.
[114] *Y v Z* [2017] EWFC 60 [74].
[115] *Re Z (Foreign Surrogacy)* (n 53).
[116] *AB v GH* [2016] EWHC 63 (Fam), [31]; *X and another v Y and another* [2023] EWFC 41.
[117] *Re Q (Parental Order: Domicile)* [2014] EWHC 1307 (Fam).
[118] *AB v GH* (n 117).

stated that the child's welfare required their status in this jurisdiction 'to be put on the securest footing possible'.[119]

The judiciary respect the mandatory nature of this requirement, potentially because it transcends the issue of the order itself and moves into issues around jurisdiction. Whilst the court can make domicile determinations that are marginal in a way that accords with the welfare of the child, it is evident that there is a limit as to how broadly or purposively this requirement can be interpreted even where the child's legal position is precarious. The Law Commissions' recommendation to allow POs based on domicile ***or*** habitual residence appears to recognise the strict nature of the domicile requirement, and the potential impact of this on the child's welfare.[120]

There must be a genetic link between the child and intended parent

For a PO to be granted, s 54(1)(b) requires that the gametes of at least one intended parent be used in the conception of the child, thus meaning there is a genetic link between one intended parent and child. This is supported by the Verona Principles which state that a genetic link requirement is 'generally' in the best interests of the child,[121] although there is no authority upon which such a proposition is based. The requirement for a genetic link can be seen as a one of the key differentiators between surrogacy and adoption. However, there are other conceptual differences that make surrogacy distinct from adoption.[122] Furthermore, the requirement contrasts with the approach to becoming a parent through other assisted reproductive techniques, such as IVF, where a genetic link is not required – in such cases, it is not suggested that the absence of a genetic connection operates against the welfare of the child, and since we do not minimise the role of parents in adoption or gamete donation, it has been argued that neither should we do so in surrogacy.[123]

As Bracken has stated, because the PO application would be automatically refused if there was no intended parent with a genetic link, the court would be unable to undertake a best interests or welfare assessment in a meaningful way so as to determine parenthood.[124] There is therefore the potential that the genetic link requirement could operate contrary to the welfare of the child because the court would be precluded from even being able to undertake that assessment. However, it must be acknowledged that should a PO not be possible owing to the lack of a genetic link, the intended parents could instead apply for an adoption order to be recognised as the child's legal parents.[125] Whilst adoption orders following surrogacy can be criticised for failing

[119] Ibid [32].

[120] Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law - Volume II: Full Report* (Law Comm No 411, 2023) 170.

[121] General Secretariat, *Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)* (International Social Service 2021) 14. The Verona Principles provide guidance in relation to legislative and policy reforms on surrogacy, having consulted with over 100 experts and observers from various regions of the world. ISS, 'Surrogacy' (*iss-ssi.org*) <https://iss-ssi.org/surrogacy/> accessed 31 Aug 2025.

[122] L Park-Morton, 'The genetic link requirement: reconsidering the arguments for double donation' in K Horsey, Z Mahmoud and K Wade (eds), *Future Directions in Surrogacy Law* (BUP 2025).

[123] Alghrani and Griffiths (n 9).

[124] L Bracken, 'Surrogacy and the Genetic Link' (2020) 32 Child and Family Law Quarterly 303, 312; see also E Jackson's consultation comments: Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law - Volume II: Full Report* (Law Comm No 411, 2023) 160.

[125] *Re N (Adoption – Surrogacy)* (n 7); *B v C (Surrogacy: Adoption)* [2015] EWFC 17*; Re L (Adoption: securing legal parental relationship in surrogacy)* [2021] EWFC 115.

to properly reflect the nature of the child's conception and birth,[126] the welfare of the child would still be satisfied in ensuring their lived reality reflects their legal status.[127]

The intended parent(s) must be at least 18 years old

The final requirement, which can be seen as mandatory, is for the intended parent(s) to be at least 18 years old. There has not been any judicial interrogation of the age requirement, but the Law Commissions have referred to it as 'self-explanatory':[128] particularly for opposite-sex couples, surrogacy tends to be an option resulting from infertility or a medical condition that can take several years to diagnose,[129] meaning the age requirement may not pose any issues.[130]

However, whilst the HFE Act 2008 imposes a lower age limit, there is no upper limit on applicants thus suggesting POs can be granted to intended parents of any age, unlike recommendations relating to access to IVF.[131] However, there may be concerns about the upper age of intended parents in relation to the child's welfare. Indeed, it was stated by the Law Commissions that it would not be 'in the children's interests for their parents to die when they are young, particularly when they are still a minor'.[132]

However, the absence of an upper age limit for POs does not mean that the court will not consider the age of intended parents; it becomes a factor when determining whether a PO meets the lifelong welfare of the child. There have been reported judgments where the court has highlighted the welfare implications raised by the older age of intended parents:[133] concerns included whether the intended parents would be able to care for the child throughout their childhood and if appropriate arrangements were put in place in the event of death or incapacity. Despite these concerns, PO were still granted based on the child's welfare, being satisfied that the provisions in place were adequate. However, the cases demonstrate that it would, at least in theory, be possible for the court to refuse a PO to older intended parents, absent a specific statutory requirement, based on the child's welfare if there were concerns over their ability to care for the child throughout childhood.[134] Therefore, whilst the requirement for the intended parents to be 18 years or older has not been subject to judicial scrutiny, it is apparent that the age of the intended parents more generally should be considered during the welfare assessment.

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[126] *M v F* [2017] EWHC 2176 (Fam) [87]; *D v ED (Parental Order: Time Limit)* [2015] EWHC 911 (Fam) [61–62].

[127] However, it should be noted that payments having been made in relation to the surrogacy arrangement may prevent an adoption order from being granted.

[128] Law Commission and Scottish Law Commission (n 121) 98.

[129] ibid 45–46; National Institute for Health and Care Excellence, 'Fertility Problems: Assessment and Treatment' (*nice.org.uk*, 06 September 2017) <https://www.nice.org.uk/guidance/cg156/chapter/Recommendations#access-criteria-for-ivf> accessed 17 Nov 2025 pt 1.11.1.3.

[130] In 2013/14, the mean age of applicants was 42, with the youngest being 26: Cafcass, 'Cafcass Study of Parental Order Applications Made in 2013/14' (July 2015) <https://www.cafcass.gov.uk/sites/default/files/migrated/Study-of-parental-order-applications-2013-14-2015.pdf> accessed 17 Nov 2025.

[131] National Institute for Health and Care Excellence (n 118) 1.11.1.3 and 1.11.1.4; Human Fertilisation and Embryology Authority, 'Women over 38' (*hfea.gov.uk*, August 2019) <https://www.hfea.gov.uk/i-am/women-over-38/> accessed 17 Nov 2025. It is acknowledged that age guidelines in relation to IVF are based on clinical factors as opposed to the child's welfare.

[132] Law Commission and Scottish Law Commission (n 121) 296.

[133] *RS v T (Surrogacy: Service, Consent and Payments)* (n 107); *Mr K & Anor v Mr Z & Anor* (n 18).

[134] L Park-Morton, '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' (2025) MLI 0(0) https://doi.org/10.1177/09685332251362403.

This demonstrates that the judicial requirement to consider the child's lifelong welfare can enable the courts to consider factors or circumstances outside of the requirements present in the legislation. This is in marked contrast to other s 54 requirements where the courts have liberally interpreted or set aside explicit requirements to ensure a PO can be made in accordance with the child's welfare.

The current status of s 54

This article has demonstrated that the courts have adopted inconsistent approaches to the statutory requirements under s 54. In most cases, the judicial task is a relatively straightforward one: the s 54 requirements can be satisfied, and the PO will satisfy the lifelong welfare of the child. However, where there are doubts over the s 54 criteria, the judiciary have not adopted a uniform approach to reconciling the tension. In some cases, judges have departed from the precise wording to prioritise the child's welfare, either through liberal interpretation (the home requirement) or outright disregard (the time limit). In contrast, other requirements, notably the surrogate's consent and the genetic link, have been strictly upheld, even where this necessitates alternative legal arrangements like adoption or CAOs. These alternatives, whilst maintaining family relationships, lack the transformative legal effect of a PO, leaving welfare subordinate to statutory compliance.

Where welfare has been prioritised, courts have not consistently explained the basis for doing so. Some judgments list practical factors,[135] but many simply assert that the child's best interests are met without substantive reasoning.[136] This lack of clarity risks undermining the legitimacy of judicial discretion and obscures the normative basis for departing from statutory language.

Ultimately, the courts' rationale in balancing s 54 and welfare lacks a principled foundation. Whilst there have been attempts by the court to justify their position in relation to their approach to different s 54 requirements, it is difficult to see a rational basis for why the requirements have been subject to different judicial treatment. Norrie has positioned many of the s 54 requirements as condition-precedents, meaning that welfare should only be considered after satisfaction of the relevant s 54 criteria.[137] However, this categorisation of certain s 54 criteria as being gateway criteria to be met prior to a welfare assessment is not clear in the legislation itself: whilst some requirements have been judicially treated as mandatory and others as discretionary, the statutory language is largely uniform. All but s 54(8), relating to payments beyond reasonable expenses, are framed as mandatory requirements in the legislation. Equally, the obligation to treat the child's welfare as paramount applies across the board. Given the lack of Parliamentary debate dealing with POs in the implementation of the HFE Acts 1990 and 2008, it is not possible rely on Parliamentary intent to justify the differing judicial approach to certain requirements. Instead, therefore, there must be other considerations weighing into the court's assessment of how to reconcile the tension between s 54 and welfare. For example, the priority given to gestation in relation to the surrogate's consent and the genetic link as a distinguishing factor between surrogacy and adoption are likely to have led to the court's absolute maintenance of these requirements. It is important that judicial reasoning such as this be transparent and justified.

[135] *Re A & B (Children)* [2015] EWHC 911 (Fam).
[136] For example, *Re X (A Child) (Parental Order: Time Limit)* (n 31).
[137] Kenneth Norrie, 'English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation' [2017] CFLQ 93.

Although this article critiques the judicial reasoning in PO cases, most outcomes are normatively defensible. The concern lies not in the decisions themselves, but in the inconsistent approach and rationale applied to different s 54 requirements. The child, as the most vulnerable party, should not have their best interests compromised by rigid statutory compliance. The statutory obligation to prioritise welfare therefore legitimises these outcomes. However, a more consistent judicial approach, grounded in this normative framework, would both enhance legal coherence and ensure the interests of children born through surrogacy. In light of the Law Commissions' recommendations for reform to the law on surrogacy,[138] the tension between the s 54 requirements and obligations relating to the welfare of the child should be comprehensively reviewed to ensure any changes in the law relieve the judiciary of this friction.

Conclusion

On reviewing the case law, the relationship between s 54 HFE Act 2008 and the child's welfare may appear unproblematic. In most cases, courts can grant POs in accordance with the statutory framework whilst also securing the child's lifelong welfare. Reported judgments tend only to be issued in complex or novel cases, meaning the reality of any tension between s 54 and welfare is likely to be less apparent for many families formed through surrogacy.

Nonetheless, this article's systematic review of the case law reveals that the judiciary has frequently been required to reconcile two statutory obligations that do not always align. In doing so, courts have stretched certain s 54 requirements, such as the 6-month time limit, the home requirement, and the prohibition on payments, sometimes to the point of near-irrelevance. This expansive approach to interpretation has been criticised for undermining legislative intent and overriding social policy,[139] and raises important questions about the role of the court and the separation of powers. In the absence of a coherent legislative framework, courts have been left to fill the gaps, potentially blurring the boundaries between interpretation and legislation. Nonetheless, the case law reflects the judiciary's commitment to prioritising the child's welfare in the absence of clear parliamentary guidance. Indeed, the legislative history of the HFE Acts demonstrates that surrogacy was given minimal attention, leaving courts to interpret and apply s 54 without a coherent policy foundation. Judicial creativity has therefore become a necessary tool to meet the expectations of intended parents, surrogates, and – most importantly – the welfare of the child.[140]

Yet this flexibility is not universal. Certain requirements, such as domicile, genetic link, and the surrogate's consent, have been treated as mandatory, even where refusal of a PO may compromise the child's welfare. The importation of the welfare principle from s 1 ACA 2002 has undoubtedly resulted in the child's lifelong welfare being a prominent feature in the case law;[141] however, it is apparent that this alone cannot guarantee the child's welfare in cases where requirements which have been deemed as mandatory are not met.

This inconsistency in how s 54 is applied exposes a flaw in the legal framework. Whilst courts often succeed in reaching decisions that align with the child's welfare, they are

[138] Law Commission and Scottish Law Commission (n 121).
[139] K Norrie (n 10).
[140] M Welstead, 'A New Pathway to Domestic Surrogacy (Building Families Through Surrogacy: A New Law: The Law Commission's Joint Consultation Paper)' [2019] Fam Law 1031, 1031.
[141] Human Fertilisation and Embryology (Parental Orders) Regulations 2010.

sometimes forced to do so through strained interpretations or alternative legal mechanisms. This is not a failure of the judiciary, but a reflection of the tension created by the current law. If the welfare of the child is to be the true guiding principle in the determination of legal parenthood following surrogacy, requirements within s 54 that obstruct welfare-driven outcomes should be reconsidered. Conversely, if there are legitimate policy reasons for imposing criterion upon intended parents in obtaining POs, these should be respected and applied by the judiciary separately to that of the welfare standard: this is not currently possible given that it is not clear from the implementation of the HFE Acts as to what the underlying policy motivations for the requirements were.

For jurisdictions considering surrogacy legislation, understanding the complex task of the court in relation to satisfying both eligibility criteria and welfare is important: this review of the case law in England and Wales demonstrates that the two statutory obligations do not always enable decisions to be made that are doctrinally and legally coherent. Equally, if the law in England and Wales and Scotland comes to be reviewed by Parliament, the tension demonstrated throughout this article must be acknowledged to ensure the judiciary of the future do not face the same challenges as today.

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