

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 731 OF 2023

IN THE MATTER OF an application
under Section 12 of the Parent and
Child Ordinance (Cap 429)

BETWEEN

A
B
1st Applicant
2nd Applicant
and
E
Respondent

Before: Hon Au-Yeung J in Chambers (not open to the public)
Date of Hearing: 25 October 2023
Date of Submission of Original Documents: 27 November 2023
Date of Judgment: 4 December 2023

J U D G M E N T

A. *INTRODUCTION*

1. This is the application by A and B (collectively “**the Applicants**”) by Originating Summons filed on 11 May 2023 (“**OS**”) for orders that:

(1) C and D (“**the Children**”) be regarded in law as the children of the Applicants’ marriage under section 12 of the Parent and Child Ordinance, Cap 429 (the “**Ordinance**”);

(2) the payment in the sum of RMB750,000 made by the Applicants pursuant to and in connection with the surrogacy agreement were expenses reasonably incurred as referred to in section 12(7) of the Ordinance and be retrospectively authorized; and

(3) the Applicants shall notify the Registrar of Births and Deaths, in such manner as may be prescribed, of the making of the Order in §(1) above.

2. The factual background has been aptly summarised by Ms Liao, counsel for the Applicants and I gratefully adopt the same.

3. The Applicants are both permanent residents of Hong Kong and have lived with their eldest child (a girl born in [REDACTED]) (“**the Daughter**”) in Hong Kong since 2012.

4. Keen to give the Daughter a sibling, the Applicants had attempted to conceive a second child themselves since 2011, but they were unfortunately unsuccessful. B had ovarian cyst and underwent two surgical operations in March 2020 and April 2021. By that time A and B were in

their mid/late 40s and the prospect of conceiving a second child themselves became increasingly dire.

5. In order to have a better chance of having a child, A entered into an **Agency Agreement** dated [REDACTED] 2020 with a surrogacy agency (the “**Agency**”) based in [H city in PRC]. It was originally contemplated that the surrogacy arrangement would be carried out in [country T]. However, due to the indefinite travel ban imposed by [country T] during the COVID pandemic, the Applicants decided to carry out the surrogacy arrangement in the Mainland via the Agency.

6. The Agency subsequently arranged E, who was from [H Province], to be the surrogate mother. E was born in [REDACTED] and [20+] years old at the time, and had given birth to [REDACTED] children of her own.

7. E underwent IVF procedures using ovum from an anonymous female donor and sperms of A. The Applicants paid a total of RMB750,000 (about HK\$850,000) for the surrogacy arrangement.

8. As a result of the surrogacy arrangement, the Children ([REDACTED] [REDACTED]) were born in [W city in PRC] on [REDACTED] 2021. Despite the fact that B was in Hong Kong at the time of the Children’s birth, the birth certificates of the Children issued by the hospital named B as the mother. Due to COVID related travel restrictions, after their births, the Children were taken care of by A’s mother and elder sister in [C city in PRC] until [REDACTED] 2022. Since [REDACTED] 2022, the Children have lived in Hong Kong with the Applicants and their Daughter and the Applicants have been their primary carers.

9. During the application for the Children’s Certificate of Entitlement to the Right of Abode in Hong Kong, on [REDACTED], A was

alerted by the Bureau of Exit and Entry Administration of the Ministry of Public Security of PRC that there was an issue with the parentage of the Children. A immediately sought legal advice in HK and upon learning the need to obtain a parental order promptly sought the consent of E and took out the OS on 11 May 2023.

10. E, acting by her solicitor, has confirmed her consent to the Application. She confirmed that her husband had no knowledge of the surrogacy arrangement and requested that it be kept confidential.

11. By the time of the hearing on 25 October 2023, the Applicants had terminated the application for Certificate of Entitlement.

B. COMPLIANCE WITH STATUTORY REQUIREMENTS

12. Section 12 of the Ordinance provides that:

“(1) The court may make an order providing for a child to be regarded in law as the child of the parties to a marriage (referred to in this section as ‘the husband’ and ‘the wife’) if —

(a) the child has been carried by a woman other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination;

(b) the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo; and

(c) the conditions in subsections (2) to (7) are satisfied.

(2) The husband and the wife must apply for the order within 6 months of the birth of the child or, in the case of a child born before the commencement of this section, within 6 months of such commencement.

(3) At the time of the application and of the making of the order—

(a) the child’s home must be with the husband and the wife or either of them; and

(b) the husband or wife, or both of them, must—

(i) be domiciled in Hong Kong;

(ii) have been habitually resident in Hong Kong throughout the immediately preceding period of 1 year; or

(iii) have a substantial connection with Hong Kong.

(4) At the time of the making of the order both the husband and the wife must have attained the age of 18 years.

(5) The court must be satisfied that both the father of the child (including a person who is the father by virtue of section 10), where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

(6) Subsection (5) does not require the agreement of a person who cannot be found or is incapable of giving agreement and the agreement of the woman who carried the child is ineffective for the purposes of that subsection if given by her less than 6 weeks after the child's birth.

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

(a) the making of the order;

(b) any agreement required by subsection (5);

(c) the handing over of the child to the husband and the wife; or

(d) the making of any arrangements with a view to the making of the order, unless authorised or subsequently approved by the court.

(8) Subsection (1)(a) applies whether the woman was in Hong Kong or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.”

13. Further, section 3 of the Guardianship of Minors Ordinance, Cap 13 (“**GMO**”) provides that in matters concerning custody or upbringing of a minor, the Court shall:

(1) regard the best interests of the minor as the first and paramount consideration; and

(2) shall give due consideration to the views of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so, and any

material information including any report of the Director of Social Welfare available to the court at the hearing.

14. Section 12(1)(a) and (b) apply as the Children had been carried by E as a result of IVF treatment. The sperms of A and the ovum of an anonymous woman were used to bring about the creation of the embryo.

15. Section 12(3) is complied with. At the time the OS was taken out, the Children's home was with the Applicants.

16. The Applicants are domiciled in Hong Kong and have been habitually resident here for more than 1 year prior to the issue of the OS. They became permanent residents of Hong Kong since 2018 and 2019 respectively. They have a substantial connection with Hong Kong having regard to their period of residence and work here.

17. Section 12(4) is met because the Applicants were aged 50 and 48 respectively on the date of the OS.

18. Regarding section 12(5), E was aged [20+] and married at the time of the surrogacy. Although the creation of the embryo carried by her was not brought about with the sperm of her husband, her husband was regarded as the father of the children under section 10(2).

19. E and her husband already have ■ children. According to the affidavit of her solicitor (Mr Yiu), E was not living with her husband and her ■ children since she was working in a city in China away from her hometown. Due to the sudden outbreak of Covid-19 in late 2019 and the movement control imposed by the Mainland government, she was unable to return to

her hometown at that time. She did not tell her husband about the surrogacy arrangement and he did not know about it at all.

20. The evidence from Mr Yiu was hearsay, but I am satisfied that there had been genuine attempts to lay the best evidence before the Court. E had subsequently, on [REDACTED] April 2023, signed a “Declaration” confirming that her husband did not know and had not consented to the surrogacy arrangement. She confirmed that after giving birth to the [children], she had not contacted the commissioning parents. She confirmed that she would give up all rights in relation to the Children and supported the commissioning parents’ application to the Hong Kong Court for a parental order.

21. In fact, B’s evidence disclosed that E did not take part in the completion of the papers for the birth certificates of the Children or decide their names. Nor did she take part in the Children’s household registration. The Children were registered as B’s children instead, in [B city in PRC]. The hospital had issued the birth certificates with knowledge of the surrogacy arrangement. After the birth of the Children, E had not seen the Children.

22. I am satisfied from paragraphs 19-21 above that E’s husband is not to be regarded as the father of the children under section 10(2). He is not required to be served and was not served with the OS. I am also satisfied that E had freely and with full understanding of what was involved, agreed unconditionally to the making of a parental order.

A C. ISSUES A

B 23. The remaining issues are: B

C (1) Whether the expenses incurred were reasonable and ought to be C
D approved by the Court; D

E (2) Whether the grant of a parental order is in the best interest of E
F the Children; and F

G (3) Whether the time limit of 6 months under section 12(2) should G
H be extended. H

I D. WHETHER THE EXPENSES INCURRED WERE REASONABLE I
J AND OUGHT TO BE APPROVED BY THE COURT J

K D1. Legal principles K

L 24. Section 12(7) involves 2 questions: L

M (1) Whether the expenses were reasonably incurred – if they were, M
N they do not require approval of the court; and N

O (2) If any part of the expenses was not reasonably incurred, whether O
P the court should exercise discretion to authorize or approve P
Q such expenses retrospectively? Q

R 25. FH & MH [2019] HKCFI 1748 has set out the following R
S principles in determining the issues under Section 12(7) at §§110-122: S

T (1) The Court should not just look at the payments that were made T
U to the surrogate mother but at the wider picture and the U
V

A			A
B		circumstances in which payments were made, including payments to agencies;	B
C	(2)	What was reasonable is a question of fact and the amount could vary greatly from place to place.	C
D	(3)	“Non-reasonable expenses” require subsequent approval or authorization by the court after meeting 3 tests:	D
E			E
F	(a)	Was the sum paid disproportionate to reasonable expenses?	F
G	(b)	Were the applicants acting in good faith and without moral taint in their dealings with the surrogate mother?	G
H			H
I	(c)	Were the applicants party to any attempt to defraud the authorities?	I
J			J
K	(4)	The Court would be sensitive to, on the one hand, the policy decision that commercial surrogacy agreements should not be regarded as lawful, and on the other hand, considerations of the child’s welfare.	K
L			L
M	(5)	Where the welfare considerations demand that an order should be made, the Court will only consider not making an order in the clearest case of abuse of or affront to public policy, or the expenses were of such a level as to raise the concern of the Court.	M
N			N
O			O
P			P
Q	(6)	The fact that the agency has made a profit where the surrogate has acted on an altruistic basis is a factor to take into account.	Q
R	(7)	While the commercialization of surrogacy is prohibited under the Human Reproductive Technology Ordinance, Cap 561, the legislative purpose is to prevent its abuse, not to prevent a married couple who had a genuine need to resort to surrogacy	R
S			S
T			T
U			U
V			V

A and used their own sperm and egg in so doing, and certainly
B not to penalise the child.

C
D2. *Reasonableness of the expenses*

D
E 26. The breakdown for the RMB 750,000 paid, according to
F A's enquiries with the Agency was as follows:

- F (1) RMB 250,000 was paid to E;
G (2) Another agency which referred E to the Agency charged
H RMB100,000 ("**referral fee**");
I (3) The lab which carried out the IVF procedure charged around
J RMB150,000;
K (4) All the medical checks costs were around RMB25,000;
L (5) Costs of caesarian section were around RMB40,000;
M (6) The remaining sum of around RMB185,000 was presumably
N the Agency's fee.

O Save for item (2), the types of expenses appeared to be reasonable.

O 27. A was unable to get further breakdown as to the amount of fees
P from the Agency. It was understandable that the Agency would want to
Q remain coy for commercial reasons.

Q 28. The only evidence before the Court as to "reasonableness" of
R the fees charged is an article about various surrogacy agencies in
S Mainland China and the level of fees charged by surrogate mothers in
T different countries that permitted surrogacy.

29. With respect, the article is of little assistance. It seems to have been published in 2019. It does not state the source of data or provide the primary information which led to the generalization on the level of fees charged by surrogate mothers. The Court has to do its best to work on the limited evidence available.

30. With regard to RMB 250,000 paid to E, despite E being located, no one (not even solicitors for the Applicants) ever made enquiries as to whether she had actually received the money as alleged, her loss of income, expenses during pregnancy or other questions to ascertain if she had been exploited or undue pressure was imposed on her.

31. However, being represented, E has all along indicated her consent to give up her rights to the Children and made no claim against the Applicants. The RMB 250,000 comprised 1/3 of the amount charged under the Agency Agreement. Overall, I am satisfied that E had received an amount she was contented with for her service and that the amount paid was not so low as to unfairly exploit her or so high that it may place undue pressure on her.

32. The referral fee appears startling. But A has explained in the witness box that it included nourishing food for E. However, there is no evidence as to the level of expenses a pregnant woman needed. Looking at the practicality, with 9 month's need of nourishing food and service of the referral agent, the RMB 100,000 could not be said to be unreasonable.

33. The costs of medical checks and caesarian section cannot be said to be high, compared to the level in Hong Kong.

34. The agency fee of RMB 185,000 formed about 25% of the overall fee. The entire process, including provision of ovum donor, documentation and records issued by the hospital, was arranged by the Agency. Looking at circumstances in the round, it was not too disproportionate as to be an abuse on the commissioning parents or to raise concerns of the Court.

D3. Whether the Applicants acted in good faith and without moral taint

35. A and B were brought up in Mainland China until they moved to work in Hong Kong in around 2010. With proficiency in the Putonghua language, it was natural for them to turn to Mainland Chinese agencies for surrogacy arrangements. A had taken steps prior to entering into the Agency Agreement to satisfy himself that the law in Mainland China did not expressly prohibit surrogacy or penalize commissioning parents or surrogate mothers, although the medical personnel or institutions which facilitated surrogacy might receive administrative penalties.

36. A's view tallies with that in the legal opinion on PRC law obtained for the purpose of this case. The Ministry of Health of the PRC issued rules in 2001 which prohibit medical institutions and staff from participating in surrogacy arrangements. However, the rules do not regulate the legal relationship of the persons involved in the surrogacy arrangement, nor do the rules render the Agency Agreement illegal by law.

37. The legal opinion cited the case of 上海市第一中級人民法院 (2015) 滬一中少民終字第56 in which the Intermediate People's Court of Shanghai held that the commissioning mother (who did not provide the eggs) was the step mother of children born out of surrogacy. She had

custodial rights with priority over the paternal grandparents. Similar to the Hong Kong Courts, the Mainland Courts regard the children's welfare as of paramount importance.

38. The Agency Agreement was originally for the surrogacy to take place in [country T]. However, due to travel restrictions imposed by [country T] during the COVID pandemic, the Applicants turned to surrogacy in Mainland China instead of Hong Kong, the place with the closest connection with them. A explained that language consideration made him feel more confident in carrying out the surrogacy in Mainland China.

39. The Applicants claim to be unfamiliar with the law in Hong Kong. They had assumed that they were automatically recognized as parents in law since the Children were born. They had assumed that their names appearing in the birth certificates of the Children would be conclusive evidence of their relationship with the Children. These are a little hard to accept since the Applicants are both PRC lawyers [REDACTED] [REDACTED]. They have also been doing [REDACTED] work in Hong Kong which would necessitate contact with the law.

40. B could not have been the birth mother of the Children because she was recovering from her second operation in Hong Kong on the date of their births.

41. Apart from the selection of ovum donor and surrogate mother by reference to their respective medical reports and background data on anonymous bases, the Applicants did not have much control over the process or the issuance of documentation. The Agency informed A that it was the long established practice under surrogacy arrangements that the names of the surrogate mother and the ovum donor would not be disclosed to the

commissioning parents or shown in any documentation of the medical institution involved and only the names of the commissioning parents would be shown on the records. How a hospital, operating under PRC law, could have issued a certificate to state that B instead of E was the birth mother is never clear on the evidence.

42. Anyway, the evidence before this Court shows that A had not hidden the surrogacy arrangement from the Immigration Department. The Applicants acted promptly in coming to Court. They also took steps to find E through the Agency in order to properly serve her with the proceedings. The Applicants made no attempt to defraud the authorities and made their best endeavours to comply with the laws of Hong Kong.

43. I am satisfied that A did not give a detailed account of the surrogacy to the Immigration Department because he genuinely thought that the right of abode of the Children was predicated upon their genetic link to him. Moreover, it was a source of pain to B that the couple had to resort to using the ovum of an anonymous donor and B was extremely concerned about the impact on the Children should they find out that she is not their biological mother.

44. The Applicants have been arrested by the Immigration Department on charges of false declaration and uttering forged documents but ended up without being prosecuted.

45. Having considered the evidence and heard A in the witness box, I am satisfied that the Applicants have acted in good faith and without knowledge of Hong Kong law on surrogacy. There was no abuse or acts that were an affront to public policy in Hong Kong.

46. It is not for this Court to speculate as to the reason why the Bureau would not process the Certificate of Entitlement Applications or issue or renew any travel documents. Afterall, Mainland China has its own law on parentage and birth registration. Nor does this Court wish to interfere with the immigration policy in Hong Kong. The present judgment is wholly premised on section 12 of PCO, and the Court's jurisdiction is grounded on the Applicants' domicile, habitual residence and period of residence in Hong Kong. But commissioning parents who have or will have children born in Mainland China should be aware of risks faced in similar applications for Certificates of Entitlement.

D4. Approval of the expenses

47. The Applicants had a genuine need to resort to surrogacy. For the reasons given in section D3, I find that there was no abuse of public policy on the part of the Applicants and I approve of the expenses.

E. WHETHER GRANT OF PARENTAL ORDER IS IN THE BEST INTEREST OF THE CHILDREN

48. The Applicants are devoted to the Children and committed in their role as parents. The Applicants are well educated and well off financially. They have a stable home and the ability to take care of the Children for their long term development physically, financially and emotionally.

49. Since [REDACTED] 2022, the Children have been living with the Applicants in Hong Kong. The Children have a happy, healthy and close relationship with the Applicants. The Daughter was extremely delighted to

welcome these long-awaited siblings into the home. The extended families of A and B are supportive of the Children.

50. Granting a parental order will meet the lifelong best interests of the Children and best meet their psychological, physical and social needs. No one would be prejudiced if a parental order is granted. E asserts no right over the Children. She tried her best to facilitate this application.

51. On the other hand, if no parental order is granted, there would be devastating effect on the family, including the eldest Daughter. A parental order is plainly the more appropriate order than an adoption order because it confirms the genetic link between A and the Children. It also reflects the reality that the Applicants are their social and psychological parents and that the Applicants have always wanted the Children to be part of their family.

52. There is no doubt that the grant of a parental order is in the best interest of the Children.

F. WHETHER THE TIME LIMIT OF 6 MONTHS SHOULD BE EXTENDED

53. The Court's approach to an application for extension of time under section 12(2) has been set out in *Re A & B* [2019] 5 HKLRD 366, §§25-26, Au-Yeung J. In gist, an application for a parental order has to be made within 6 months of the birth of the child born out of surrogacy. However, the court has power to extend the time. A parental order will be granted except in the clearest case of abuse of public policy. In the light of the best interests of the child as the first and paramount consideration, the court will consider a basket of factors, including the length of the delay, the

explanation for the delay, merits of the application and the prejudice that may be caused if no parental order is granted.

54. The unawareness of the legal requirement is also an important factor for the court to consider: see *A v C* [2017] 2 FLR 101 (FC) at §6.

55. In the present case, the “delay” was 18 months, 12 of which were due to the pandemic which forced the Children to stay in the Mainland. But for that stay, the Applicants may not be out of time, as can be seen from their expeditious action after the Children came to Hong Kong.

56. Given the consideration of best interests in Section E above, and lack of delay in substance, I extend the time for the application under section 12(2) by 18 months to 11 May 2023, the date of the OS.

G. CONCLUSION AND COSTS

57. I order as follows:

- (1) That the time for filing the OS be extended to 11 May 2023; refiling be dispensed with;
- (2) That C and D be regarded in law as the children of the Applicants under section 12 of PCO;
- (3) That the payment in the sum of RMB750,000 made by the Applicants pursuant to and in connection with the surrogacy arrangement be authorized and approved by the Court;
- (4) The Applicants shall serve a copy of this Order on the Registrar of the High Court.

(5) The Registrar of the High Court shall notify the Registrar of Births and Deaths, in such manner as may be prescribed, of the making of the order in paragraph (1) above.

58. E has to incur costs for independent Hong Kong lawyers solely for the benefit of the Children and at the request of the Applicants. I therefore order the Applicants to bear the costs of E on indemnity basis, to be summarily assessed, if not agreed, on 18 December 2023.

H. A FEW MATTERS OF PROCEDURE

59. Applications for parental orders are serious matters. Most often, the commissioning parents have to provide strict proof of compliance of all statutory requirements. Whilst the substance is important, the manner of adducing evidence is also important. Documents like the foreign marriage certificate (where the commissioning parents were married outside Hong Kong), the birth certificates of the Children who were born outside Hong Kong, and foreign proof of identity (such as passport, residence card), ought to be properly notarized or apostillized before submitting as evidence. I have requested for and received them for this case.

60. Further, whilst it is accepted that agency agreements for surrogacy are often arranged discreetly and agencies in some jurisdictions are coy in explaining to commissioning parents the fee structure, applicants should give the best details they can to enable the Court to assess the reasonableness of surrogacy expenses. Where the surrogate mother can be located, it is best to verify from her the amount she has received in terms of remuneration and that she was not subject to exploitation or undue pressure in entering into the surrogacy arrangement.

61. Needless to say, there should be satisfactory evidence that the surrogate mother was the person who gave birth to the subject child, as many surrogate mothers remain anonymous under an agency agreement. This may often require cooperation of the agency, as has happened in this case, to identify the surrogate mother and provide proof of her connection to the subject child.

(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

Ms Tara Liao, instructed by KYMS Law Office, for the 1st and 2nd Applicants

Mr Keith Cheung, instructed by Yiu & Associates, Solicitors, for the Respondent

Ms Ally Shum Lok Tim, Government Counsel of Department of Justice, on watching brief