

HCMP 1313/2018
[2019] HKCFI 1748

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 1313 OF 2018**

IN THE MATTER of a joint
application by FH and MH

and

IN THE MATTER of an infant named
B, a boy, and an infant named G, a girl

and

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

BETWEEN

FH	1 st Applicant
MH	2 nd Applicant

and

WB	1 st Respondent
HB	2 nd Respondent
B (an infant) by the Official Solicitor as guardian ad litem	3 rd Respondent
G (an infant) by the Official Solicitor as guardian ad litem	4 th Respondent

Before: Hon Au-Yeung J in Chambers (Not Open to the Public)

Date of Hearing: 8 March 2019

Date of Judgment: 15 July 2019

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A. UNDISPUTED BACKGROUND

1. This is an application for a parental order concerning **B** and **G**, a boy and a girl (“**the Twins**”) born out of a surrogacy arrangement. It calls for interpretation of the Parent and Child Ordinance, Cap 429 (“**PCO**”) and the Human Reproductive Technology Ordinance, Cap 561 (“**HRTTO**”).

2. WB is the surrogate mother and HB is her husband.

3. FH and MH (collectively “**the Applicants**”) have been married for 17 years and are the commissioning father and mother respectively. The Applicants are in their forties ■. They are Americans by origin but are also Hong Kong permanent residents.

4. FH and MH have ■ natural children ■, born in [the 20■].

5. In about 2011, FH and MH started discussing the idea of having more children in the family. However, owing to miscarriage and the fact that ■ MH had undertaken ■ surgery, it was unlikely for her to have another pregnancy without risk to her health and the mental well-being of the baby. The couple therefore consulted a doctor in California.

6. In 20■, FH and MH underwent a viral fertilization treatment. However, it was discovered that MH had ■ which would prevent the implantation of embryos. The doctor advised FH and MH to pursue a surrogacy arrangement.

7. FH and MH were introduced to the Agency in California which, in turn, introduced them to WB and HB.

8. The Agency introduced WB and HB to FH and MH.

9. FH and MH sought legal advice from their USA attorney who assured them that the surrogacy arrangement would be compliant with California law.

10. ■ In 2015, the Applicants entered into a gestational carrier agreement (“**GC Agreement**”) with WB and HB whereby WB was to be the surrogate mother. Pursuant to the GC Agreement, the applicants made certain payments to WB. Two embryos were placed inside WB’s uterus.

11. ■ In 2016, WB gave birth to the Twins in California.

12. On the following day, the Applicants filed an application, through a law firm, in the Superior Court of the State of California to establish parent-child relationship with the Twins. ■ 8 days after birth of the Twins, the California Court declared the Applicants genetic and legal parents of the Twins; and declared WB and HB not to be legal parents of the Twins.

13. On the Twins’ Certificates of Live Birth issued in California, the Applicants are stated as their parents.

14. ■ About 2 months after birth, the Twins entered Hong Kong as visitors on the strength of their USA passports and were granted

dependent visas by the Director of Immigration (“**the Director**”). They have since lived here with the Applicants and ■ elder children as a family.

15. In late 2017, when the family left Hong Kong for holidays, FH realized that the Twins’ dependent visas had expired and had not been renewed before the expiry date owing to an oversight. Therefore, the Twins had to re-enter Hong Kong after the holidays on the strength of temporary visitor visas.

16. In mid-January 2018, FH caused an application to renew the Twins’ dependent visas to be submitted. On 20 March 2018, in the course of answering the requisitions of the Director through solicitors, FH disclosed to the Director that the Twins were born out of a surrogacy arrangement and his intention to bring the present application.

17. Without dependent visas or a parental order, the Twins cannot be enrolled into a kindergarten in Hong Kong.

B. THE APPLICATION FOR A PARENTAL ORDER AND THE ISSUES

18. Under s.9(1) PCO:

“The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be regarded as the mother of the child.”

19. Under s.10 PCO:

“(1) This applies in the case of a child who is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination.

(2) If –

(a) at the time of the placing in her of the embryo or the sperm and eggs or her insemination, the woman was a party to a marriage; and

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,

then, ... [inapplicable] the other party to the marriage shall be regarded as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).”

20. Thus, in accordance with Hong Kong law, WB and HB are the legal parents of the Twins.

21. On 16 May 2018, FH and MH took out the present originating summons (“OS”) for:

(1) a parental order pursuant to s.12 PCO; and

(2) a declaration that the payments made by the Applicants pursuant to the GC Agreement were expenses reasonably incurred or otherwise were expenses authorized or subsequently approved by the court pursuant to s.12(7) PCO.

22. The court may grant a parental order if the conditions stated in s.12 PCO are satisfied, ie:

“(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.

A		A
B	(2) The husband and the wife must apply for the order <u>within 6 months of the birth of the child</u> or, in the case of a child born before the commencement of this section, within 6 months of such commencement. (emphasis added)	B
C		C
D	(3) At the time of the application and of the making of the order—	D
E	(a) the child's home must be with the husband and the wife or either of them; and	E
F	(b) the husband or wife, or both of them, must—	F
G	(i) be domiciled in Hong Kong;	G
H	(ii) have been habitually resident in Hong Kong throughout the immediately preceding period of 1 year; or	H
I	(iii) have a substantial connection with Hong Kong.	I
J	(4) At the time of the making of the order both the husband and the wife must have attained the age of 18 years.	J
K	(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.	K
L	(6) [not applicable]	L
M	(7) The court must be satisfied that <u>no money or other benefit (other than for expenses reasonably incurred)</u> has been given or received by the husband or the wife for or in consideration of—	M
N	(a) the making of the order;	N
O	(b) any agreement required by subsection (5);	O
P	(c) the handing over of the child to the husband and the wife; or	P
Q	(d) the making of any arrangements with a view to the making of the order,	Q
R	<u>unless authorized or subsequently approved by the court.</u> (emphasis added)	R
S	(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.	S
T		T
U		U
V		V

(9) Where an order is made under subsection (1), the Registrar of the court shall notify the Registrar of Births and Deaths, in such manner as may be prescribed, of the making of that order.”

23. S.12 (1) has been satisfied. The gametes of the Applicants were used to bring about the creation of the embryos in question. The Official Solicitor accepts that the Twins are genetically related to the Applicants. This is also borne out by the DNA reports submitted by the Applicants to the Immigration Department.

24. S.12(3)(a) has been satisfied. The Twins have since birth always lived with the Applicants and their elder children ■ in Hong Kong.

25. S.12(3)(b) has been satisfied. The Applicants are domiciled in Hong Kong and have been habitually resident in Hong Kong for more than a decade ■. FH operates a company in Hong Kong. WH ■ does charitable work in Hong Kong.

26. S.12(4) has been satisfied as both Applicants are over the age of 18 years.

27. At a prior directions hearing, this court has directed that WB and HB be made parties to the OS because they are the only legal parents recognized under Hong Kong law. After being served with the OS, WB and HB have taken legal advice. They have given unconditional consent to the present application. So s.12(5) has been satisfied.

28. However, the Applicants cannot satisfy s12(2), being 21 months out of time. PCO gives no power to the court to extend time.

The application must fail on the face of legislation unless the court can apply what is known as the welfare principle and/or enforce the fundamental rights of the Twins or the Applicants.

29. There is also an issue under s.12(7) as to reasonableness of some of the expenses incurred in the surrogacy arrangement. In particular, some of those expenses might be in breach of ss. 17 and/or 39 of HRTO. Although the 6-month period for prosecution of the Applicants has expired, there is an issue as to whether or not ss. 17 and 39 HRTO should be read down in a way consistent with the Applicants' constitutional rights.

30. This application discloses the following issues:

- (1) Whether or not the courts in Hong Kong should treat the child's welfare as the first and paramount consideration when considering an application under s.12 PCO ("**the welfare issue**")?
- (2) Whether or not the court has jurisdiction to extend the 6-month time limit under s.12(2) PCO ("**the time extension issue**")?
- (3) Whether or not the payments made by the Applicants pursuant to the GC Agreement were "expenses reasonably incurred"; if not, whether or not the court should authorize or approve such payments ("**the expenses issue**")?
- (4) Whether or not sections 17 and/or 39 of HRTO should be interpreted in a way consistent with the Applicants' constitutional rights by way of "reading down" ("**the HRTO issue**").

31. The Official Solicitor has been appointed by the court to act on behalf of the children and to address the court on issues of law. The Official Solicitor supports the present application.

32. I start by analyzing the nature of a parental order before dealing with the issues. Whilst deliberating on this judgment, this court has had the advantage of the submission of Mr Hectar Pun SC, Ms Tara Liao and Ms Allison Wong in another surrogacy case (*Re A&B*, HCMP 1571/2018). Some of the materials in their submission are equally applicable here.

C. NATURE OF A PARENTAL ORDER AND WHAT IT ENTAILS

C1. Legal nature of a parental order

33. The long title provides that PCO is to, amongst others, “provide for the determination of parentage in cases where birth or pregnancy results from medical treatment services, to provide for the use of scientific tests in determining parentage in court proceedings, and for connected purposes”.

34. S.12(1) PCO defines a parental order as “an order providing for a child to be regarded in law as the child of the parties to a marriage”, ie the commissioning parents. Such an order does not just govern the welfare of a child up to the age of 18 or when he finishes full-time education. It has far-reaching, life-long, implications for the child, his/her surrogate mother or the commissioning parents. It has “transformative effect” on the legal relationship between the child and the commissioning parents: *A v P* [2012] Fam 188, §24, Theis J. It confers legal identity and

status on the child, and defines whose child he/she is and the family to which the child belongs. It is irreversible for the surrogate mother, the commissioning parents and the child. It has implications extending far beyond the merely legal.

35. As stated by Sir James Munby P (then President of the Family Division of the English High Court) in *Re X (A Child) (Parental Order: Time Limit)* [2015] Fam 186.

“54. Section 54 [the equivalent of s.12 PCO] goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about Xs identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J’s powerful expression, a transformative effect, not just in its effect on the child’s legal relationships with the surrogate and commissioning parents but also, to adopt the guardian’s words in the present case, in relation to the practical and psychological realities of X’s identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in *In re J (Adoption: Non-Patril)* [1998] 1 FLR 225, 229, referred to as “the psychological relationship of parent and child with all its far-reaching manifestations and consequences”. Moreover, these consequences are lifelong and, for all practical purposes, irreversible: see *G v G (Parental Order: Revocation)* [2013] 1 FLR 286, to which I have already referred. ...”

36. An adoption order or wardship order is no comparison to a parental order. A wardship order gives no status or identity to the child, often placing the child into the custody of an unrelated party, such as the court, until he reaches a certain age.

37. An adoption order does not recognize the genetic link between the child and the commissioning parents. Mr Pun SC refers to me to *In re G (Children) (Residence: Same-sex Partner)* [2006] 1 WLR 2305, §33, wherein Baroness Hale refers to “genetic parenthood” as the provision of the gametes which produce the child. This is of some importance:

“This can be of deep significance on many levels. For the parent, perhaps particularly for the father, the knowledge that this is ‘his’ child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child (see, for example, the psychiatric evidence in *Re C (MA) (an infant)* [1966] 1 WLR 646). For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may also be important (although certainly not an essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain.”

38. What entails from a parental order are (i) the establishment of legal parenthood and responsibility of the commissioning parents; (ii) removal of the surrogate mother and her husband’s rights and responsibility over the child; (iii) enhancement of the chance of the child acquiring immigration status; and (iv) conferment of inheritance rights on the child.

C2. Establishment of legal parenthood and responsibility of the commissioning parents

39. A parental order confers permanent legal parenthood and parental responsibility on the commissioning parents. In turn, the parental order provides lifelong security for the child’s relationship with them.

“A parental order will give permanency and security to the day to day arrangements that exist at the moment. Most importantly a parental order will confer joint and equal legal parenthood and

parental responsibility upon both applicants. This will provide lifelong security for the children’s relationship with the applicants, which is what the welfare of each child overwhelmingly demands.” Theis J in *Re W* [2013] EWHC 3570 at §30. See also *J v G (Parental Order)* [2014] 1 FLR 297, 27-29, Theis J.

(Ms Yip SC describes this in her skeleton submission as “social, psychological and emotional development”, but it has no difference in substance to what is discussed in Section C2.)

40. In *D, G v ED, DD A and B (by their children’s guardian)* [2016] 2 FLR 530 at §§56, 59, 61-63, Russell J explains it further:

“56. In many ways in practical terms either parental orders or adoption orders will resolve the children’s legal position by ensuring their rights to inheritance, pension entitlement, financial support in the event of their parents’ separation and all other basic entitlements which flow from them having a legal parent-child relationship with the Applicants. The orders are not the same, however. Nor are they intended to be as a matter of law and public policy.

...

59. ... Parental orders create a permanent parent-child relationship throughout the children’s lifetimes which reflect the reality of their particular situation about which they are both already aware. Thus parental orders are explicitly the most apposite orders to be made in keeping with the children’s welfare throughout their lives, and which confer important status and rights over and above parental responsibility.

...

61. However, in terms of their identity, only parental orders will fully recognise the children’s identity as the Applicants’ natural children, rather than giving them the wholly artificial and, in their case, inappropriate status of adopted children. I keep in mind European jurisprudence, as set out above, in respect of their family life and their identity. As the President said in *Re X* ... at [54]:

‘Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the

child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family.’

62. It is undeniably a basic and fundamental part of these children’s identity as human beings that the applicant/father is their biological father, and that the applicant/mother played a full part in the process of their conception having selected an egg donor, as she has herself explained to them and as they have grown up believing. The applicants were their planned and intended parents from before conception and since the day on which they were born. All of these facts, fundamental to these children’s very existence and identity are far from those present in adoption. ...

63. To make adoption orders would effectively deny adequate recognition of the Applicants’ and children’s identity and their right to family life under Article 8 ECHR, particularly their established identity, their biological and social ties. There is no doubt in this case that as far as these children are concerned their identity has already been formed as the biological children of their father and the commissioning of their conception and birth involving their mother.”

41. In *A v P* [2012] Fam 188, §26, Theis J so describes the consequences of not making the order:

“26. The consequences of not making an order in this case are: (1) There is no legal relationship between the child and his biological father who is also the commissioning father. (2) The child is denied the social and emotional benefits of recognition of that relationship. (3) The child may be financially disadvantaged if he is not recognised legally as the child of his father (in terms of inheritance). (4) The child does not have a legal reality which matches the day to day reality. (5) The child is further disadvantaged by the death of his biological father.”

C3. Removal of surrogate mother and her husband’s rights and responsibilities over the child

42. It would be in the interest of a child for parental rights between the surrogate mother and the commissioning parents to be determined once and for all.

43. *Re AB (Surrogacy: Consent)* [2017] 2 FLR 217 illustrates the difficulties if the rights and responsibilities of the surrogate mother and her husband were not removed. In that case, the surrogate and her husband refused to give their consent to the grant of a parental order because the surrogate mother felt that the applicants were not sufficiently concerned about her well-being during her pregnancy. Theis J described this as arising out of their own feelings of injustice, rather than what was in the children's best interests and the breakdown of the relationship between the 2 couples (§§8&19). Absent consent from the surrogate mother Theis J had to adjourn the application with liberty to restore. The consequences were that the children were left in a "legal limbo":

(a) They remain living with applicants, their biological and psychological parents but not legal parents. The child arrangements order, which gives the applicants parental responsibility, lasts until they are 18 years old.

(b) The respondents, who wished to play no part in the children's lives, remained the children's legal parents throughout their lives by virtue of summonses 33 and 35 of the HFEA 2008.

C4. Enhancement of the chance of the child acquiring immigration status

44. It is not in the best interests of a child that he be granted only a visitor's or dependent's visa while the commissioning parents have right of abode in Hong Kong. A parental order has the effect of strengthening the chance of the child becoming a Hong Kong permanent resident.

45. In *UKM v AG* [2018] SGHCF 18, the child was born out of a surrogacy arrangement in the USA and hence a USA citizen. The Immigration

and Checkpoints Authority of Singapore issued him with a “dependent’s pass” which allowed him to remain in Singapore until the conclusion of the proceedings. It was unclear whether he could have remained in Singapore thereafter and the Singapore Court found it undesirable.

46. It was held that it was in the child’s best interests that an adoption order (as Singapore did not have the equivalent of a parental order) be granted. It would render the appellant the parent of the Child, thereby enhancing the Child’s chance of becoming a citizen or permanent resident of Singapore and enable his carers to plan the care arrangements on the basis that the child would stay in Singapore in the long term. Sundaresh Menon CJ held as follows:

“65. ... we accept that an adoption order would enhance the Child’s prospects of remaining in Singapore. In our judgment, this would significantly promote the Child’s welfare. If the anticipated application for the Child to become a citizen or permanent resident of Singapore were to be successful, it would undoubtedly stabilise the Child’s care arrangements by enabling his caregivers to plan on the basis that they will remain together in Singapore in the long term. This would give the Child a sense of security, which is vital to his well-being and development. Although the Child is presently too young to comprehend fully the benefits of being able to remain in Singapore indefinitely, it is the relief experienced by his caregivers which would very likely feed into his own sense of security. (emphasis added)

...

67. ... That prospect [of strengthening the prospects of regularising his citizenship or residency status in Singapore] would give the Child’s caregivers a peace of mind, which would in turn contribute to the Child’s sense of security and overall emotional well-being. In arriving at this view, we are aware that the Child’s somewhat precarious immigration status in Singapore is in large part the result of the appellant’s own actions. It was the appellant who went overseas and procured a child out of wedlock through the reproductive services of a foreigner, and thereby created this situation in which, under Singapore law, the Child is treated as illegitimate and a non-citizen. However, none of this conceptually affects the point that the Child’s well-being would be improved should the appellant be allowed to adopt him, and that is the only relevant point at this stage of the inquiry.”

C5. Conferment of inheritance rights on the child

47. A parental order confers inheritance rights to the parents' estate on the child. I repeat what Theis J said in *A v P*, cited in paragraph 41 above.

48. It is apparent from all these authorities in Section C that the theme running through them is the welfare (or the best interests) of the subject child when considering an application for a parental order. Is the welfare principle part of the consideration under s.12 PCO?

D. THE WELFARE ISSUE

49. The word "welfare" must be taken in its widest sense. It has been said that the welfare of the child is not to be measured by money only or by physical comfort only; moral and religious welfare of the child must be considered as well as his physical well-being; nor can the ties of affection be disregarded. "Welfare" and "best interests" are synonymous. See *Rayden and Jackson on Divorce and Family Matters*, 18th ed, Chapter 36.14, 36/11.

50. In Hong Kong, the welfare principle is not found in PCO. This is probably because the PCO covers various types of applications, including one by an adult seeking a declaration as to his legitimacy.

51. S.12 PCO, however, specifically deals with an application where the subject is a child. For 3 reasons, I am of the view that the welfare principle does apply to interpretation of that section:

- (1) S.3(1) of the Guardianship of Minors Ordinance, Cap 13 (“GMO”) requires the court to take into account the welfare principle;
- (2) Article 3 of the Convention on the Rights of the Child (“CRC”) requires the best interests of the child to be taken into account in all actions concerning children; and
- (3) S.12 PCO is drafted in materially similar terms as the UK counterpart and the authorities in the UK do regard welfare of a child as the paramount consideration.

D1. Section 3(1) of GMO

52. Under s.3(1) of GMO,

“In relation to the custody or upbringing of a minor, ... -

- (a) in any proceedings before any court (whether or not a court as defined in section 2) the court [defined to mean “the Court of First Instance or the District Court” in s.2 GMP]—
- (i) shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to— [the views of the minor and any material information including any report of the Director of Social Welfare available to the court at the hearing; ... ” (emphasis added)

53. Use of the word “shall” in s.3(1) GMO obliges the court to consider “the best interests” of a child as its paramount consideration.

54. The question of a child’s identity and legal relationship with the commissioning parents is a more fundamental one that comes before any issue of custody and upbringing. This is no reason why that question

should not be determined with regard to the same first and paramount consideration.

D2. Article 3 of the CRC

55. Article 3 of the CRC provides that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

56. An application for a parental order is plainly an action concerning children. The Hong Kong courts must give effect to this Article.

D3. UK counterpart of s.12 PCO

57. When the Hong Kong statutory provisions are almost identical to the English counterpart, and when there is no discernable difference in the social and economic context of these two places, the English approach to the interpretation of the relevant provisions should be followed in Hong Kong: *DD v LKW* [2008] 2 HKLRD 523, at §§65, 94.

58. Historically, applications for parental orders in UK were governed by s.54 of the Human Fertilisation and Embryology Act 2008 (“**HFEA 2008**”), the equivalent of s.12 PCO. The UK courts were then not required by statute to treat a child’s welfare as a paramount consideration in those applications but only in an adoption application by reason of s.1 of the Adoption and Children Act 2002 (“**ACA 2002**”). But UK courts did not refrain from considering the welfare of a child in applications for parental orders.

59. Following the introduction of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (“**HFER 2010**”), HFEA 2008 underwent significant changes, including:

- (1) The inclusion in s.54 HFEA 2008, as amended by Schedule 1 to HFER 2010, a list of factors commonly known as “the welfare checklist” found in ACA 2002; and
- (2) That welfare was no longer merely the court’s first consideration but becomes its paramount consideration: *Re L (A Child) (Parental Order: Foreign Surrogacy) [2011] Fam 106* at §9, Hedley J.

60. As s.12 PCO and s.54 of HFEA 2008 have almost identical wording, and there is no discernable difference in the social and economic context between UK and Hong Kong, the UK approach should be followed in Hong Kong. Accordingly, the welfare principle applies to applications for parental orders.

61. When considering the best interests of a child under s.3(1) GMO, judges have consistently adopted, with minor modifications to suit the local circumstances, the welfare checklist:

- “(a) the ascertainable wishes and feeling of the child concerned (considered in the light of his age and understanding)
- (b) his physical, emotional and educational needs
- (c) the likely effect on him of any change in his circumstances
- (d) his age, sex, background and any characteristics of his which the court considers relevant
- (e) any harm he has suffered or is at risk of suffering

- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs
- (g) the range of powers available to the court under the 1989 Act in the proceedings in question.”

62. Although the welfare checklist has not yet been incorporated into Hong Kong’s legislation, it has acted as an aide-memoir to assist judges in making a holistic assessment to reach a result that is in the best interests of a child. The welfare checklist is, however, subject to three caveats laid down by Poon J (as he then was) in *H v N* [2012] 5 HKLRD 498 (endorsed by the Court of Appeal in *ZJ v XWN* [2018] 3 HKLRD 644, §25, Lam VP):

“29. First, absent any statutory underpinning in the GMO, our courts are under no duty to have regard to “the welfare checklist”. In other words, it is not compulsory to do so. Whether a judge may wish to make use of it and if so how is entirely a matter for him. For example, he may cherry-pick, as it were, only those factors on the checklist which are relevant to the case before him. As long as the judge’s decision, supported by reasons, is demonstrably in the best interests of the minor, he cannot be criticized for not expressly applying the checklist or not going through all the factors one by one.

30. Second, when applying the checklist, judges are not subject to the laborious necessity of expressly relating their findings in every case to its specific provisions one by one. Otherwise the task will become too onerous unnecessarily.

31. Third, “the welfare checklist” is an aide-memoire designed to ensure that none of the factors potentially relevant for a court considering a child’s welfare generally in the circumstances of each particular case is left out of account. It is not meant to be exhaustive. Judges are entitled to and indeed should have regard to all other relevant factors even if they are not on the list.”

E. THE TIME EXTENSION ISSUE

E1. Lack of statutory power to extend time

63. PCO gives no power to the court to extend time for application to the court. Is it the intention of the Legislature that once an application is made out of time, regardless of the reason, the commissioning parents would be barred from making an application forever?

64. To answer this issue, one needs to (i) resort to principles of statutory interpretation; (ii) consider the need to protect fundamental rights; and (iii) consider whether there is any need to read down the legislation. I shall deal with these in turn.

E2. Principles of statutory interpretation

65. When there is a failure to comply with a time provision, the court does not ask if the requirement as to time is “mandatory” or “directory” but asks if the legislature intended the person making the determination to comply with the time provision; and if so, whether the legislature intended that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make to be total invalidity. See *Nina Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286, 1296D-E, in which the Privy Council followed and applied the dictum of Lord Hailsham in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 190.

66. In *SJ v Chau Wan Ying & ors* [2016] 5 HKC 303, 310G-311B, Chow J gave a recent statement of the law. In that case, the applicant failed

to set down the originating summons for a committal order for hearing within 14 days after leave was granted pursuant to Order 52 rule 3(2) of the Rules of High Court, Cap 4A. Chow J stated:

“22. The conventional approach when there has been non-compliance with a time or other procedural requirement laid down by a statute for the commencement or prosecution of proceedings is to seek to ascertain whether the requirement which was not complied with should be categorized as ‘directory’ or ‘mandatory’. Generally, the statute would not state whether the requirement is directory or mandatory. There would be no difficulty if the statute expressly stipulates the consequence of the non-compliance. On the other hand, if the statute does not do so, the distinction between directory and mandatory requirements would not assist in answering the question of what should be the consequence of the non-compliance.

23. The modern approach for determining the consequence of non-compliance with a time or other procedural requirement laid down by a statute is to treat the matter as one of statutory construction, and the court’s task is to ascertain what the legislature intends to be the consequence of the non-compliance, having regard to the language of the statute, the legislative purpose of the requirement in question and the relevant factual context in which the non-compliance occurred.” (emphasis added)

67. The primary principles of statutory interpretation have been summarized in *Town Planning Board v Town Planning Appeal Board* (2017) 20 HKCFAR 196, at §29, Ma CJ:

(1) In construing statutory provisions, the court does not merely look at the relevant words in isolation but construes them having regard to their context and purpose;

(2) The context of the relevant statutory provision should be taken in its widest sense and will of course include the other provisions of the statute. It may also be relevant in any given case to look at the history of the relevant provisions;

(3) Ascertaining the purpose of the statutory provision is obviously relevant, not only to help provide the relevant context, but to give meaning to the words used. In this latter respect, it is to be observed that often the meaning of words by themselves will not be clear unless regard is paid to context and purpose. Words have to be construed but they must not be construed in a vacuum; and

(4) In ascertaining the purpose of a statutory provision, the court adopts a flexible and open-minded approach. The purpose may be clear from the provision itself or it may be necessary to look at the Explanatory Memorandum to the bill introducing the provision or a ministerial or official statement may be utilized for this purpose.

E2.1 Ascertaining the context and purpose of the 6-month time limit

68. The court can make reference to legislative materials to ascertain the purpose of the legislation or the mischief which the legislation was intended to remedy if 3 conditions are satisfied:

- (1) The legislation was ambiguous or obscure or led to absurdity;
- (2) The material relied upon consisted of one or more statements by a Minister or other promoter of the Bill together, if necessary, with such other Parliamentary material as was necessary to understand such statements and their effect; and
- (3) The statements relied upon were clear.

See *Pepper v Hart* [1993] AC 593, 634D-E, referred to in *PCCW-HKT Telephone Ltd v Telecommunication Authority* (2005) 8 HKCFAR 337 at 354, §§21 & 28, Bohkary PJ. The Court of Final Appeal left open the question as to whether the 3 tests could be framed in more modest terms.

69. The 6-month time limit in s12(2) PCO was not ambiguous but strict adherence to it can lead to the absurdity. For example, if an application out of time is dismissed, the absurd result would be that a child could have 2 sets of legal parents, one set in Hong Kong and the other in the state where the child was born: *Re AB (Surrogacy Consent)*. The child will have no identity as the commissioning parents' child in Hong Kong although they have been taking care of him/her. At the same time, the surrogate mother may have given up or (as in the present case) never had parental rights on the child in the jurisdiction where she has given birth. So if the Director does not grant the child resident status here, should the child be "deported to" to the place where the surrogate mother is and where the child is not wanted?

70. Given the significance of a parental order, the Legislature could not have intended such consequences on the child who has not chosen the manner through which he came to this world. It would be absurd to suggest that an application made even one day out of time should deprive the child of his/her legal relationship, status and identity to the commissioning parents for life. Such a consequence would be totally disproportionate to the one-day delay and plainly against the welfare principle.

71. Given such absurdity, this court made reference to the legislative materials to ascertain the purpose of the 6-month time limit. Unfortunately, the *Hong Kong Hansard* gave no clue as to why a time limit was specified and why it had to be 6 months.

72. However, the *Official Record of Proceedings of the Legislative Council* dated 24 June 1992 recorded the then Attorney General, in moving the second reading of the Parent and Child Bill, as having said the following as regards ss.9-12 PCO:

“Mr Deputy President, clauses 9 to 12 of the Bill refer to surrogacy and births brought about through artificial insemination or other scientific means. I am conscious that this is an area which raises sensitive and important questions of ethics and morality. I must stress, however, that this Bill is not concerned with whether or not surrogacy and scientifically assisted birth is desirable, nor with considering the controls, if any, which should be applied. This Bill deals only with making provision to identify the legal parents where such births take place, and to provide a legal mechanism for parties to a surrogacy to apply to the court for an order as to the child’s parentage which reflects the reality of the surrogacy arrangement. The extent to which such arrangements should be allowed, or how they should be regulated, are questions which fall outside the ambit of this Bill and are currently under consideration by the Secretary for Health and Welfare as a separate exercise.”
(underline added)

73. Mr Pun SC referred me to *The Legislative Council Brief on Parent and Child Bill dated 3 June 1992*, §§13-14 which explained that s.12 PCO introduced a new order which was:

“specifically designed for the circumstances of surrogacy (which adoption is not) and can proceed swiftly, in the best interests of the child and the other parties to the surrogacy.

... the present Bill is not concerned with the regulation of surrogacy, only its effects on legitimacy...”

74. The statements from the Attorney General was clear. Read with the long title, it was clear that purpose of s.12 PCO was to confer identity and status on the commissioning parents and the child born out of surrogacy. The purpose was not to pass moral judgment on births through surrogacy, or to impose birth control, or to punish people who were involved in surrogacy arrangements.

75. Parentage is a matter for life. The Legislature, with the best of intention, may have wanted a child's identity and status to be determined "swiftly" after birth. However, it could not have intended to bar an application to the court forever after the first 6 months of a child's birth.

E2.2 The UK position on time limit

76. The current UK position is that the time limit would not bar an application except in a serious case of abuse of public policy. Tracing of the legislative history from HFEA 2008 to HFER 2010 is useful to interpretation of s.12(2) PCO which was based on s.54(3) HFEA 2008.

77. At the time of HFEA 2008, welfare was only the first but not the paramount consideration. Similar to the Legislature in Hong Kong, the UK Parliament had not explained why there was a 6-month time limit.

78. It was once stated, *obiter*, that the court had no power to extend time although no specific reason could be ascertained for that: *In re X and another (Children) (Parental Order: Foreign Surrogacy)* [2009] 2 WLR 1274, §12, Hedley J.

79. In *JP v LP (Surrogacy Arrangement: Wardship)* [2015] 1 All ER 266, Eleanor King J described the rationale as follows:

“29. ... There is no provision within the Act to provide for a discretionary extension to the statutory time limit and no one sought to argue that the court could or should, whether by means of the use of its inherent jurisdiction or otherwise, seek to circumnavigate the mandatory provisions of the statute.”

30. It was recognized by the parties that the policy and purpose of parental orders is to provide for the speedy consensual regularization of the legal parental status of a child’s carers following a birth resulting from a surrogacy arrangement. Such a policy does not fit comfortably with extensions of time which inevitably result in the continued involvement over a protracted period of the surrogate mother in the lives of the commissioning couple and their child.”

80. *JP v LP* was decided without legal debate of the issue of time limit between the parties. That case had its own complications. The application for parental order was dismissed because the applicants did not attend the directions hearing. They then obtained a divorce absolute before restoration of the application for a parental order. The court had to make a wardship order, with parental responsibility delegated to the applicants and prohibition on the surrogate from exercising her parental responsibility.)

81. The current position in the UK is that the time can be extended as a result of the seminal decision in *Re X (A Child)*, Sir James Munby P. The learned President held that to construe the time limit as barring forever an application made beyond 6 months could not have been intended by Parliament as it would be too draconian. He did not agree with the rationale in *JP v LP* (§55 of *Re X*). He read down the statute and granted an application for a parental order made 26 months after the child was born. His reasoning was as follows:

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“52. The starting point is clear and remains essentially unchanged from that identified by Lord Penzance in *Howard v Bodington* 2 PD 203 and most recently restated by Sir Stanley Burnton in *Newbold v. Coal Authority* [2014] 1 WLR 1288. I must consider section 54(3) having regard to and in the light of the statutory subject matter, the background, the purpose of the requirement (if known), its importance, its relation to the general object intended to be secured by the Act, and the actual or possible impact of non-compliance on the parties. The question, as posed by Lord Steyn in *R v Soneji* [2006] 1 AC 340, is: can Parliament fairly be taken to have intended total invalidity? As Toulson LJ put it in *Dharmaraj v Hounslow London Borough Council* [2011] PTSR 1523, is any departure from the precise letter of the statute, however minor, to be fatal? And the assumption, as Sir Stanley observed, must surely be that Parliament intended a “sensible” result.

53. In addressing these questions, I start with Theis J’s powerful analysis in the three cases I have already referred to in paras 24-26 above and, in particular, with what she said in *A v P* [2012] Fam 188, paras 24-26. Since I respectfully agree with every word of it, I can be brief.

54. Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about Xs identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J’s powerful expression, a transformative effect, not just in its effect on the child’s legal relationships with the surrogate and commissioning parents but also, to adopt the guardian’s words in the present case, in relation to the practical and psychological realities of X’s identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in *In re J (Adoption: Non-Patril)* [1998] 1 FLR 225, 229, referred to as “the psychological relationship of parent and child with all its far-reaching manifestations and consequences”. Moreover, these consequences are lifelong and, for all practical purposes, irreversible: see *G v G (Parental Order: Revocation)* [2013] 1 FLR 286, to which I have already referred. And the court considering an application for a parental order is required to treat the child’s welfare throughout his life as paramount: see *In re L (A Child) (Parental Order: Foreign Surrogacy)* [2011]

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Fam 106. X was born in December 2011, so his expectation of life must extend well beyond the next 75 years. Parliament has therefore required the judge considering an application for a parental order to look into a distant future.

55. Where in the light of all this does the six-month period specified in section 54(3) stand? Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so. Parliament has not explained its thinking, but given the transcendental importance of a parental order, with its consequences stretching many, many decades into the future, can it sensibly be thought that Parliament intended the difference between six months and six months and one day to be determinative and one day's delay to be fatal? I assume that Parliament intended a sensible result. 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. It is, after all, easy to imagine far from fanciful circumstances in which the application arrives too late: the solicitor misunderstands section 54(3) and excludes the day on which the child was born from his calculation of when time runs out; the solicitor's legal executive is delayed by a broken down train or a traffic jam and arrives at the court office just after it has closed; on the way to their solicitor's office to give instructions the commissioning parents are involved in a car crash that leaves them both in a coma from which they recover only after the six-month period has elapsed. Why should they be barred? Even more to the point, why should the wholly innocent child be barred by such mishap? Let it be assumed, though in truth, and with all respect to her, this is little more than speculation, that the underlying policy is that identified by Eleanor King J in *JP v LP (Surrogacy Arrangement: Wardship)* [2015] 1 All ER 266, namely to provide for the speedy consensual regularisation of the legal parental status of a child's carers following a birth resulting from a surrogacy arrangement; that policy surely does not require section 54(3) to be read as meaning that any delay, however trivial, is to be fatal. One can see why Eleanor King J was concerned that there should not be what she referred to as delay over "a protracted period", but that is a different point.

56. I have considered whether the result at which I have arrived is somehow precluded by the linguistic structure of section 54, which provides that "the court may make an order ... if ... the [relevant] conditions are satisfied". I do not think so. Slavish submission to such a narrow and pedantic reading would

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simply not give effect to any result that Parliament can sensibly be taken to have intended.

57. I conclude, therefore, that section 54(3) does not have the effect of preventing the court making an order merely because the application is made after the expiration of the six-month period. That is a conclusion which I come to, without reference to the Convention and on a straightforward application of the principle in *Howard v Bodington* 2 PD 203.” (emphasis added)

82. As a side note, the principles in *Howard v Bodington* have been overtaken, in Hong Kong, by the principles of statutory interpretation in Section E2 above. However, that does not in any way undermine the reasoning and correctness of the decision of Munby P.

83. However, Sir James Munby P was careful to say that he intended to lay down no principle beyond that which appeared from the authorities. He limited his decision to the facts of that case where no one would suffer prejudice if the application was allowed to proceed, whereas the commissioning parents and the child stand to suffer immense and irremediable prejudice if the application was halted in its tracks.

84. In general, the court would balance between the welfare of a child (as a paramount consideration) and the public policy of adhering to legislation and decisively determine in favour of welfare. It would only withhold an order only in the clearest case of abuse of public policy. See *Re D and G v ED and DD* [2015] EWHC 911 (Fam), Russell J:

“46. I am, as I must be, mindful of public policy issues. The importance of adhering to the legislation is the general rule and not one to be easily set aside and the need not to discourage commissioning parents through surrogacy from making applications for parental orders promptly. I must, as a matter of law and as set out above, weigh public policy concerns against the welfare of these particular children. I remind myself again that s 1 of the ACA 2002 applies to parental order applications

by virtue of the Human Fertilisation and of the Embryology (Parental Orders) Regulations 2010 (regulation 2 and Schedule 1) which provide “The paramount consideration of the court must be the child's welfare, throughout his life”.

47. That balance of public policy and welfare, as discussed above with reference to the court's discretion to authorise payments under s 54 (8), and considered in *Re L* [2010] EWHC 3030 (Fam) forms part of the legal context of this decision. In *Re L* [2010] as Hedley J said at paragraph 10 the effect of the application of s1 of ACA 2002 must be to weigh the balance between public policy considerations and welfare decisively in favour of welfare and that it must follow that only 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. I can see no reason in law, particularly as there is no prejudice to any other party, why I should not assume a similar approach in respect of any discretion under s 54 (3) and apply the paramountcy of the welfare principle — unless the case is one of the clearest abuse of public policy. (emphasis added)

85. In *Re D and G v ED and DD*, the 2 children were aged 8 and 5 respectively. The application was initially made for adoption orders. After the case of *Re X, per Munby J*, the application was changed to one for parental orders. The reasons were that the applicants did not know that their parentage under California State law was not recognized in the UK and that they needed to apply for a parental order. They were in ignorance of the considerable difficulties that the children would face in later lives if they were not in law the applicants’ children (§§45 and 49). The applicants had in fact sought legal advice in California and comprehensively complied with all US legal procedures to enable them to be recorded as parents on the birth certificates of the children. It did not occur to them that they should seek advice in the UK. It was not until the applicants discovered when reading a news article about international surrogacy that they became aware that the applicants’ status as legal parents might be in doubt in UK. They sought legal advice in UK and made an application for adoption of their children as the best available legal solution known to them (§§51-52).

86. Russell J considered the applicants to have acted in good faith, at all times, setting out to protect their children's best interests and took prompt steps to rectify the children's UK citizenship. He found them to be responsible people who cared deeply about complying fully with the law in all respects (§53). He granted the application.

87. There are other examples of cases in which the UK courts have granted applications for parental orders out of time: eg

(a) *A, B v X, Y, C, D* [2015] Fam Law 1192, 17 months out of time;

(b) *KB, RJ v RT* [2016] EWHC 760 (Fam), §§28-38, 20 months out of time.

(c) *A & Anor v C & Anor* [2017] 2 FLR 101, §§2-10, the applications were made 13 years and 12 years respectively since birth.

88. In summary, having regard to the child's welfare as the first and paramount consideration, the principles of statutory interpretation and authorities in the UK, I hold that the court does have power to extend time for making an application for a parental order. Though public policy requires adherence to legislation, welfare of a child prevails over his/her parents' delay. A parental order will be granted except in the clearest case of abuse of public policy.

E3. Protection of fundamental rights

89. If the above is not sufficient, the Twins have fundamental (1) rights to protection of family and privacy; (2) rights in respect of family;

(3) rights as children to protection against discrimination; and (4) rights of access to court. The court's responsibility is to guarantee not rights that are theoretical and illusory but rights that are practical and effective: *A v P* [2012] Fam 188, §54, Theis J. Guaranteeing such rights require the court to read down section 12(2) PCO.

E3.1 Article 14 HKBOR – protection of privacy and family

90. Article 14 of the Hong Kong Bill of Rights Ordinance, Cap 383 (“**HKBOR**”) entitled “protection of privacy, family, home, correspondence, honour and reputation” provides that:

“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home ...”

(2) Everyone has the right to the protection of the law against such interference or attacks.”

91. Article 14 is similar in substance to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“**ECHR8**”) which is in these terms:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

92. In *A v P*, Theis J held that the effect of not making a parental order will be an interference with family life under ECHR8 in that the factual relationship will not be recognized by law.

93. In *D & G v ED & DD*, Russell J held that the right to respect for family life included the right to adequate legal recognition of biological and social family ties. Article 8 also encompassed the right to an identity (§§39-40). If members of a family are prevented from sharing family life together, Article 8(1) is probably infringed (§41).

94. Similarly, to err on the side of caution, Sir James Munby P in *Re X (A Child)* (§61) relied on ECHR8 (apart from the welfare considerations) to read down the 6-month time limit.

E3.2 Article 19(1) HKBOR – rights in respect of family

95. Article 19 of HKBOR entitled “rights in respect of marriage and family” provides that:

“(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. ...”

96. Mr Hectar Pun SC’s submission in respect of Article 19 of HKBOR is equally applicable here.

- (1) The term “family” should be interpreted broadly. It does not refer solely to the family home during marriage or cohabitation but also to the relations in general between parents and a child. Some minimal requirements for the existence of a family are necessary, such as life together, economic ties and a regular and intense relationship: *The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary*, 2nd ed, §20.10.

(2) The existence of family life is a question of fact depending on the existence in practice of close personal ties: *Singh v Entry Clearance Officer* [2005] QB 608, §20 (CA), in the context of ECHR8; *D & G v ED & DD*, §41.

(3) Family life existed between two parents and their children even though the parents had never married, did not cohabit and lived in separate houses: *Re X (A Child)*, at §68, where Munby P considered the equivalent of Article 19 in the context of infants born out of a surrogacy arrangement.

(4) The government has positive duties to adopt legislative, administrative or other measures to protect the family: *The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary*, 2nd ed, §20.56; *CCPR General Comment No. 19 Issued by the Office of the High Commissioner for Human Rights*, §3.

(5) In the context of ECHR8, respect to family life includes a positive obligation which requires the government to ensure that de facto relationships are recognized and protected by law: *A v P (Surrogacy: Parental order: Death of Applicant)* [2012] Fam 188, §22(3), Theis J.

97. Once the existence of family life is established as a matter of fact, the court must protect that life. Refusing to grant a parental order merely because the application was made out of time is an unlawful interference with the family life of not only the child but also the commissioning parents. To have such fundamental rights extinguished 6 months after a child was born out of surrogacy is absurd.

E3.3 Article 20 HKBOR - children's rights

98. HKBOR Article 20 entitled “rights of children” provides that:

“Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. ...” (underline added)

99. As submitted by Mr Hectar Pun SC, a child’s rights are more than mere enforcement of other civil rights in the ICCPR. The law must reflect the special status of a child and afford special protection to the child: *The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary*, §21.09.

100. A child born out of surrogacy is as much entitled to his identity and status in a family as a child born naturally. Leaving him without the legal identity and status contemplated by PCO because the commissioning parents did not apply within time is to discriminate the child as to birth.

E3.4 Article 35 of the Basic Law – right of access to courts

101. Article 35 of the Basic Law guarantees that Hong Kong residents shall have the right of access to the courts and to judicial remedies.

102. A child needs to rely on his/her parents to apply to the courts to regularize his/her identity and status. It would not do justice to the child, who had no say in the manner of his/her birth, to bar his/her access to courts, for a parental order, forever, because of his/her parents’ delay.

E4. Interference with fundamental rights and the proportionality test

103. The court is bound to give constitutional rights a generous interpretation so as to give individuals its full measure. Restrictions on such a fundamental right must be narrowly interpreted. The burden is on the Government to justify any restriction. In a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them. See *Leung Kwok Hung v. HKSAR* (2005) 8 HKCFAR 229, §16.

104. Where legislation restricts or limits constitutional rights, such restriction or limitation can only be lawful if it satisfies the proportionality tests laid down in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372:

- (1) The restriction or limitation serves a legitimate aim;
- (2) It is rationally connected to the legitimate aim;
- (3) It is no more than is necessary to accomplish that legitimate aim; and
- (4) It strikes a reasonable balance between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual.

105. Application for a parental order is not ordinary contentious civil litigation where the court needs to achieve finality in litigation by imposing time constraints for making a claim or appealing. It is an application involving lifelong welfare of a child.

106. The 6-month time limit has no legitimate aim apart from encouraging swift applications to the court to regularize the child's identity and status. The 6-month period is an arbitrary time frame which gives no room for exercise of judicial discretion that takes account of individual circumstances. To forbid making an application 6 months after birth of the child could damage his/her fundamental rights in an irreparable way. The 6-month time limit fails the 1st and 2nd tests.

107. There are no other orders comparable to a parental order. The 6-month time limit is disproportionate to the purpose to be achieved under PCO and the constitutional rights to be enforced that can affect the child for life. The time limit fails the 3rd test.

108. The society does not benefit from the grant of a parental order; the child does. To deny the child an order is unacceptably harsh. The balance is plainly in favour of the child. The time limit fails the 4th test.

E5. Reading down s.12(2) PCO

109. Given the fundamental rights involved and lack of justification for restricting or limiting them, the court has power to read down the 6-month time limit in such a way as to ensure that the "essence" of the protected right is not impaired: see *Re X (A Child)*, Sir James Munby P, §§58-61.

F. THE EXPENSES ISSUE

F1. Legal principles

110. S.12(7) involves 2 questions:

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(1) Whether the expenses were reasonably incurred?

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

111. S.12(7) is similar to s.54(8) of HFEA 2008 save that s.54(8) does not contain the phrase “or subsequently approved by the court”.

112. Whether the expenses were reasonably incurred is a pure question of fact: *Re X and another (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam) at §19, Hedley J (a pre-HFER 2010 judgment).

113. The court should not just look at the payments that were made to the surrogate mother but at the wider picture and the circumstances in which payments were made, eg to agencies: *Re P-M* [2013] EWHC 2328 (Fam), §19, Theis J.

114. If the court finds the expenses to be reasonably incurred, it is not necessary to make a declaration to that effect.

115. As for non-reasonable expenses, the policy reason behind the need for retrospective authorization was explained by Hedley J in *Re S* [2009] EWHC 2977 (Fam), at §7:

“(1) To ensuring that commercial surrogacy agreements are not used to circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country.

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(2) The court should be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas. That has been ruled out in this country and the court should not be party to any arrangements which effectively allow that.

(3) The court should be astute to ensure that sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate.

The last consideration, of course, is not one which is applicable to a case involving the United Kingdom and the State of California. It may, and does, arise in other contexts. The first two considerations, however, do.”

116. In deciding whether non-reasonable expenses should be authorized or approved, the court should ask 3 questions (“**the non-reasonable expenses test**”) : *Re X and another (Children)*, §21, Hedley J:

- (1) Was the sum paid disproportionate to reasonable expenses?
- (2) Were the applicants acting in good faith and without “moral taint” in their dealings with the surrogate mother?
- (3) Were the applicants party to any attempt to defraud the authorities?

117. What was reasonable under question (1) could vary depending on the place where the surrogacy arrangement took place. Hedley J explained in *Re X and another (Children)*:

“22. The first question is more difficult and its answer may vary considerably depending upon where the arrangement was made. The whole basis of assessment will be quite different in say urban California to rural India. In this case the evidence that I have (and am prepared to accept) is that living costs in the relevant part of Ukraine (a big city) bear comparison with those in this country, though it might be quite different in rural Ukraine. On the evidence that I have, I am prepared to conclude that the sums paid were not so disproportionate to “expenses reasonably

incurred” that the granting of an order would be an unacceptable affront to public policy.”

118. In *Revisiting the Regulation of Human Fertilization and Embryology* (Routledge, 2015) at p 211:

“The role of the courts thus far is also rendered morally difficult as international concepts of ‘reasonable expenses’ and of ‘profit’ fluctuate widely. In Australia the average cost of altruistic surrogacy has been estimated at \$45,000. The average cost of surrogacy in India (including travel) is \$77,000, while an arrangement in the US costs on average about \$176,000 (Walsh Halligan Douglas, 2012)...” (emphasis added)

119. The currency of the above paragraph was expressed in Australia dollars. At the exchange rate of US\$1 = AUD1.0086 in 2012, it meant approximately US\$174,500.

120. In coming to a conclusion to these questions, 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, there might sometimes be reasons to approve payments in light of the welfare of the child under consideration: *Re X and another (Children) (Parental Order: Foreign Surrogacy)*, Hedley J, at §20. This was a pre-HFER 2010 judgment when a child’s welfare was a first consideration but not a paramount consideration.

121. 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: *J v G (Parental Orders)* [2014] 1 FLR 297, §20; *Re P-M* [2013] EWHC 2328, §19, Theis J; or of such a level as to raise the concern of the court: *LB, DB v. SP, SP, B* [2016]

EWFC 77 (Fam) §45. The fact that the agency has made a profit where the surrogate has acted in an altruistic basis is a factor to take into account. *Re P-M*, §19, Theis J.

122. Accordingly, in some cases, even if a significant portion of the expenses went beyond what was reasonable, the courts still granted parental orders in accordance with the principles in the preceding paragraph.

(1) In *Re P-M*, the profit to the agency was found to be about US\$21,500, ie about 33% of the overall expenses of US\$65,700 (§§16-17). Theis J held that that level of profit was unlikely, in circumstances of that case where it was in compliance with the legal framework in the country that it was entered into be a reason for refusing to make an order, save in the most exceptional case. The reality was that there was a commercial framework which was driven by supply and demand. She authorized the payments of about US\$21,500.

(2) In *Re S* [2009] EWHC 2977, Hedley J found that a significant portion of US\$23,000 went beyond what was reasonable, although it was difficult to specify exactly what of the \$23,000 represented a payment which was contrary to the statutory provision. The applicants were “wholly unable to persuade the court that no sum has been paid which offends the provisions of s.30(7).” (§8 of the judgment).

(3) In *J v G*, the surrogacy agreement was entered into under Californian law. The fees totaling US\$56,750 included a base fee of US\$5,000 for twin pregnancy, US\$3,000 for

compensation for birth by caesarian section and US\$2,750 as allowance for unspecified “incidental expenses”, US\$1,000 as inconvenience fee for the IVF transfer and US\$45,000 as pregnancy compensation fee (§14). It was not clear what proportion these fees formed to the overall expenses but they were approved. The court held, amongst others, that there was “no evidence to suggest that the expenses were of such a level as to overbear the will of the surrogate. The surrogate was a mature woman with financial means and had legal advice before entering into the agreement. As the surrogate was an experienced one, she was able to command a higher compensation fee (§22(1)). The applicants had formed a close relationship with the surrogate and her family” (§21);

(4) In *Re X and Y (Children)* [2011] EWHC 3147, as much as 32% of expenses paid to a clinic in India by the commissioning couple were for non-medical expenses such as legal fees and compensation for the surrogate, coordinator and donor (§24). Sir Nicholas Wall P did not find it easy to establish precisely what sums the surrogate mother and her husband actually received and what those sums were for. He found that the payments to them contained elements of profit and financial reward (§§34-39).

(5) In *Re C (A Child)* [2013] EWHC 2408 (Fam), §§18-19 Theis J identified part of the (i) payments in accordance with the surrogacy agreement consisting of compensation and a sum not attributed to expenses (§13); and (ii) payment to the surrogacy agency (§14), as caught by section 54(8) of the

HFEA 2008. She approved those payments. She took into account, amongst others, that the expenses did not overbear the will of the surrogate. They were payments permitted in the jurisdiction in which they were made, and were not too dissimilar to payments made in similar cases. The profile information about the surrogate mother demonstrated that she was altruistically motivated to become a surrogate. She had been a surrogate before and had the benefit of detailed prior discussions and legal advice before entering into the surrogacy agreement. She formed a positive relationship with the applicants. The applicants had at all times sought to comply fully with the requirements of Californian and English Law. The surrogacy arrangement was entered into with care and thought and in respect of a much-wanted child, and did not represent the simple buying of a child overseas.

F2. Analyses of the expenses

123. Counsel have helpfully categorized the payments that made up the US\$108,198. They were paid over 17 months, pre-and post-pregnancy at an average of US\$6,365 per month.

Table 1

	<u>Nature</u>	<u>Amount</u> (to nearest US\$)
1.	Total agency fees paid to the Agency	20,000
2.	Legal & notary fees	5,370
3.	Insurance for WB (covering the period from Feb 2015 to Apr 2016)	7,830

4.	Travelling expenses for WB	620
5.	Monthly expense allowance for WB	3,019
6.	Psychological counselling & support for WB & HB	2,500
7.	Childcare & housekeeping expenses for WB	9,885
8.	Fees paid to WB for various medical procedures and lab work (plus accommodation necessitated by such procedures)	7,457
9.	Maternity clothing for WB	1,000
10.	Lost wages for WB	5,000
11.	Full participation bonuses for WB	3,000
12.	Reimbursement to WB for singleton pregnancy (ie base fee)	32,000
13.	Additional fees to WB for bearing twins	7,500
14.	Breastmilk pumping fees for WB	2,064
15.	Miscellaneous expenses	953

124. In respect of unshaded items in Table 1,

- (a) The expenses were clearly referable to the terms of the GC Agreement.
- (b) Scientifically assisted pregnancy involved risks and legal issues. The Agency, the Applicants and WB had gone through a careful process of consulting a mental healthcare professional, a physician and independent legal counsel before entering into the GC Agreement. The medical expenses (including related accommodation) and insurance were incidental to the process.

(c) WB was contractually bound to provide proof of wages earned at the time of the signing of the GC Agreement and must provide a doctor's note explaining the reason for bedrest and the dates for which bed rest was required before she could receive compensation for lost wages.

(d) Other expenses like maternity clothes, travelling, housekeeping, childcare expenses for WB were necessary.

125. The accounts were properly kept through the use of a trust pursuant to the GC Agreement. The unshaded items totaling US\$45,698 were reasonable.

126. However, Ms Yip SC fairly conceded that some of the items may not meet the requirement of reasonableness. I do find the shaded items in Table 1 to be non-reasonable expenses:

(a) The agency fees were plainly administrative fees and profit for the Agency.

(b) The full participation bonus was payable at the discretion of the Agency for eg keeping appointments with professionals involved in the surrogacy process, taking required medications, following directions of physicians, and fulfilling contractual obligations. It was in the nature of a bonus rather than reimbursement.

(c) US\$32,000 was the 10 months' total of a pre-determined monthly lump sum to WB for pre-pregnancy and pre-birth child support expenses and post-birth expenses including

reasonable and necessary living expenses. Although described as reimbursement, it was in fact remuneration to WB, as genuine expenses were covered by other items.

- (d) The additional fees for bearing twins was a 10-month total of a pre-determined lump sum per additional child carried. Whilst bearing twins might cause more risk and attendant costs, all expenses would have been covered by other items. There was plainly an element of “bonus” in this item.

These 4 items added up to about US\$62,500 (about 58% of the total).

127. FH had engaged an independent lawyer (**Ms T**) from California to advise on, amongst others, the legality of the GC Agreement and the effect of the judgment of the California court.

128. Ms T confirmed that FH and WH on the one hand and WB and HB on the other were, pursuant to the GC Agreement, separately represented by lawyers experienced in the area of assisted reproductive technology law. Neither of those lawyers were known to be an owner or employee of the Agency. Ms T confirmed that that was sufficient to adequately and appropriately comply with California law.

129. There was no requirement under California law for expenses to be reasonable before an order of legal parentage could be obtained. The court did not scrutinize the expenses at all.

130. Ms T has given her opinion that expenses for the present surrogacy arrangement in California were reasonable and within the

standard mark terms with reference to the expert's experience in this field. Unfortunately, her opinion was not backed up by objective empirical data.

131. Ms T confirmed that under California law, WB was not the genetic mother of the Twins. The payments to WB "were meant to compensate her for her services in gestating the fetus and undergoing labour, rather than for giving up 'parental' rights to the child.

132. Under California law, neither the GC Agreement nor the judgment of the California court amounted to a "surrender of rights" by WB or HB. There were no parental rights for a child until the child is born, so WB and HB never possessed legal or custodial rights to the Twins.

133. Applying the non-reasonable expenses test, firstly, there was a commercial element in the GC Agreement. The non-reasonable expenses were quite disproportionate to the reasonable ones. However, with the legal requirements in California and the liaison that needed to be done among the parties, and medical/legal personnel, the administrative work was not simple and was essential. It cost an average of US\$1,176 (HK\$9,000) per month. I do not find US\$20,000 for the agency as raising the concern of the court.

134. As for the other 3 items, there was nothing to show that the Applicants had paid anything over and above the ordinary in California. I note that they were close to the level of expenses in *J v G* (2014), although very much higher as compared to other authorities cited.

135. Secondly, the Applicants acted in good faith and were law abiding at all times. They complied, in all respects, with the law in California. They had sought legal advice as to parentage under California law before the Twins were born. The GC Agreement was prepared by a law firm specializing in surrogacy law in California. They went through proper court process in California before being registered as parents of the Twins on their respective birth certificates.

136. The Applicants acted without moral taint. They have maintained a close relationship with WB and HB throughout the process. FH had met them in the USA in person before entering into the GC Agreement with them. WB and HB had consulted professionals and sought independent legal advice before entering into the GC Agreement.

137. Immediately before WB gave birth, MH was present at the hospital. FH came ■ with his elder children shortly after the birth of the Twins as the elder children ■ had to attend school before that.

138. Since the Twins were 4 months old, MH has been exchanging emails and pictures periodically with WB. The emails exhibited showed that the Applicants were and are very thankful to WB for what she had done for them and had developed a personal relationship with WB. WB never asserted “parental rights” over the Twins. Clearly, the payments to her had not and could not have overborne WB’s will.

139. Having been joined as parties at the court’s direction, WB and HB have been cooperative. They confirmed their willingness in entering into the GC Agreement and signing the unconditional consent required

under s.12(5) PCO. FH also confirmed that in obtaining their consent, no money or other benefit had been given to or received by them.

140. Thirdly, the Applicants made no attempt to defraud the authorities. The Applicants are the legal parents under California law and assumed mistakenly that the position was the same under Hong Kong law. The dependent visas were obtained upon the Twins' first arrival in Hong Kong without knowing the law under PCO.

141. FH only became aware of the need for a parental order after he received a letter from the Director on 20 February 2018 asking for, amongst others, antenatal check documents and pregnancy photos of MH during her pregnancy of the Twins and 5 family photos taken on the day of birth of the Twins and different periods thereafter.

142. FH immediately sought legal advice and learnt that a parental order was needed under Hong Kong law, regardless of the California position. He was also advised that it would be difficult to seek independent visas for the Twins without first establishing parentage over them under Hong Kong law.

143. In his reply to the Director through his solicitors, FH made frank disclosure about the surrogacy arrangement and his intention to take out the present application. In less than 3 months' time from the Director's letter, the OS was filed.

144. This is the first surrogacy case where the court has to assess the reasonableness of expenses. It would not be fair to deprive the child of

a parental order where his parents were ignorant of the law and simply had no authorities in Hong Kong to guide them as to the court's view. Therefore, although the non-reasonable expenses were quite high, given that the commissioning parents have not abused public policy, I do not think those expenses should stand in the way of a parental order. However, before authorizing those expenses, I have to consider if those non-reasonable expenses contravened the HRTTO.

G. THE HRTTO ISSUE

145. The purpose of HRTTO, as the long title shows, is to regulate, amongst others, the practice of reproductive technology and surrogacy arrangements.

146. S.17(1) of the HRTTO provides as follows:

“No person shall—

- (a) whether in Hong Kong or elsewhere, make or receive any payment for—
 - (i) initiating or taking part in any negotiations with a view to the making of a surrogacy arrangement;
 - (ii) offering or agreeing to negotiate the making of a surrogacy arrangement; or
 - (iii) compiling any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;
- (b) seek to find a person willing to do any act which contravenes paragraph (a);
- (c) take part in the management or control of a body of persons corporate or unincorporate whose activities consist of or include any act which contravenes paragraph (a); or
- (d) carry out or participate in any act in furtherance of any surrogacy arrangement where he knows, or ought

reasonably to know, that the arrangement is the subject of any act which contravenes paragraph (a).”

147. “Payment” is defined in HRTO s. 2 to mean:

“payment in money or money’s worth but does not include any payment for defraying or reimbursing—

- (a) the cost of removing, transporting or storing an embryo or gamete to be supplied;
- (b) any expenses or loss of earnings incurred by a person and attributable to the person supplying an embryo or gamete from the person’s body;
- (c) in the case of a surrogacy arrangement, any expenses incurred by the surrogate mother for—
 - (i) any reproductive technology procedure; or
 - (ii) bona fide medical expenses arising from pregnancy and delivery of a child born pursuant to the arrangement”. (emphasis added)

148. S.39 of HRTO makes contravention of s.17 of HRTO a criminal offence punishable with a fine of HK\$25,000 and 6 months’ imprisonment on first conviction. This is a summary offence, with a time limit of 6 months “from the time when the matter of such complaint or information respectively arose” for prosecution: s.26 of the Magistrates Ordinance, Cap. 227.

149. In the present case, the matter arose when the Applicants took part in negotiating with a view to making the GC Agreement. They made payments on 4 occasions, ie on 24.12.2014, 30.4.2015, 27.10.2015 and 10.12.2015. Prosecution was plainly time-barred.

150. Given the tension between s.12(7) PCO and s.17(1) of HRTO:

- (1) The most law-abiding commissioning parents could find themselves worse off complying with the law than breaching

it. For example, they have to give up the privilege against self-incrimination guaranteed by Article 11(2)(g) of HKBOR and inform the Director of the surrogacy arrangement in order to get visas for the child. If they apply within time, they run the risk of criminal prosecution under HERTO for regularizing the identity and status of their child. If they apply beyond time, it would be at the expense of the child's welfare.

(2) The court is put into the awkward position of having to approve expenses (which pass the non-reasonable expenses tests) under s.12(7) PCO and yet are regarded as illegal under ss.17(1) and 2 of HERTO. In the present case, only US\$7,457 in Table 1 (less accommodation cost) could fall within the meaning of "*bona fide* medical expenses arising from pregnancy and delivery of a child born pursuant to the arrangement" in s.2(a)(ii) of HERTO.

151. The UK counterpart of s.12(7) was the former s. 2(1) of the Surrogacy Arrangements Act 1985. That UK provision forbade commercial surrogacy but did not have the extra-territorial effect of s.17 of HERTO. (Note that the former Australian Surrogate Parenthood Act 1988 (Qld) does have extra-territorial effect. See paragraph 170 below.)

152. The updated UK position under the Surrogacy Arrangements Act 1985 is that non-commercial or non-profit making surrogacy is not illegal. "Payment" is defined in s.2 broadly as including "payment in money or money's worth. In s.2(3) of the Act,

"(3) For the purposes of this section, a person does an act on a commercial basis (subject to subsection (4) below) if—

- (a) any payment is at any time received by himself or another in respect of it, or
- (b) he does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement.

In this subsection “payment” does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother.

...

(5A) A non-profit making body is not guilty of an offence under subsection (5), in respect of the receipt of any payment described in that subsection, merely because a person acting on behalf of the body takes part in facilitating the making of a surrogacy arrangement.” (underline added)

153. Ms Yip SC submits that the court should read down HRTO:

- (1) S.17(1) to remove its extra-territorial effect but maintain the prohibition in Hong Kong; it would mean that surrogacy and expenses happening outside Hong Kong would not be penalized;
- (2) S.17(1) should not punish “commissioning parents who have used their own gametes (either sperm or egg or both) to bring about the creation of the embryo carried by the surrogate”;
- (3) S.2 should exempt expenses as defined in PCO;
- (4) These would preserve the applicants’ constitutional rights against self-incrimination.

154. Again, one goes back to basic principles of statutory interpretation set out in paragraph 67 above. In addition, Ms Yip SC submits that

- (1) The court acts on a presumption that the Legislature intended to act reasonably and did not intend the statute to have consequences

which were absurd: *Bennion on Statutory Interpretation*, 7th ed, (2017), p290.

- (2) The court can identify the mischief that HRT0 was aimed at remedying: *Bennion*, §§10.2-10.4. This may be ascertained from the text of the legislation or from any admissible external aid to construction.

155. Bearing these principles in mind, it should be noted, firstly, that PCO was enacted before HRT0. It is absurd for the Legislature to give power to the court to retrospectively approve non-reasonable expenses to enable a parental order to be made on the one hand, but at the same time criminalize the payment, of those expenses (reasonable or unreasonable) that did not fall into the narrow definition of s.2 of HRT0.

156. Secondly, the relevant legislative materials were contained in the *Official Record of Proceedings of the Legislative Council dated 22nd June 2000*. The then Secretary for Health and Welfare, Dr Yeoh Eng-Kiong J.P. who moved the Second Reading, described the purpose of the HRT Bill as follows:

“In putting forward this Bill, it is obvious that the Government has accepted the principles of the then Committee, and these include:

- (1) This Bill is not to promote the procedure or services of reproductive technology. But seeing that there will always be people who will need reproductive technology either medically or otherwise, proper law, rules and regulations should be set up to protect societal values, the commissioning couples and the child so born. To this end, law and regulations have to be established.
- (2) Yet it should not stifle development, and must be flexible enough to accommodate scientific further development.

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- (3) To give the best for the children so born, reproduction technology should only be provided to married couples proven to be unable to raise a family by other means.
- (4) Reproduction technology is a procedure that goes beyond getting pregnant. Proper counselling is of paramount importance before and during pregnancy, and well after the delivery of the baby.
- (5) To provide a machinery for watertight protection of the detail and data of the donors, be they donating gametes or embryos.
- (6) To provide a mechanism to prevent incest.
- (7) To prevent commercialization as such could invite abuses.

On these principles, the Bill, therefore, not only provides control for reproductive technology procedures in general, but also makes provisions to regulate different methods of reproductive technology. This is done through this Bill itself and also through a Code of Practice to be completed and promulgated by a proposed Council on Human Reproductive Technology.”
(underline added)

157. Dr Yeoh went on to say that one of the important aspects of the Bill, among others, was to

“prevent the abuse associated possibly with surrogacy”, and that to achieve this, “the law only allows surrogacy for infertile married couples where the embryo to be placed in the surrogate mother must be genetically related to the commissioning parents. In short, the egg (or ovum) and the sperm must come from the same husband and wife.” (underline added)

158. It is thus clear that the mischief that HRT Bill targeted at was the commercialization of surrogacy which could give rise to abuse and the legislation was to penalize both the payor and payee. The intention of the Legislature was not to stop a married couple like the Applicants who had a genuine need to resort to surrogacy and used their own sperm and egg.

159. Throughout the legislative debate, the government had not explained what abuse was contemplated or why the extra-territorial effect

of s.17 of HRTTO was justified. There was no discussion on the definition of “payment” in s.2 of HRTTO either. It was not easy to guess. People should not be permitted to do, outside Hong Kong, what they were forbidden to do inside and bring children into the territory.

160. However, it is noteworthy that s.12(8) PCO actually contemplates granting a parental order (assuming other conditions are satisfied) in a situation where the surrogate mother was, at the time of placing in her of the embryo, or the sperm and eggs, out of Hong Kong.

161. Ms Yip SC submits that neither the extra-territorial effect nor the narrow definition of payment in HRTTO could be justified in the name of prevention of abuses brought about by the commercialization of surrogacy.

162. Research of counsel in this case has not revealed any criminal prosecution under ss.17 and 39 of HRTTO. Despite Sidley Austin’s enquiries of the Department of Justice, there was no reply as to what commercial surrogacy or resultant abuse had occurred in Hong Kong.

163. However, without disrespect Ms Yip SC, I decline to read down HRTTO in this case.

164. Firstly, these are not criminal proceedings against the Applicants under HRTTO. It was on the court’s own motion that HRTTO was referred to – to ascertain what type of payments under surrogacy arrangements were regarded as illegal and to see if the Applicants ought to be referred to the Department of Justice for prosecution.

165. Secondly, the Legislature is taken to do nothing without a reason and so there is a reason for the passing of every piece of legislation: *Bennion*, §2. Whilst HRT0 is not targeted at commissioning parents like the Applicants, the purpose of the extra-territorial effect of s.17(1) might be genuinely aimed at protecting children from being treated as commodities that could be bought and sold for illegitimate purpose under the pretext of forming a family. It would be inappropriate for the court to read down the extra-territorial effect without the government's submission.

166. Thirdly, the proposed reading down so as to exempt commissioning parents who have used their own gametes is simply unnecessary as the legislative intent was already reflected in the legislative materials of HRT0 and in s.12(1)(b) PCO.

167. The Applicants plainly fell within the words underlined in the legislative materials in paragraphs 156-157 above. They were unable to give birth to children by natural means as contemplated by HRT0. Their gametes were used. They and the surrogate mother had received counselling in respect of the surrogacy. The Applicants' unintentional violation of local law exhibited no conduct of abuse of public policy.

168. Fourthly, to exempt expenses as defined in PCO is unworkable. Is it for the Applicants to prove what expenses they had incurred and that they were reasonable? If so, it runs the risk of reversing the burden of proof in prosecution. Is it for the court to rule that the expenses were not unreasonable? The criminal court is not in a position to do so. If the civil court is asked to approve or authorize the expenses first

before the trial under HRTTO, it would require full and frank disclosure of the Applicants and that might violate the privilege against self-incrimination.

169. It was accepted in Australia that such privilege applied to an applicant for a parental order: *Ellison v Karnchanit* [2012] FamCA 602, §3, Ryan J. There, the commissioning parents legally made a surrogacy arrangement in Thailand and applied for a parental order and parentage declaration in Australia. Ryan J made the following remarks:

“[3] Scant evidence was initially provided by the applicants in support of their application. This was designed to mask the fact that the children were born as a consequence of an illegal (in Australia) commercial surrogacy arrangement. While such an arrangement is not illegal in Thailand, the Surrogate Parenthood Act 1988 (Qld) in which state the applicants and children live, asserts extra-territorial effect and renders the applicants liable to prosecution and potentially imprisonment for up to 3 years. Of course, imprisonment of the applicants would see two much loved children (from the children’s perspectives) inexplicably separated from the only people they have known as parents. The potential for long term psychological and emotional harm to the children were such an event to come to pass is obvious. Thus, so as to ensure that the court could get to the truth, each applicant was granted a certificate pursuant to s 128 of the Evidence Act 1995 (Cth). They were thus able to speak freely and be confident that their evidence could not be used in other courts.”

170. Whilst I accept that privilege against self-incrimination is a relevant consideration, it is academic in the present case because the limitation time for prosecution has long past.

171. For reasons given in paragraphs 164-170 above, any question on reading down HRTTO should be left to a more appropriate case in future.

172. I bear in mind the policy reason behind HRT0 is to prohibit commercial surrogacy. However, any penal sanctions that HRT0 might impose is plainly not targeted at the child but the adult perpetrators. The child's rights under PCO and fundamental rights remain unaffected when one considers the best interests of the child to be of paramount importance.

173. In the circumstances of this case, I find no abuse of public policy by the commissioning parents, who might themselves have been exploited by the Agency. As can be seen in Section H below, the commissioning parents have demonstrated by 2 years' effort their real love for the Twins. Welfare of the Twins being of paramount importance, I give retrospective approval to the non-reasonable expenses incurred by the Applicants. I make clear that this approval should not be taken as a precedent that the court accepts payments to the tune of US\$108,198 is the norm in these applications.

H. WHETHER A PARENTAL ORDER SHOULD BE GRANTED

174. The court should consider the length of the delay in coming to court, the explanation for delay, the merits of the application, whether anyone would be prejudiced and whether there was abuse of process or public policy.

175. Similar to the case of *A, B v X, Y, C, D*; and *J v G*, the delay in application arose because the Applicants were not aware of the requirements under s.12 PCO. They lost no time in coming to court upon receiving legal advice. There was no intention to delay in the application nor to conceal the identity of the Twins. I accept FH's evidence that had he known about the 6-month requirement, he would have applied within time. There was good explanation for the delay.

176. The reasoning in paragraphs 135-143 above as regards the expenses equally apply to show that there are merits in this application.

177. The Applicants and the Twins have always lived together, with a home base in Hong Kong. They have taken good care of the Twins. Their elder children ■ have always treated the Twins as siblings. ■ The Applicants and all children have close personal ties, living harmoniously together with the substance of a family and are bonding well. These are borne out by the Social Investigation Report dated 22 February 2019.

178. The Applicants' career and family lives are intimately connected to Hong Kong. They treat Hong Kong as their home for more than a decade ■. The elder children ■ are brought up here and know of no other home but Hong Kong. It would be against the whole family's interests (including those of the Twins) to uproot them. As FH deposed, leaving Hong Kong to return to the USA at this stage would cause significant disruption to the whole family's professional and personal lives and discontinuity to the education of the elder children ■. It is currently not a feasible nor realistic option for the family to leave and abandon their lives in Hong Kong.

179. In terms of immigration status, it is therefore in the best interests of the Twins to follow that of the Applicants. This would stabilize their care arrangements whilst remaining infants. The relief experienced by the Applicants as caregivers would likely feed into the Twins' own sense of security.

180. In terms of inheritance rights, it is not in the interests of the Twins that they be regarded as inferior to the ■ elder children ■ of the Applicants.

181. No one would suffer prejudice if a parental order is granted. On the other hand, if a parental order is refused, not only the Twins but the whole family will suffer a devastating consequence and be thrown into the unknown if they have to move out of Hong Kong.

182. Granting a parental order will meet the lifelong welfare of the Twins and best meet their psychological, physical and social needs. It would reflect the reality that they are genetically linked to the Applicants and that they are a family. Any rights of WB and HB are removed so that the Twins can properly be regarded as children of the Applicants, which in reality has always been the position. There is no abuse of public policy or countervailing factors that should trump this conclusion.

183. There is good explanation for the delay. Taking a holistic assessment of the circumstances, this application is clearly meritorious. Section 12(2) and (7) are satisfied. It is in the best interests of the Twins, throughout their lives, that a parental order be granted.

184. I therefore order as follows:

- (1) I extend time by 22 months for the Applicants to apply under s.12 PCO for a parental order;
- (2) There be a declaration that FH and MH are the parents of the Twins pursuant to s.12(1) PCO;

(3) There be a declaration that the payments to the extent US\$62,500 made by the Applicants pursuant to the GC Agreement dated 28 April 2015 entered into among FH and MH on the one part and WB and HB on the other be authorized by the court pursuant to s.12(7) PCO.

(4) Pursuant to s.12(9) PCO, the Applicants shall, within 7 days, serve a sealed copy of this order on the Registrar of the High Court who shall, in turn, notify the Registrar of Births and Deaths of this order in writing.

I. COSTS OF THE OFFICIAL SOLICITOR

185. The court is grateful to the Official Solicitor for his assistance. Mr Yim asks for costs associated with his representation of the Twins to be paid by the Applicants.

186. Costs of the Official Solicitor is a matter of discretion for the court. In *LB (Warship: Costs)* [2012] 1 HKLRD 266, Poon J (as he then was) at §§26-31, following *Re G (Official Solicitor's costs)* [1982] 3 FLR 340, Omrod LJ, stated as follows:

“26. The Official Solicitor is an officer of the court. He may at any time be called upon to carry out investigation or to assist the court to see that justice is done between the parties. He is appointed to act where, if this were not done, there would be a denial or miscarriage of justice. When the Official Solicitor is appointed as *guardian ad litem* in children cases, he is much more than a mere *guardian ad litem* in typical civil actions. He is at once *an amicus curiae*, an independent solicitor acting for the children, an investigator, an adviser and sometimes a supervisor.

27. The court retains an unfettered discretion over the payment of the Official Solicitor's costs. There is no hard and fast rule as

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to how the discretion should be exercised and the court will bear in mind all the circumstances of the case.

28. The first and most important of the considerations which the court will have regard to is that a judge, whenever he thinks it would be right to invoke the assistance of the Official Solicitor, should feel free to do so without being constrained by anxiety about the possible effect in relation to costs on one or other, or both of the other parties to the proceedings. It is one of the many valuable functions of the Official Solicitor to provide such assistance, and he is funded by central funds for this and other purposes. This consideration applies particularly where the Official Solicitor is appointed *guardian ad litem* on the judge's own motion. It may well persuade the court to make no order as to the Official Solicitor's costs.

29. However, there are plainly cases where it is not unjust to order one or other of the parties to bear the Official Solicitor's costs rather than the central revenue. For example, if a party has acted unreasonably in the conduct of the proceedings, which necessitated the appointment of the Official Solicitor or prolonged his engagement in the case, he may be held liable for the Official Solicitor's costs in full or partially.

30. In other cases where the Official Solicitor is appointed on the application of one, or sometimes both, parties either to assist generally in the interests of the child or for a particular purpose, it may be just to order his costs, or a proportion of them, to be borne by the party asking for his assistance. Indeed, the Official Solicitor, like all *guardians ad litem*, can only be appointed if he has consent to act. This enables him, where he thinks fit, to ask the party seeking to appoint him for a full or partial indemnity for his costs.

31. All in all, much will depend on the actual circumstances of the individual case when the court determines the Official Solicitor's costs."

187. In the present case, the Official Solicitor was appointed on the court's own motion because this case involves novel and complex points of law of importance that may have implications on other children born out of surrogacy. The Applicants have acted properly all along. It is justifiable for the Official Solicitor's costs to be publicly funded. I therefore make no order as to costs.

J. JOINDER OF SURROGATE MOTHER AND HER HUSBAND

188. At this hearing, there was some discussion as to whether or not the surrogate mother (and her husband if she was married at the time the surrogacy took place) should be joined as parties in an application for a parental order. This is really for future reference as WB and HB have been joined in this case.

189. Ms Yip SC refers this court to the Family Procedure Rules 2010, Part 13.3 which requires, amongst others, the surrogate mother and her husband to be joined as respondents. The UK court is empowered to direct any other person or body to be added or removed as a respondent to the proceedings. The Hong Kong legislation is silent on the aspect.

190. Ms Yip SC's initial position is that the surrogate mother and her husband ought to be joined. However, in the light of the UK legislation, she submits that it makes sense to be flexible in this type of application, which involves myriad factual scenarios incapable of being exhaustively defined. An application may be made years after a surrogacy arrangement. The applicants may encounter difficulty locating the surrogate mother and her husband. Complications may arise which may add to costs and time. These are intrinsically against the idea of facilitating the best interests of the child and may work against their welfare.

191. In the present case, the Applicants do not make any claims against WB and HB, who have confirmed multiple times that they consent to give up whatever rights they have in the Twins. They have clearly indicated their intention not to contest the application from the very beginning. Ms Yip suggests that it may not be necessary to join people

like them in future and non-joinder would not cause prejudice to anyone. It was almost impossible for WB and HB to resile from their consent and assert any right over the Twins.

192. Ms Yip SC suggests that the matter ought to be dealt with on a case by case basis. Joinder should depend on whether consent of the surrogate mother and her husband is in doubt. The court should make use of its power to order parties to be joined or removed: Order 15, rules 4 and 6 of the Rules of the High Court.

193. Without disrespect, I disagree. Ss. 9 and 10 PCO expressly regard the surrogate mother and her husband to be parents of the child. That status carries with it rights and responsibilities over the child. The surrogate mother and her husband must be given an opportunity to make representation, before those rights and responsibilities can be taken away from them. The fact that they are likely not to respond to the proceedings is not a reason not to serve them.

194. Under s.12(5) the court must be satisfied that the surrogate mother and her husband have “freely and with full understanding of what was involved and agreed unconditionally to the making of the order.” On such an important matter, the court is not prepared to accept the say-so of the applicants except in the clearest of cases.

195. In addition, there may be issues like, how much the surrogate mother had received and whether her will was overborne by the fees she received. There are relevant matters which the court will take into account to see if there is abuse of public policy.

196. Of course, circumstances may sometimes speak for themselves. For example, an application may be made years after the child's birth and the surrogate mother and her husband have never participated in the life of the child. The court may be flexible and dispense with service or order substituted-service.

197. Accordingly, I am of the view that the default position should be the same as under the UK Family Procedure Rules. That is, in fact, no different from civil proceedings in Hong Kong. The surrogate mother and her husband must be made parties to the proceedings but the court may be flexible in terms of dispensation with service or removal of respondents in an appropriate case.

K. THE WAY FORWARD ON PCO

198. It is not the purpose of this judgment to judge the desirability of surrogacy and the moral issues surrounding it. That should be left to public debate. However, it is plain from the way this court comes to this judgment that s.12 PCO and ss.2 and 17 of HRT0 are in need of review.

199. Imposing the 6-month time limit for applications to court is simply non-sensical and harms the innocent children. If it is desired to control commercial surrogacy arrangement, those controls need to operate before the court process is initiated (ie at the border or even before): *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), §10. Better still, the control should operate, if that be the intention of the Legislature, before the surrogacy arrangement was entered into.

200. The English Parliament recognized that surrogacy law was out of date. By way of example, Viscount Craigavon, Crossbencher of the House of Lords, stated in a parliamentary debate on surrogacy on 14 December 2016 as follows:

“I shall give some brief examples of things going wrong at the moment. ... We have the courts and judges having to rightly—bend the law laid down in 1985, and now out of date, to allow deadlines, time limits and even expense limits to be breached, for the very good reason of putting the best interests of the child first. That might be good British pragmatism, but it is not normally how we think of our law working and it adds uncertainty for following future cases.”

201. In May 2018, the UK government has requested the Law Commission of England and Wales and the Scottish Law Commission to review the laws concerning surrogacy. The Commissions have identified, amongst others, that the conditions which applicants for parental orders are subject to is an area which may require reform.

202. This court has come across 4 cases where commissioning parents applied to court for a parental order well beyond 6 months. Common to these cases was that the commissioning parents either have resided in or studied in a jurisdiction out of Hong Kong where surrogacy was and is not prohibited. They got birth certificates in the places of the children’s birth. They all love the children born out of the respective surrogacy arrangement. Not aware of the need to apply for a parental order in Hong Kong, the commissioning parents applied for parental orders either when reminded by the court or immigration authorities. In 2 cases, the children narrowly missed the chance of benefitting from a parental order but for a Family Court judge spotting the issue and adjourning the divorce proceedings to enable applications to be made under PCO. In one

of those 2 cases (*S v J* [2017] 5 HKLRD 129), sadly, the commissioning “mother” in Hong Kong would not consent to the making of a parental order and a wardship order had to be made. The present case and *Re A&B*, HCMP 1571/2018 are the more “fortunate ones” where the parents were still married when the applications were made and still are.

203. When commissioning parents do not know the need to apply for a parental order, chances are that they would not have kept the receipts as to expenses. They may have to base themselves on bank statements (for payments by cheques) to work out the expenses. It would be hard to pass the requirement in s.12(7) PCO. The present case is an exceptional one where “accounts” were kept properly by the Agency.

204. Last but not least, I am most grateful to Ms Yip SC, Ms Alison Choy and Mr Eugene Yim for their thorough preparation and able assistance to the court.

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

Ms Anita Yip SC leading Ms Alison Choy, instructed by Sidley Austin, for the Applicants

Attendance of the 1st and 2nd Respondents were executed

Mr Eugene Yim, instructed by Official Solicitor, for the 3rd and 4th Respondents