

Cases and CPD Takeaways

FH and MH v WB AND OTHERS [2019] HKCFI 1748
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Court: Court of First Instance, HCMP 1313/2018. Au-Yeung J, sitting in chambers (not open to the public).

Hearing and judgment: Heard 8 March 2019; judgment 15 July 2019.

Counsel: Ms Anita Yip SC leading Ms Alison Choy, instructed by Sidley Austin, for the applicants. Mr Eugene Yim, instructed by the Official Solicitor, for the twins.

Significance: This was the first case in which a Hong Kong court assessed whether surrogacy expenses were reasonable (para 144). It set the framework for the later Hong Kong surrogacy cases.

Facts

- The applicants were an American-born couple, married for 17 years, who were Hong Kong permanent residents domiciled here for over a decade. The wife could not safely carry another pregnancy, so the doctor advised surrogacy (paras 3–6).
- In 2015 they entered a gestational carrier agreement in California, through an agency, with WB (the surrogate) and her husband HB. Embryos made from the applicants' own gametes were transferred, and twins were born in California in 2016 (paras 7–11).
- Eight days after the birth, a California court declared the applicants the legal parents. The twins entered Hong Kong on dependant visas (paras 12–14).
- In 2017 the visas lapsed by oversight. When the applicants applied to renew them, the Director of Immigration's enquiries led them to disclose the surrogacy. Without visas or a parental order, the twins could not enrol in kindergarten (paras 15–17, 141–143).
- Under Hong Kong law, WB and HB were still the legal parents (ss.9–10 of the Parent and Child Ordinance, Cap 429). The application was 21 months out of time (paras 20, 28).
- The court joined WB and HB as parties, and they consented unconditionally. The Official Solicitor represented the twins and supported the application (paras 27, 31).

Issues

1. Is the child's welfare the paramount consideration under s.12 of the Parent and Child Ordinance?
2. Can the court extend the six-month time limit in s.12(2)?
3. Were the payments "expenses reasonably incurred"? If not, should the court approve them under s.12(7)?
4. Should ss.17 and 39 of the Human Reproductive Technology Ordinance (HRTTO, Cap 561) be "read down" (narrowed) to fit the applicants' constitutional rights (para 30)?

Held

The parental order was granted.

1. Nature of a parental order (paras 33–48). The order has a "transformative", lifelong and irreversible effect. It gives the child legal identity and status. Adoption and wardship are no substitute: adoption does not recognise the genetic link, and wardship gives no status. The order establishes the commissioning parents' parenthood and removes the surrogate's rights. It also improves the child's immigration prospects and gives inheritance rights.

2. Welfare is paramount (paras 49–62). Welfare applies to s.12 for three reasons:

- s.3(1) of the Guardianship of Minors Ordinance;
- Article 3 of the UN Convention on the Rights of the Child; and
- s.12 mirrors s.54 of the UK Human Fertilisation and Embryology Act 2008, and English courts treat welfare as paramount.

The welfare checklist can be used as an aide-memoire.

3. The six-month limit can be extended (paras 63–109).

- **Statutory interpretation:** Strictly applying the limit would be absurd. A child could end up with two sets of legal parents, or none in Hong Kong. The purpose of s.12 is to give identity and status, not to punish (paras 69–75).
- **UK authority:** The court followed *Re X (A Child) (Parental Order: Time Limit)* 2015, where an order was granted 26 months after birth (para 81).
- **The rule:** Welfare prevails over the parents' delay. An order will be granted "except in the clearest case of abuse of public policy" (para 88).
- **Fundamental rights:** The limit also interferes with the twins' rights:
 - privacy and family life (Article 14 of the Hong Kong Bill of Rights);

- protection of the family (Article 19);
- freedom from discrimination by birth (Article 20); and
- access to the courts (Article 35 of the Basic Law).

The limit fails the Hysan proportionality test, so the court read it down (paras 89–109).

4. Expenses (paras 110–144, 173).

- **The two-stage test:** (1) Were the expenses reasonably incurred? (2) If not, should the court approve them? For the second stage, the court asked Hedley J's three questions: Was the amount disproportionate? Did the applicants act in good faith, without "moral taint"? Did they try to defraud the authorities (paras 110, 116)?
- **Reasonable:** US\$45,698 of the US\$108,198 total was reasonable. This covered legal fees, insurance, medical costs and travel. The money was properly accounted for through a trust (paras 123–125).
- **Not reasonable:** US\$62,500, about 58% of the total, was not reasonable. This was the agency fee (US\$20,000), a "full participation bonus", a US\$32,000 monthly lump sum that was really payment to WB, and an extra fee for carrying twins (para 126).
- **Approval:** These amounts were "quite disproportionate". The agency fee did not raise concern, given the administrative work involved (para 133). The applicants acted in good faith and complied with California law. They kept close, grateful contact with WB, whose will was not overborne, and made frank disclosure to the Director (paras 135–143). The court approved the US\$62,500 retrospectively.
- **Caveat:** The court warned that US\$108,198 must not be treated as the norm (para 173).

5. The HRTO (paras 145–173).

- **The offence:** Section 17 bans payments for surrogacy, and applies "whether in Hong Kong or elsewhere". Breach is a summary offence under s.39, with a fine of HK\$25,000 and 6 months' imprisonment. Prosecution must start within 6 months, and the payments dated from 2014–2015, so any prosecution was time-barred (paras 146–149).
- **The conflict:** The two Ordinances pull in opposite directions. Parents who comply with the law are worse off: applying in time exposes them to prosecution and to giving up their privilege against self-incrimination. Of the payments here, only

US\$7,457 would qualify as bona fide medical expenses under the HRTD definition (para 150).

- **No reading down:** The court declined to read the HRTD down:
 - these were not criminal proceedings;
 - the extraterritorial reach may legitimately protect children from being treated as commodities;
 - an exemption for parents who use their own gametes is unnecessary; and
 - exempting expenses would be unworkable.

The question was left for a future case (paras 163–171).

- **Penalties target adults:** HRTD penalties are aimed at the adults involved, not the child (para 172). The parents "might themselves have been exploited by the Agency", and there was no abuse of public policy (para 173).

6. Granting the order (paras 174–183). The factors are: the length of and reason for the delay, the merits, prejudice, and any abuse. The delay came from ignorance of the law, and the applicants acted promptly once advised. The family was settled in Hong Kong, as the Social Investigation Report confirmed. No one would be prejudiced by the order, while refusing it would be "devastating".

Orders (para 184)

1. Time extended by 22 months.
2. Declaration that FH and MH are the twins' parents under s.12(1).
3. Payments of US\$62,500 authorised under s.12(7).
4. The Registrar to notify the Registrar of Births and Deaths under s.12(9).

The Official Solicitor's costs were publicly funded, with no order as to costs, because the case raised novel points of public importance (para 187).

Practice Points

- **Join the surrogate:** By default, the surrogate and her husband must be joined as respondents, because ss.9–10 make them the legal parents. The court will not simply accept the applicants' word on consent. It can dispense with service in a suitable case, such as an application made years later where the surrogate has had no involvement (paras 188–197).

- **Call for reform:** The court said s.12 and ss.2 and 17 of the HRTO need review. It called the six-month limit "simply non-sensical", and said any controls on commercial surrogacy should operate before the arrangement or at the border, not in court (paras 198–201).
- **Common pattern:** The judge noted four late applications with a common pattern. The parents held foreign birth certificates and were unaware of the need for a parental order. Two cases were caught only in divorce proceedings. In one of those, S v J 2017, the commissioning mother refused consent and a wardship order had to be made instead (para 202).
- **Keep receipts:** Parents who don't know about the requirement often keep no receipts. That makes s.12(7) hard to satisfy, and this case was exceptional because the agency kept proper accounts (para 203).

CPD Takeaway

Welfare outweighs delay and the illegality of the payments, unless there is a clear abuse of public policy. The HRTO conflict stays unresolved; the court expressly left it for a future case, and in LH v LW (2021) the same judge applied it strictly to refuse approval in advance.

One minor point: the judgment says the application was 21 months out of time (para 28), but the order extends time by 22 months (para 184). Quote the order if you cite the figure.

LH v LW [2021] HKCFI 1998; Date of Decision 8 July 2021
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Court: Court of First Instance, HCMP 707/2021. Au-Yeung J, sitting in chambers (not open to the public).

Hearing and decision: Heard 24 June 2021; decided 8 July 2021.

Counsel: Mr Timothy Parker and Ms Samantha Lau, instructed by CRB, for the applicants.

Facts

- The applicants were a Hong Kong husband and wife in their 50s who had been married for over 10 years and had one daughter. IVF failed, and the wife could no longer conceive. They rejected adoption because they wanted a genetically linked child (paras 2–4).
- In May 2019 they approached a surrogacy agency in Minnesota. After taking legal advice in Hong Kong, they stopped dealing with the agency (para 5).
- No surrogate had been identified and no child had been conceived. They asked the court to declare that the payments under a commercial agency agreement were reasonable, or to authorise them in advance. The estimate was US\$130,950 to US\$197,700 (para 6).

Issues

1. Does the court have power under s.12(7) of the Parent and Child Ordinance (Cap 429) to authorise surrogacy expenses in advance?
2. If so, what test applies (para 9)?

Held

The application was dismissed (para 72).

1. The power exists. The closing words of s.12(7), "unless authorized or subsequently approved by the court", allow approval in advance as well as after the event. The legislative history confirms this: the words "or subsequently approved" were added in 1993 so that the court could also approve payments after they had been made (paras 15–18).

2. A new six-step test for advance approval. The court said it would be "putting the cart before the horse" to assess whether expenses are reasonable before deciding whether the arrangement is legal (para 22). The steps are:

1. Is the arrangement legal under Hong Kong law?

2. Is it legal where the agreement will be made and where the baby will be delivered?
3. Has the child been conceived or born?
4. For commercial surrogacy, is there a prosecution under the Human Reproductive Technology Ordinance (HRTTO)?
5. Are the projected expenses reasonable?
6. If any are not reasonable, should the court exercise its discretion to authorise them?

Steps 5 and 6 are the two-stage test from *FH v WB*.

3. Why *FH v WB* and *Re A and B* were distinguished (para 21):

- In those cases the children were already born. Here, there was not even a surrogate yet.
- Here, no child's welfare had to be weighed, so the welfare principle did not apply (para 42).
- The court could give more weight to the policy against commercial surrogacy.
- In those cases the six-month window for prosecution had already expired. Here, prosecution was still a real risk, and the court must not be seen to create a "defence" or to tie the hands of the criminal court.

4. The arrangement was illegal.

- Section 17 of the HRTTO bans commercial surrogacy and applies outside Hong Kong ("whether in Hong Kong or elsewhere"). Its definition of "payment" excludes any element of profit (paras 27–29).
- If the agreement were signed, the agency would breach s.17. The applicants would breach at least s.17(1)(d). Their decision to stop negotiating after legal advice showed they knew this (para 30).
- The choice of Minnesota law to govern the agreement made no difference (para 31).
- Authorising any expenses, reasonable or not, would be "akin to condoning an illegal agreement" (para 32).
- The legality question comes before any assessment of the expenses; it is not just a public-policy factor in that assessment (para 33).

5. The two Ordinances do not conflict. Counsel argued it was unfair to approve payments after a child is born but refuse applicants who come to court in good faith beforehand. The

court rejected this. The HRTO bans commercial surrogacy, while s.12(7) of the Parent and Child Ordinance applies to altruistic surrogacy. The tension in earlier cases arose only because parents had breached the HRTO, not deliberately. The courts accepted that "necessary evil" to give innocent children a legal identity (paras 34–35).

6. Obiter: what would have been approved if the arrangement were legal.

- **Reasonable expenses:** medical, counselling, insurance, legal fees, maternity clothing, travel, lost wages (capped at US\$4,000) and US\$200 a month for daily expenses (paras 53–54). The agency's legal fees and the US\$1,250 marketing fee were reclassified as commercial (para 52).
- **Non-reasonable expenses:** the agency fee of US\$24,500 and the gestational fee of US\$25,000 to US\$38,000 fell within ranges approved in earlier cases. The surrogate fees did not cover 10 months of an average Minnesota woman's wages, so they were unlikely to exploit her or overbear her will (paras 59–65).
- **Item 32:** the miscarriage fee could not be authorised because it is unrelated to a parental order (para 69).
- **Overall:** apart from item 32, everything could have been authorised. The court made no comment on amounts (para 71).
- **Practice:** in future advance-approval cases, the court may approve a range of figures, with liberty to apply and a declaration (paras 23–25).

Other Points

- **Good faith:** The court accepted the applicants' good faith completely. This was "clearly not a case of buying a child overseas", and there was no "moral taint" (paras 13–14).
- **No view on altruistic surrogacy:** The court expressed no view for or against it. It noted there is no scheme for advance approval, such as a body to assess suitability or guard against exploitation. It said reform needs public debate and legislation, citing Hedley J in *Re S* 2009 EWHC 2977 (Fam) (paras 36–37).
- **Constitutional challenge dropped:** Counsel indicated a challenge to the constitutionality of s.17 of the HRTO but did not pursue it (para 38).

Takeaway for the CPD Session

The courts will approve commercial surrogacy payments afterwards, for the child's sake. They will not approve them in advance, because that would condone a criminal offence. So

the law-abiding couple who seek approval first are refused, while those who go ahead without approval usually obtain the order. That paradox makes a strong discussion point.

Court: Court of First Instance, HCMP 1731/2023. Au-Yeung J, sitting in chambers (not open to the public).

Hearings and judgment: Heard 26 February and 24 September 2024; judgment 25 September 2024.

Counsel: Ms Alison Choy, instructed by Cheng & Ng, for the applicants. The surrogate was not represented and did not appear.

Significance: This is the most extreme Hong Kong case so far. The arrangement broke the law in three jurisdictions and the application was 59 months late, yet the order was still granted. The judgment also gives a clear warning to future commissioning parents (paras 1, 136).

Facts

- The applicants were a Hong Kong married couple. After years of failed IVF caused by the wife's infertility, the husband signed an agreement with a Cambodian fertility agency in April 2016. The agency was to find an egg donor and a surrogate, for an initial fee of RMB650,000 (paras 5–7).
- Three implantation attempts failed in 2016–2017. In 2017, embryos made from donor eggs and the husband's sperm were placed in a Thai surrogate in Cambodia (paras 8–9).
- The surrogate was 19 and unmarried, and she lived in Thailand. She gave birth to twins prematurely in Bangkok in 2018. The Thai birth certificates named her as the mother and the husband as the father (paras 10–12).
- DNA tests confirmed the husband was the biological father. On that basis the twins received HKIDs and HKSAR passports, and they have lived with the applicants ever since. The family now lives in Canada (paras 14–16, 25).
- In September 2021 the husband filed for divorce. Only then did his divorce lawyers tell the couple they needed a parental order, and the divorce was stayed (para 18).
- An earlier application, HCMP 278/2022, was dismissed in July 2023 for procedural failings. Its originating summons expired before the surrogate was ever served (paras 4, 88–89).

Issues (para 35)

1. Did the arrangement breach the laws of Hong Kong, Cambodia and Thailand?
2. Should the court extend the six-month time limit in s.12(2) of the Parent and Child Ordinance?
3. Should the court authorise or approve the payments under s.12(7)?
4. Should parental orders be granted?

Held

Parental orders were granted.

1. The nine statutory requirements (paras 19–34)

- **Still married:** The applicants still counted as a married couple because the divorce had been stayed.
- **Surrogate's boyfriend:** Her cohabiting boyfriend took no part in the treatment, so he was not the father under s.10(3). His consent was not needed, though the solicitors obtained it anyway.
- **Thai birth certificates:** The husband being named as father did not help him. The presumption of paternity in s.5(1)(b) applies only to entries in a Hong Kong birth register.
- **Surrogate's consent:** The applicants relied on the surrogate's third consent form, dated 20 February 2024, which met the requirements of s.12(5).

2. Cambodian law was breached (paras 41–58)

- Prakas No. 679 (October 2016) bans commercial embryo creation and "all surrogacy arrangements which are part of a service package". Both were breached.
- The human trafficking law and the Criminal Code could make the applicants accomplices. However, breaching the Prakas itself is unlikely to be a criminal offence, and the applicants had not been threatened with prosecution.
- The court said that a country has the right to set its own policy, and foreigners may not breach it simply because they escape penalties (para 58).

3. Thai law was breached (paras 59–80)

- Several requirements of s.21 of the Protection of a Child Born by Medically Assisted Reproduction Technology Act B.E. 2558 were not met. The surrogate was not a blood

relative, she was 19 (a minor under Thai law) and not of the same nationality as the husband.

- Commercial surrogacy is banned by s.24, with up to 10 years' imprisonment. Both the agency and the surrogate made a profit.
- **Parentage under Thai law:** Under Thai law, the twins are the surrogate's legitimate children only. The husband has not legitimated or adopted them, so he has no legal rights under Thai law. Parental power can only be revoked by a Thai court, and private transfers of parental power are not recognised (paras 74–80).

4. Hong Kong law was breached. The arrangement also breached s.17 of the Human Reproductive Technology Ordinance (HRTO), which applies outside Hong Kong (para 81).

5. Extension of time: 59 months (paras 82–93)

- **Test:** Following *FH v WB*, the court considers the length of the delay, the reasons for it, any prejudice and public policy, with the children's best interests in mind.
- **Criticism of the applicants:** The court doubted their explanation. They had relied on a friend and the agency for advice that surrogacy was legal. It was "hard to believe" they sensed nothing wrong, and they never sought legal advice (para 85).
- **Findings in their favour:** There was no deliberate breach of the law. They were driven by a desperate wish for children and pressure from their in-laws, and were "probably victims of the Agency" (para 86).
- **Reasons for the later delay:** These included two changes of counsel, the need for opinions on two foreign legal systems, a language barrier, losing contact with the surrogate in rural Thailand, notarisation, slow translations and the applicants' financial constraints (paras 88–91).
- **Result:** The innocent twins should not lose the benefit of an order because of their parents' failings. Time was extended to 6 October 2023 (paras 92–93).

6. Payments (paras 94–118)

- **Test:** The court applied the three-step test from *FH v WB*, *Re A & B* and *Re STP*, together with the considerations summarised in *A & B v E* (paras 94–95).
- **Total paid:** About HK\$1,034,900, made up of:
 - RMB700,000 to the agency;
 - RMB148,762 in hospital fees for the premature twins;

- RMB78,429 for the surrogate's tonic food and supplements; and
- a HK\$22,500 cash gift to the surrogate (para 96).
- **Four features showed the arrangement was commercial (para 107):**
 - The total was about 20% higher than in FH v WB (California) and three times that in Re A & B (Mainland), even though living costs in Cambodia are far lower.
 - The agency's share (64%) was the highest of any Hong Kong case, and the surrogate's share (20%) was the lowest.
 - IVF for a married couple in Cambodia costs about US\$12,300–13,100.
 - The surrogate's RMB100,000 equalled about 22 months of her family's income. That was a strong incentive for an unemployed minor.
- **Finding:** This was "a plain case of violation or affront to public policy of 3 jurisdictions" (para 109).
- **The surrogate:** She was not exploited. She took part freely, made "huge profits" and used them to buy farmland and run a grocery shop (para 110).
- **Factors in favour of approval:**
 - The twins' best interests: without approval of the payments, an order was "virtually impossible" (para 113).
 - The applicants were genuinely unaware of the law, treated the surrogate fairly and made no attempt to defraud the authorities (para 114).
- **Ignorance of the law:** It "has never been a defence". The duty is always on commissioning parents to check that an arrangement is legal. However, in 2016 there was no Hong Kong precedent on surrogacy, so the court exercised leniency (paras 115–117).
- **Result:** RMB778,429 (about HK\$850,000, around 84% of the total) was approved. The hospital fees were a reasonable expense, and the cash gift was a reasonable benefit and post-natal thank-you rather than an inducement. Neither needed approval (paras 111, 118).

7. Parental orders granted (paras 119–127)

- Neither applicant is a legal parent under Hong Kong or Thai law. The applicants were the only parents the twins had known for six years. The surrogate has shown no interest, and the orders reflect reality without prejudicing anyone.
- **Limits of the order:** Relinquishment of parental rights is not recognised in Hong Kong (S v J 2017) or in Thailand. So the order may not have the full transformative effect described in FH v WB (para 123).
- **No effect in Thailand:** Counsel argued the order binds everyone (a judgment in rem). The court had reservations, because each jurisdiction decides parentage for itself. The order binds the surrogate and the Hong Kong community, but not, for example, the Thai government (paras 124–126).
- **Re-registration of birth:** Re-registration under s.12C of the Births and Deaths Registration Ordinance is an administrative matter for the Registrar of Births and Deaths. The court declined to comment (para 129).

Orders (para 130)

1. Parental orders for both twins under s.12(1).
2. Time extended by 59 months, so the filing on 6 October 2023 stands.
3. Declaration authorising RMB778,429. The hospital fees (RMB148,762) and the HK\$22,500 gift were reasonable.
4. No order as to costs, except that the applicants must pay the surrogate's costs on an indemnity basis.
5. Notification to the Registrar of Births and Deaths under s.12(9).

Warning to Practitioners (paras 132–136)

Applications must be properly prepared. The court criticised the time this case took. It should not have had to raise basic questions about:

- the experts' qualifications;
- who did the translations and whether they knew both languages;
- illegible copies; and
- serving the surrogate.

The court asked for a clear summary of the legal breaches in each jurisdiction (para 132).

Policy has not changed. On 24 May 2023 the Acting Secretary for Health confirmed to LegCo that commercial surrogacy remains prohibited, and s.17 of the HRTO still stands. The courts "should not condone or be seen to condone commercial surrogacy arrangements" (paras 133–134). The court also pointed to Re T & L 2022 2 HKLRD 685 (B Chu J) as the comprehensive guide to the law and procedure.

The pattern of cases is getting worse. Early cases involved parents who had lived in places where surrogacy was lawful. Later cases (Re STP, Re T & L and this one) involved parents with no connection at all to the country where the surrogacy took place (para 135).

The test for future pleas of ignorance (para 136). Parents who claim ignorance of the law must satisfy the court on four points:

1. Why they did not enter a surrogacy arrangement in Hong Kong, and what they did to check Hong Kong law.
2. Why they went abroad, and what they did to check the foreign law. Relying on an agency's advice is "unlikely to be satisfactory".
3. Who the legal parents are, because the law on commercial surrogacy and the law on parentage are two different matters.
4. What steps they took to remove those parents' rights, and if none, why not.

CPD Takeaway

The twins' welfare still outweighed breaches in three jurisdictions and a 59-month delay. But the court made clear that this leniency depended on the law being untested in 2016. The para 136 test means future parents who plead ignorance will face a much higher bar.

Citation note: This is the case reported as Re CS & CTW and also as CS v SW. Use 2024 HKCFI 2326; 2024 5 HKLRD 70.

Court: Court of First Instance, HCMP 706/2025 and HCMP 707/2025, heard together. Au-Yeung J, sitting in chambers (not open to the public).

Hearings and judgment: Heard 9 October and 12 December 2025; judgment 2 February 2026.

Counsel: Ms Alison Choy for the applicants (paras 81, 92). The surrogates did not appear.

Significance: This is the latest Mainland surrogacy case. It is the first to apply the four-question test from *Re CS & CTW* to a plea of ignorance. It also gives important guidance on serving surrogates in the Mainland.

Facts

- The applicants had been married for 33 years. The husband, 61, runs factories in the Mainland and a business in Hong Kong. The wife, 59, is a housewife. They were infertile, and earlier IVF had failed (paras 6–7).
- In 2020 a friend, C, introduced the husband to an agent, S, in Shenzhen. C worked at the hospital where the births later took place. COVID delayed matters, and in July 2023 the husband made two oral surrogacy agreements with S, about a month apart. There was no written contract, only a fee schedule (paras 7–8, 43).
- The two boys were created from the husband's sperm and donor eggs. Two different surrogates gave birth to them on the same day in 2024, in the same Shenzhen hospital, about an hour apart. Each surrogate is named as mother on the birth certificate. DNA tests confirmed the husband is the father (paras 3, 9).
- The boys live in Shenzhen with the wife and a nanny, and they had never been to Hong Kong. The plan is to move to the family's home in Hong Kong once the paperwork is done (paras 1, 10).
- **The identity-document problem:** The husband no longer has Mainland household registration. The surrogates have none in Shenzhen and would only help for a price the husband would not pay. Hong Kong residence appears to be the boys' only option, but the Mainland application form requires the birth mother, so the wife cannot submit it (paras 12–13).
- The applicants took advice from Hong Kong and PRC lawyers in October 2024 and filed on 8 May 2025 (para 14).

Issues (para 25)

1. Should the court approve the payments under s.12(7) of the Parent and Child Ordinance?
2. Should it extend the six-month time limit in s.12(2)?

Before answering these, the court first examined whether the arrangements were legal and what status everyone had under PRC law (para 26).

Held

Both parental orders were granted.

1. Statutory requirements (paras 18–24)

- **Hong Kong connection:** The couple were married in Hong Kong, are permanent residents and have a furnished home there. The husband spends about 67% of his time in Shenzhen.
- **Consent:** The surrogates' consent forms were not notarised, as A & B v E normally requires. The court accepted them anyway, because the surrogates would not cooperate without further payment (para 16).
- **The documents signed:** Each surrogate signed:
 - a consent form dated 8 April 2025;
 - a notarised custody agreement dated 26 November 2025; and
 - an affirmation.

The applicants did not rely on a "giving up custody" declaration that S had prepared and the surrogates signed in hospital without legal advice (para 15).

2. Illegality and status (paras 27–40)

- **Illegal in both jurisdictions:** The arrangements breached s.17 of the Human Reproductive Technology Ordinance in Hong Kong. They were also illegal in the Mainland, because Article 1007 of the Civil Code bans buying or selling human cells and tissues (paras 28–29).
- **Status under PRC law:** The husband is the father, and each surrogate is her boy's legal mother. The wife is only a stepmother (paras 30–31).
- **What the surrogates can give up:** They can give up direct custody by agreement. They cannot give up guardianship, because a court will not uphold such an agreement. They therefore remain the boys' mothers (paras 32–34).

- **No route for the wife:** The court asked whether the wife could obtain status in the Mainland:
 - Two Shenzhen courts refused to accept her guardianship application. One did so because the case involved commercial surrogacy; the other said it lacked jurisdiction.
 - Mainland adoption was not available either, because none of the conditions in Article 1093 of the Civil Code were met.

So there is "no legal channel" for her to become the legal mother (paras 35–40).

3. The four-question test from *Re CS & CTW* (paras 41–49)

- **Comparison with English case law:** The court noted *Re A v X* 2025 4 WLR 73 (Theis J), where English intended parents who skipped due diligence were still granted orders. This case differed: the couple had substantial Mainland connections, and C's position at the hospital explained why they trusted S (para 46).
- **Their failings:** They made no legal enquiries for three years. They also chose not to use a Hong Kong surrogacy because they had already committed to S (paras 44–45).
- **Questions 1 and 2 (why not Hong Kong, why abroad):** The applicants were ignorant of the law, not deliberately flouting it (para 47).
- **Question 3 (who the legal parents are):** The husband and each surrogate (para 48).
- **Question 4 (removal of parental rights):** Only custody had been given up. The wife has no route through adoption or guardianship (para 49).

4. Payments (paras 50–64)

- **Test:** The court applied the established test from *FH v WB*, *Re A & B*, *Re STP* and *A & B v E* (paras 50–53).
- **Amounts paid:** About RMB883,055 for the elder boy and RMB666,187 for the younger. The money was paid in stages to the company, to S and to individuals, and not to the surrogates directly (para 54).
- **Classification:** The hospital and medicine costs were reasonable. For the rest, there was "simply nothing" to show whether the sums were expenses or benefits, or reasonable or not (paras 55–56).

- **Comparison with other cases:** Comparison is not usually useful, but it does give an overall picture. Re A & B involved RMB300,000 and A & B v E RMB750,000, so the unexplained items were "not unreasonable" (paras 57–59).
- **Good faith:** The payments were made in large instalments through unclear routes. But the surrogates asked for more money only for help with identity papers, not for the surrogacy itself, which suggests they received what they bargained for. There was no reason to doubt the husband's good faith, and no attempt to defraud the authorities (paras 60–63).
- **Result:** RMB860,000 was approved for the elder boy and RMB650,000 for the younger (para 64).

5. Extension of time (paras 65–74)

- **The delay:** The application was 3½ months late. The applicants had sought advice within time, had applied for HKIDs soon after the births, and then spent months tracing the surrogates, who were unresponsive (paras 66–68).
- **The boys' welfare:** The social investigation reports, from Hong Kong and international, confirm close bonds with the applicants and stable care (para 70).
- **Prejudice if refused:** Refusing the orders would leave the boys without a legal mother, even though the wife has been their social and psychological mother since birth (NF v R 2023, para 72). If anything happened to the husband, the boys' identity would be precarious (para 71).
- **Limits of the order:** As in S v J and CS & CTW, relinquishment of parental rights is not recognised in Hong Kong or the PRC. So the orders may not have the full transformative effect. Still, they are "the best that can be done" (para 72).
- **Result:** The court has power to extend time under FH v WB, and time was extended to 8 May 2025 (paras 73–75).

Orders (paras 75–76)

1. Time extended to 8 May 2025.
2. Payments approved under s.12(7) for each boy.
3. A parental order for each boy.
4. Notification to the Registrar of Births and Deaths.
5. Separate orders to be drawn up in Chinese for each boy, for use in the Mainland.

Practice Note on Service (paras 77–91)

Service must be valid. This matters because a parental order may need to be enforced under the Mainland Judgments in Matrimonial and Family Cases Ordinance (Cap 639). It may also need to be produced to obtain identity cards or One-way Permits to settle in Hong Kong (para 78).

What went wrong in this case (paras 79–81):

- Asking for substituted service as relief in the originating summons is undesirable. The solicitors had not even tried formal service, though the surrogates' addresses were on the birth certificates.
- Sending the papers by ordinary post, or by courier to the agent, is invalid. Service in the Mainland must go through Order 11 rule 5A.
- Delay in service through the Mainland judicial authorities is no excuse for not using them.
- It is wrong in principle to ask the agent to serve the papers and explain them to the surrogates.

Leave is not needed (paras 82–90). Applying *SFC v Subotic* (2023) 26 HKCFAR 488 by analogy, the court held that no leave is needed to serve a surrogate outside Hong Kong under Order 11 rule 1(2)(b). The words "in Hong Kong or elsewhere" in s.12(8), and the legislative history, show that s.12 was meant to reach surrogates outside Hong Kong.

But the proper channel must still be used (para 91). Service in the Mainland must still follow Order 11 rule 5A (*L v L* 2017 HKFLR 588, CA). That means a request through the Registrar, with service by the Mainland judicial authorities.

CPD Takeaway

The court is still lenient where parents are genuinely ignorant and have real Mainland ties, even with payments that are poorly documented. But a Hong Kong order cannot fix the child's status in the Mainland: the surrogate stays the legal mother there, and the wife has no route to legal motherhood. For practitioners, the service guidance in paras 77–91 is the most practical part of the judgment.

K (An Infant) v Secretary for Justice [2025] HKCFI 1974

Court: Court of First Instance, HCAL 2063/2023 (Constitutional and Administrative Law List). Coleman J, sitting in open court.

Hearing and judgment: Heard 4–5 June 2025; judgment 9 September 2025.

Parties: K, a young child, acting through R as his next friend, against the Secretary for Justice. The interested parties were B and the Chief Executive.

Counsel: Mr Nigel Kat SC for K. Ms Isabel Tam, pro bono, for B. Mr Stewart Wong SC for the Government.

Facts

- R is a Hong Kong permanent resident. B is South African and became a permanent resident in 2022. They married in South Africa in 2019, a marriage not recognised in Hong Kong (paras 12–15).
- K was conceived by reciprocal IVF in South Africa: R's egg was fertilised with sperm from an anonymous donor and carried by B. DNA confirms R is the genetic parent (paras 17–20).
- K's birth certificate names only B, as mother. The father's space is marked with asterisks, and the form has no space for another parent (paras 2, 53).
- In *NF v R* 2023 HKCFI 2233, Au-Yeung J refused to declare R a parent under s.6 of the Parent and Child Ordinance. Under ss.9 and 11, only the woman who carries the child is the mother. She did, however, declare R a "parent at common law" (paras 3, 73–87).
- On 31 October 2023 the Department of Justice refused to re-register K's birth to add R. Its reason was that re-registration under s.12B of the Births and Deaths Registration Ordinance needs a declaration under s.6 (para 33).

Challenge

K brought judicial review. He challenged:

- s.6 and Part V of the Parent and Child Ordinance; and
- Form 1 of the Births and Deaths Registration Ordinance (the birth registration form),

to the extent they do not recognise a "parent at common law" of a child born by reciprocal IVF. He also challenged the Government's decision not to register R (para 35).

Held

The constitutional challenge was "made good" (para 239).

1. Reciprocal IVF is not surrogacy. It is a "common endeavour" of both partners, "not akin to one woman being a mere egg donor, or to the other acting as a mere surrogate" (para 20). B's counsel stressed that the case does not involve any surrogate or surrogacy arrangement (para 61).

2. The "parent at common law" declaration. Coleman J said the declaration in NF v R had "no practical effect (for any legal purpose), and was as a result probably simply wrong" (para 130).

3. Rights engaged and infringed (paras 141–184):

- **Privacy, family and identity (Article 14 of the Bill of Rights):** This includes the "identity of one's parents".
- **Protection of the family (Article 19).**
- **Children's rights (Article 20):** probably engaged.
- **Equality (Article 22 of the Bill of Rights and Article 25 of the Basic Law).**

Excluding R from the birth certificate causes practical difficulty with schools and hospitals, embarrassment and harm to K's dignity. It also takes away rights to maintenance and inheritance (paras 173–184).

4. The Government's justifications all failed (paras 185–233). The court applied the Hysan proportionality test:

- **Flexibility:** A blanket exclusion is "the antithesis of flexibility" (para 193).
- **Social consensus:** This is not a legitimate aim (para 194).
- **Consistency:** Neither is the wish for consistency (para 195).
- **Policy choice:** This argument is circular (para 198).
- **Guardianship as an alternative:** It is not enough. Guardianship ends at 18, does not change the birth certificate and does not recognise the genetic link (paras 197, 233–235).
- **"Dual motherhood":** This is a "red herring". K seeks recognition of R as a parent, not as a second mother (para 201).

- **Standard of review:** Closer to "no more than reasonably necessary". But the interference would be disproportionate even on the more lenient test (paras 231–232).

5. Discrimination (paras 240–253). If the challenge is limited to cases with two parents, the provisions are clearly discriminatory on the ground of birth. The Government raised a possible three-parent scenario, where a known sperm donor could count as a "male partner" under s.10(3) (paras 247–251).

6. Relief has not yet been granted. The court found a basis for relief, probably by way of declarations. The precise form was left for further argument, and costs were reserved (paras 254–257). The judgment ends with a King Canute postscript: the law must recognise and adapt to social realities rather than "bury its head in the sand" (paras 258–259).

Using It in the Surrogacy Seminar

Why it belongs in a surrogacy talk

1. It applies the same rule that governs surrogacy. The "carrying woman and no other woman" rule in s.9 is what makes the surrogate the legal mother. K shows how that rule shuts out a genetic mother. In surrogacy, a s.12 parental order is the only way around it. In reciprocal IVF, there is no way around it at all.

2. It confirms the welfare reasoning in the surrogacy cases.

- Coleman J relied on FH v WB: refusing an order merely for lateness would interfere with family life (para 144).
- He repeated that guardianship and adoption are no substitute for legal parentage (paras 50, 197). That is the same reasoning used in FH v WB, CS v SW and HSC v T.
- He relied on Mennesson v France (ECtHR, 2014), a California surrogacy case on a child's right to have a legal relationship with their parents recognised (paras 151–152, 183).

3. It undermines a case relied on in HSC v T. HSC v T relied on NF v R (para 72) for the welfare value of a social and psychological mother. Coleman J has now said the "parent at common law" declaration was "probably simply wrong". The welfare point in NF v R is still good, but don't treat "parent at common law" as an established status.

4. It exposes the gap in s.12 for same-sex couples.

- A parental order is only available to "the parties to a marriage" (s.12(1)). Same-sex marriages are not recognised in Hong Kong, so same-sex couples who use

surrogacy appear unable to obtain one. This is my reading of the statute, not a holding in K.

- K suggests the rigid "mother/father" structure of the Ordinance may fail constitutional scrutiny. A future challenge to the marriage requirement in s.12 is foreseeable.

5. The three-parent concern is familiar from surrogacy. The Government's three-parent argument (paras 247–250) mirrors surrogacy cases, where the surrogate, her husband and the commissioning parents may all have claims. The court has not resolved how that would be handled.